UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RALPH LAUREN CORPORATION,	:	
	:	Honorable Susan D. Wigenton
Plaintiff,	:	Civil Action No. 20-cv-10167 (SDW) (LDW)
	:	
v.	:	
	:	
FACTORY MUTUAL INSURANCE COMPANY,	:	**Motion date: March 15, 2021**
	:	
Defendant.	:	

DEFENDANT FACTORY MUTUAL INSURANCE COMPANY'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

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Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, Defendant Factory Mutual Insurance Company ("FM Global") respectfully submits this memorandum of law in opposition to Plaintiff Ralph Lauren Corporation's ("Plaintiff" or "Ralph Lauren") Motion for Partial Judgment on the Pleadings (the "Motion") and in support of its Cross-Motion for Judgment on the Pleadings (the "Cross-Motion").

PRELIMINARY STATEMENT

Despite the complexity of Plaintiff's Motion, this litigation boils down to four straightforward questions. *First*, has Plaintiff adequately alleged the existence of *physical* loss or damage triggering seven of the nine coverages it claims apply to its losses, including for Time Element and Civil or Military Authority? *Second*, has Plaintiff adequately alleged that its losses are not barred by the Policy's contamination and loss of use exclusions? *Third*, has Plaintiff adequately alleged the two prerequisites triggering coverage for Communicable Disease Response and Interruption by Communicable Disease (together, the "Communicable Disease Provisions")? *Fourth*, has Plaintiff adequately alleged a claim under the New Jersey Consumer Fraud Act ("NJCFA")? Because the answer to each of these questions is no, Plaintiff's Motion should be denied, and FM Global's Cross-Motion should be granted in its entirety.

With regard to the first question, Plaintiff contends that the economic losses it experienced as a result of its inability to fully utilize its properties due to government issuance of Stay-At-Home Orders and/or the alleged presence (or threatened presence) of the novel coronavirus at its properties are sufficient to constitute "physical loss or damage" within the meaning of its property insurance policy with FM Global (the "Policy"). Compl. ¶¶ 48-55. But Plaintiff is mistaken. In two recent decisions, this Court has made clear that the loss of income and incurrence of expenses by businesses subject to New Jersey's Stay-At-Home Orders are "not enough" to "support a showing that its property was physically damaged." *Boulevard Carroll*

Entm't Grp., Inc. v. Fireman's Fund Ins. Co., 2020 WL 7338081, *2 (D.N.J. Dec. 14, 2020); *see also 7th Inning Stretch LLC, et al. v. Arch Ins. Co.*, Civil Action No. 20-8161 (D.N.J. Jan. 19, 2021) (a copy of which is attached hereto as Exhibit A). The logic of *Boulevard Carroll* and *7th Inning* is mirrored in dozens of decisions from federal district courts throughout the country and New Jersey state courts. It is also dispositive with regard to seven of the nine Policy provisions pursuant to which Plaintiff seeks coverage.

Second, even if Plaintiff could carry its burden and demonstrate the existence of physical loss or damage (it cannot), the Policy unambiguously excludes from coverage "contamination and any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy" (the "Contamination Exclusion"). Included in the Policy's definition of "contamination" are a number of "disease causing or illness causing agent[s]," including "virus" and "bacteria." There is no dispute that the novel coronavirus (or SARS-Cov-2) is a "virus." Accordingly, and as this Court and numerous others have held when analyzing nearly identical provisions, "Plaintiff's losses are tied inextricably to [the novel coronavirus] and are not covered by the Policy." *Boulevard Carroll*, 2020 WL 7338081, at *2. In addition, the Policy also contains a separate exclusion barring recovery for "loss of market or loss of use" (the "Loss of Use Exclusion"). This, too, bars coverage under the same seven Policy provisions that require a showing of physical loss or damage (or imminent physical loss or damage); as the Motion repeatedly—and explicitly—acknowledges, the alleged damages Plaintiff has sustained *all* resulted from its inability to fully use its properties.

With regard to the Communicable Disease Provisions, which pose the third question presented by this litigation, Plaintiff's problem is different. By their terms, neither of these coverages require a showing of physical loss or damage and both are excepted from the

operation of the Contamination or Loss of Use Exclusions. Instead, each requires Plaintiff to demonstrate, among other things, the actual presence of the Covid-19 disease at one or more of its properties. FM Global has repeatedly informed Ralph Lauren that it will promptly cover any losses falling within the Communicable Disease Provisions so long as each of its factual prerequisites are met. To date, however, Plaintiff has not submitted any such claim to FM Global, and its request that this Court simply assume that Covid-19 was present "everywhere" in the world and thus at all of Ralph Lauren's properties suggests strongly that it will not be able to do so. In any event, its failure to plead any facts demonstrating the presence of Covid-19 at its properties compels judgment in FM Global's favor on this point as well.

Finally, the denial of benefits under an insurance policy cannot state a claim under the NJCFA, and Plaintiff has in any event failed to plead facts suggesting that FM Global engaged in any unlawful conduct. Accordingly, this Court should enter judgment for FM Global on each of Counts I, II, III, IV and VI,[1] and deny Ralph Lauren the ability to replead Counts II, III and VI in their entirety or Counts I and IV as to any of coverages identified by Ralph Lauren other than the two Communicable Disease Provisions.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Allegations in the Complaint.

According to its Complaint, Plaintiff Ralph Lauren is a "global leader in the design, marketing, and distribution of premium lifestyle products," and "operates over 1,000 stores around the world." Compl. ¶¶ 7, 9. In March 2020, in an early effort to help prevent the spread of Covid-19, a number of state and local governments issued emergency orders (the "Stay-At-Home Orders") "requiring residents to shelter in place or remain in their homes unless

[1] There is no Count V in the Complaint.

performing 'essential' activities."[2] Compl. ¶ 34. These Stay-At-Home Orders allegedly affected Plaintiff's use of its properties, which in turn "directly impacted Ralph Lauren's operations and Ralph Lauren's gross earnings and gross profit." *Id.* ¶ 51.

Plaintiff does not allege that any employees of Ralph Lauren or customers who visited a Ralph Lauren property tested positive for Covid-19. Plaintiff does not otherwise proffer any factual allegations supporting its assertion that Covid-19 was "present" on its properties. Plaintiff does not identify which of its locations were subject to Stay-At-Home Orders, how long those locations were closed or, with the exception of its allegations pertaining to use impairment, whether it suffered *any* damages or losses due to the alleged presence of Covid-19.

II. The Relevant Terms of Ralph Lauren's Policy.

As a general matter, Ralph Lauren's Policy with FM Global provides coverage "against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded," to certain insured properties. Policy at 1, 8.[3] The text of the Policy enumerates a number of specific coverage provisions, many of which contain certain prerequisites which must be met in order for them to apply, as well as certain exclusions, which operate to preclude coverage in certain circumstances. The Policy's exclusions are in turn subject to certain exceptions. *See* Policy at 19 (exclusions apply "unless otherwise stated").

Here, seven of the nine Policy provisions which Ralph Lauren alleges provide coverage

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[2] Plaintiff asks the Court to take "judicial notice of the transmissibility and health hazards associated with Covid-19, which is documented in the government shutdown orders and the guidance issued by the CDC and WHO." Mot. at 8 n.2. Plaintiff, however, does not identify the "adjudicative facts" of which it is asking the Court to take notice, thus precluding a substantive response. Although Defendant has no objection to the Court taking judicial notice of the fact that certain governments issued Stay-At-Home Orders, a number of those Orders contain statements of intent or legal conclusions which are inappropriate subjects for judicial notice.

[3] Citations to the Policy refer to the document found at Exhibit A to the Complaint, ECF No. 1-1. Page number references are to the last two digits of the bates numbers.

expressly require the existence (or, in the case of Protection and Preservation of Property, the "immediately impending existence") of "physical loss or damage" as a prerequisite:

Protection and Preservation of Property	This Policy covers . . . reasonable and necessary costs incurred for actions to temporarily protect or preserve insured property; provided such actions are necessary due to actual, or to prevent immediately impending, ***insured physical loss or damage*** to such insured property. Policy at 40-41 (emphasis added)
Time Element Coverage and Extra Expense[4]	This Policy insures TIME ELEMENT loss, as provided in the TIME ELEMENT COVERAGES, directly resulting from ***physical loss or damage of the type insured*** . . . . Policy at 46 (emphasis added)
Civil or Military Authority	This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY if an order of civil or military authority limits, restricts or prohibits partial or total access to an insured location provided such order is the direct result of ***physical damage of the type insured*** at the insured location or within five statute miles/eight kilometres of it. Policy at 58 (emphasis added)
Contingent Time Element Extended	This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY directly resulting from ***physical loss or damage of the type insured*** to property of the type insured at contingent time element locations located within the TERRITORY of this Policy. Policy at 58 (emphasis added)
Ingress/Egress	This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured due to the necessary interruption of the Insured's business due to partial or total physical prevention of ingress to or egress from an insured location, whether or not the premises or property of the Insured is damaged, provided that such prevention is a direct result of ***physical damage of the type insured*** to property of the type insured. Policy at 59 (emphasis added)

[4] Plaintiff identifies these as two different provisions, but Extra Expense is a type of "Time Element Coverage" subject to the "Loss Insured" requirements.

Attraction Property	This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY directly resulting from ***physical loss or damage of the type insured*** to property of the type insured that attracts business to an insured location and is within 1 statute mile/1.6 kilometres of the insured location. Policy at 62 (emphasis added)

Accordingly, unless Ralph Lauren can demonstrate such extant or impending "physical loss or damage" to its property, these seven coverages are inapplicable to its claimed losses. By contrast, the two remaining coverages which Ralph Lauren claims apply to its losses—for "Communicable Disease Response" and "Interruption by Communicable Disease" (together, the "Communicable Disease Provisions")—do not contain any mention of, and thus do not require Ralph Lauren to show, impending or actual "physical loss or damage."

The Policy also contains a number of enumerated exclusions that apply "unless otherwise stated," two of which are of particular relevance here. First, the Policy's Contamination Exclusion states, in relevant part:

> [The] Policy excludes the following unless directly resulting from other physical damage not excluded by this Policy: 1) ***contamination, and any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy***.

Policy at 23 (emphasis added). "Contamination" is defined as:

> any condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, ***pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent,*** fungus, mold or mildew.

Id. at 79 (emphasis added). By its plain terms, the definition of contamination encompasses "viruses" and other "disease causing or illness causing agents" like the novel coronavirus, and thus precludes recovery unless the contamination in question results from "other physical damage not excluded by this Policy" or falls within one of the Policy's exceptions.

Second, the Policy also contains an exclusion for "loss of market or loss of use" (the "Loss of Use Exclusion"). *Id.* at 19. To the extent that Ralph Lauren's claimed losses stem from an impairment to use due to the Stay-At-Home Orders and/or Covid-19, this exclusion also bars recovery (again, subject to any applicable exceptions).

The Contamination and Loss of Use Exclusions act as separate bars to recovery under the seven non-Communicable Disease Provisions pursuant to which Ralph Lauren claims coverage. However, and as FM Global has informed Ralph Lauren, the Communicable Disease Provisions themselves are not subject to these two exclusions (or the requirement of physical loss or damage). Rather, they provide coverage under the following conditions:

> If a location owned, leased or rented by the Insured has the actual not suspected presence of communicable disease[5] and access to such location is limited, restricted or prohibited by:
>
> 1) an order of an authorized governmental agency regulating the actual not suspected presence of communicable disease; or
>
> 2) a decision of an Officer of the Insured as a result of the actual not suspected presence of communicable disease[.]

Id. at 31, 65. In other words, if Ralph Lauren is able to show that (1) it has the "actual not suspected presence" of Covid-19 on its covered property, and that (2) access to that property is limited by the Stay-At-Home Orders, it may be eligible to recover a total of up to $1 million in costs for remediation and public relations services as well as other losses and expenses. *Id.* at 12, 13, 31, 65. To date, however, Ralph Lauren has pled no facts alleging the actual presence of Covid-19 at its properties; instead, it appears to be asking this Court to simply presume as a matter of law that this requirement is automatically met because Covid-19 is literally "everywhere."

[5] The Policy defines "communicable disease" as a "disease which is . . . transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges, or . . . Legionellosis." Policy at 79.

III. Plaintiff's Insurance Claim and Filing of this Lawsuit.

On March 30, 2020, Ralph Lauren, through its insurance broker, submitted a claim for coverage under the Policy "due to Covid-19 impact on physical assets and time element." Compl. Ex. G. The loss notice states "TBD" for (i) the date of loss and (ii) the estimated gross loss for physical damage and time element. In a series of subsequent communications, FM Global conveyed its understanding that "there has not been any reported case of Covid-19 at any insured locations," and that none of the closed locations "were the result of an order of a government agency or an officer of the insured as a result of the actual presence of Covid-19." *Id.* Ex. H. FM Global also repeatedly asked Ralph Lauren to provide any information relating to any "physical damage due to Covid-19." *Id.* Exs. F, J.

Rather than provide any substantive response, including information that might have demonstrated it was entitled to coverage pursuant to the Communicable Disease Provisions, Ralph Lauren chose to file this lawsuit. In addition to three breach of contract claims, Ralph Lauren seeks declaratory relief and asserts a claim under the NJCFA, N.J.S.A. 56:8–2, *et seq*. For the reasons set forth below, Ralph Lauren's motion should be denied in its entirety and this Court should enter judgment in favor of FM Global on each of these claims.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 12(c), a court will enter judgment on the pleadings "if the movant clearly establishes that there are no material issues of fact and he is entitled to judgment as a matter of law." *Battista v. Borough of Beach Haven*, 2016 WL 3951381, at *2 (D.N.J. July 21, 2016). When analyzing a motion for judgment on the pleadings, "the court examines the pleadings in the same manner as it would a Rule 12(b)(6) motion to dismiss." *Mid-Am. Salt, LLC v. Morris Cty. Coop. Pricing Council*, 2018 WL 999675, at *3 (D.N.J. Feb. 20, 2018). Thus, a court "will accept the complaint's well-pleaded allegations as

true, and construe the complaint in the light most favorable to the non-moving party, but will not accept unsupported conclusory statements." *DiCarlo v. St. Mary Hosp.*, 530 F.3d 255, 262-63 (3d Cir. 2008). In deciding a Rule 12(c) motion, a court may only consider "the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Wolfington v. Reconstructive Orthopaedic Assocs. II PC*, 935 F.3d 187, 195 (3d Cir. 2019).

ARGUMENT

I. Plaintiff Has Failed to Meet its Burden of Establishing Coverage Under the Policy.

The interpretation of an insurance policy is a question of law.[6] *See, e.g.*, *N&S Rest. LLC v. Cumberland Mut. Fire Ins. Co.*, 2020 WL 6501722, at *2 (D.N.J. Nov. 5, 2020) (citation omitted). Courts interpret the language of an insurance policy according to its plain and ordinary meaning. *Arthur Andersen LLP v. Fed. Ins. Co.*, 416 N.J. Super. 334, 345 (App. Div. 2010). If the express language is clear and unambiguous, courts must enforce the language as written, *Katchen v. Gov't Employees Ins. Co.*, 457 N.J. Super. 600, 605 (App. Div. 2019), and "should not write for the insured a better policy of insurance than the one purchased." *N&S Rest.*, 2020

[6] Plaintiff assumes without explanation that New Jersey law applies to its claims, despite the fact that (1) the Policy covers approximately 300 properties within 41 different states in the United States alone, and over 1000 worldwide (Policy at 85-106 (App. A)); and (2) the Stay-At-Home Orders to which it ascribes its losses were issued by Los Angeles and New York in addition to New Jersey. Because this Court is sitting in diversity, it resolves choice of law questions by applying New Jersey's "most significant relationship test," first determining whether there is a conflict between the laws of the various potential forum states. *Maniscalco v. Brother Int'l (USA) Corp.*, 709 F.3d 202, 206 (3d Cir. 2013). FM Global does not believe there is any real conflict between the laws of California, New York, and New Jersey (or, for that matter, any of the other states in which Plaintiff has a store) as they relate to contract interpretation or whether Covid-19 constitutes "physical loss or damage." *See, e.g.*, *Selane Prod., Inc. v. Cont'l Cas. Co.*, No. 220CV07834MCSAFM, 2020 WL 7253378, at *6 (C.D. Cal. Nov. 24, 2020) (California law); *Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405, at *11 (S.D.N.Y. Dec. 11, 2020) (New York law). It thus is prepared to assume the applicability of substantive New Jersey law. However, FM Global reserves the right to seek additional briefing should the Court view the issue of which state's law applies as outcome-determinative in any way.

WL 6501722, at *2 (quoting *Buczek v. Continental Cas. Ins. Co.*, 378 F.3d 284, 288 (3d Cir. 2004)). A "genuine ambiguity" in an insurance policy only exists "where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage." *Arthur Anderson*, 416 N.J. Super. at 346. "However, ambiguities will not be forced into an insurance policy nor will the words of an insurance policy be artfully construed to include a type of coverage outside the scope and nature of the policy in question." *N&S Rest.*, 2020 WL 6501722, at *2; *Longobardi v. Chubb Ins. Co. of New Jersey*, 121 N.J. 530, 537 (1990) ("[A] court should not engage in a strained construction to support the imposition of liability.").

As the party seeking coverage, Plaintiff "bears the burden of bringing its claim within the basic terms of the insurance policy." *Arthur Anderson*, 416 N.J. Super. at 347; *see also Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 232 (3d Cir. 2002) (plaintiffs have burden of establishing property was "in fact, physically damaged in order to trigger coverage"). Here, Ralph Lauren cannot carry its burden with regard to the non-Communicable Disease Provisions because the Policy clearly and unambiguously does not cover (and, in fact, explicitly excludes) the damages sought by Plaintiff.

A. Plaintiff Has Not Pled and Cannot Plead the Existence of "Physical Loss or Damage" at any of its Insured Properties.

As discussed, seven of the nine Policy provisions on which Plaintiff bases its claim for coverage expressly require that the covered properties have sustained (or, in the case of Protection and Preservation of Property, are in immediate danger of sustaining) "physical loss or damage." *See supra* at 5-6. Although Plaintiff contends that allegations regarding impairment of use are sufficient to constitute "physical loss or damage" (*see* Compl. ¶¶ 48-56), this Court and numerous others have repeatedly and consistently held that they are not. Moreover, even had Plaintiff pled the presence of SARS-Cov-2 at any of its properties (it has not), that too would be

insufficient to allege physical loss or damage as a matter of law. Thus, FM Global is entitled to dismissal with prejudice of each of Ralph Lauren's claims under those seven provisions.

1. Plaintiff's Alleged Loss of Use Due to the Stay-At-Home Orders Cannot Constitute Physical Loss or Damage.

The bulk of Ralph Lauren's brief is dedicated to arguing that its inability to fully utilize its properties due to the Stay-At-Home Orders itself constitutes physical loss or damage. But that argument runs headlong into this Court's recent decisions in *Boulevard Carroll* and *7th Inning*, both of which are on all fours with this case.

In *Boulevard Carroll*, the plaintiff, a "full-service music production company," suffered "substantial loss of business income and related expenses" as a result of the Stay-At-Home Orders issued to prevent the spread of the virus. When its insurer refused coverage, plaintiff filed suit. 2020 WL 7338081, at *1. This Court dismissed the claims, finding that the policy "unambiguously limits its coverage to physical loss or damage to Plaintiff's commercial property," and that the plaintiff was attempting to rely on coverage provisions that "specifically require 'direct physical loss or damage' to trigger the Policy." *Id.* at *2. In doing so, this Court specifically rejected the idea that impaired use of property was sufficient to establish "physical loss or damage," instead holding that a plaintiff must show "that its property was *physically damaged*." *Id.* (emphasis added); *see also 7th Inning* (same). In so reasoning, the Court cited a recent New Jersey state court decision, which also held that mere loss of use cannot constitute a "direct physical loss or damage to covered property." *Mac Prop. Grp. LLC v. Selective Fire and Cas. In. Co.*, 2020 WL 7422374, at *9 (N.J. Super. L. Nov. 5, 2020).

So too here. Ralph Lauren is no differently situated than the plaintiff in *Boulevard Carroll*, or *7th Inning*, or any other business that has suffered business losses and expenses due to its inability to fully utilize its properties as a result of Stay-At-Home Orders. Like those

plaintiffs, Ralph Lauren is unable to demonstrate that any of its covered properties were *physically* damaged by the Stay-At-Home Orders or their underlying causes. *See Uncork & Create LLC v. Cincinnati Ins. Co.*, 2020 WL 6436948, at *4 (S.D.W. Va. Nov. 2, 2020) ("Recovery for the Plaintiff here would be purely economic, solely for lost business without any accompanying repairs to the premises."). That in itself is dispositive, as court after court has recognized that the impaired use of premises due to a Stay-At-Home Order does not trigger coverage premised on "physical loss or damage" to property.[7]

2. Plaintiff's Alleged Loss of Use Due to the Alleged Presence of Covid-19 on Its Properties Cannot Constitute Physical Loss or Damage.

Perhaps recognizing that *Boulevard Carroll* precludes its ability to recover for losses stemming from the Stay-At-Home Orders, Plaintiff also contends that "Covid-19"[8] was "present" on its properties and that its presence "destroy[ed] the function of Ralph Lauren's property." Mot. at 14. As the Motion and Complaint make clear, however, this is simply the same wine in a different bottle: Ralph Lauren admits that this alleged "destruction" did not stem

[7] *See, e.g.*, *Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405, at *6 (S.D.N.Y. Dec. 11, 2020); *Uncork & Create*, 2020 WL 6436948, at *4; *4431, Inc. v. Cincinnati Ins. Cos.*, 2020 WL 7075318, at *11-12 (E.D. Pa. Dec. 3, 2020); *Water Sports Kauai*, 2020 WL 6562332, at *6-7; *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, 2020 WL 5938755, at *5 (N.D. Ga. Oct. 6, 2020); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London Known as Syndicate PEM 4000*, 2020 WL 5791583, at *4 (M.D. Fla. Sept. 28, 2020); *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 5258484, at *7-8 (E.D. Mich. Sept. 3, 2020).

[8] Although Plaintiff recognizes in its Statement of Facts that the novel coronavirus or SARS-CoV-2 is a "virus" and Covid-19 is the disease caused by that virus (*see* Mot. at 2), it confusingly uses the term "Covid-19" to refer to both throughout its papers. With regard to the question of physical loss or damage, that distinction makes no difference, as neither the disease nor the virus can constitute physical loss or damage under New Jersey law. However, the distinction between virus and disease is of more relevance when it comes to the application of the Contamination Exclusion or the Communicable Disease provisions. Accordingly, in the sections below dealing with those provisions (specifically, Argument Sections I.A.4, I.B, and I.C), FM Global adopts the terminology used by the WHO and CDC and refers to the virus as the "novel coronavirus" or "SARS-CoV-2" and the disease caused by that virus as "Covid-19."

from any *physical* alteration to its properties, but simply from an inability to use them in the ordinary course. That, of course, is precisely the argument rejected by *Boulevard Carroll*.

Plaintiff's argument fails for two additional reasons. First, it has not alleged that Covid-19 was actually "present" on its properties. Although Plaintiff describes certain studies regarding the transmissibility of the virus and alleges that the Stay-At-Home Orders were issued in order to slow its spread, these only speak to the *possibility* that Covid-19 was present at any of Plaintiff's properties and are thus plainly insufficient to establish the virus's *actual presence* under Rule 12(c) (or, for that matter, Rule 12(b)(6)). *See Promotional Headwear Int'l v. Cincinnati Ins. Co.*, 2020 WL 7078735, at *8 (D. Kan. Dec. 3, 2020) (holding that these types of statistics and data "do not support the conclusory assertion that the virus was present on the surfaces of Plaintiff's property, causing it losses"); *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.*, 2020 WL 6562332, at *4 (N.D. Cal. Nov. 9, 2020) (same).

Plaintiff concedes—as it must—that it has not adequately alleged the existence of Covid-19 on any of its properties. Instead, it boldly asks this Court to find—as a matter of *law*—that Covid-19 was "present throughout the world" and "everywhere" (Mot. at 19, 20), and thus extant at each of its properties. There is, of course, no factual basis for such a claim.[9] After all, were Covid-19 literally present everywhere in the world, there would have been no reason to put in place the Stay-At-Home Orders or encourage social distancing, the efficacy of which rest on the premise that the spread of Covid-19 can be limited. Plaintiff may not attempt to bolster its allegations by asking this Court to assume something that simply cannot be true. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (a court should "draw on its judicial experience and common sense" when analyzing the plausibility of a claim).

[9] Plaintiff's alternative request for a "rebuttable presumption" is discussed in Section I.C, *infra*.

Second, and more fundamentally, even if Plaintiff could establish the "actual presence" of Covid-19 on any of its properties, that would still do it no good. As this Court and scores of others throughout the country have held, the mere presence of Covid-19 cannot constitute physical loss or damage *as a matter of law*. Indeed, the novel coronavirus can be eliminated by routine cleaning and, as Plaintiff itself acknowledges, it can and does dissipate on its own (Compl. ¶ 28). Accordingly, even the actual presence of Covid-19 could not establish physical loss or damage. *See, e.g.*, *Mama Jo's Inc. v. Sparta Ins.*, 823 Fed. App'x 868, 879 (11th Cir. 2020) ("[A]n item or structure that needs merely to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'"); *Promotional Headwear*, 2020 WL 7078735, at *8 (presence of Covid-19 does "not constitute the direct, physical loss or damage required to trigger coverage because its presence can be eliminated"); *Uncork & Create*, 2020 WL 6436948, at *5 (no physical loss or damage from Covid-19 because it "does not threaten the inanimate structures covered by property insurance policies" and "can be eliminated with disinfectant").[10] Plaintiff's own Complaint underscores this point: Ralph Lauren is not claiming *any* property damage caused by the presence of Covid-19; rather, all of its claimed damages are economic losses associated with limitations on its operations and the use of its properties. Compl. ¶¶ 48-55.

The *Port Authority* and *Gregory Packaging* cases on which Plaintiff relies are not to the contrary. Indeed, both simply reinforce the proposition that the term "physical loss or damage"

[10] *See also Tappo of Buffalo, LLC v. Erie Ins. Co.*, 2020 WL 7867553, at *4 (W.D.N.Y. Dec. 29, 2020); *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 2020 WL 5847570, at *1 (S.D. Cal. Oct. 1, 2020); *Hillcrest Optical v. Continental Ins.*, 2020 WL 6163142, at *7-8 (S.D. Ala. Oct. 21, 2020); *Infinity Exhibits v. Certain Underwriters at Lloyd's London*, 2020 WL 5791583, at *5 (M.D. Fla. Sept. 28, 2020); *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 2020 WL 5630465, at *2 (N.D. Ill. Sept. 21, 2020); *Diesel Barbershop, LLC v. State Farm Lloyds*, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020); *Social Life Magazine, Inc. v. Sentinel Ins. Co. Ltd.*, 2020 WL 2904834 (S.D.N.Y. May 14, 2020) (Covid-19 "damages lungs," not "printing presses").

means exactly what it says: loss or damage caused by some *physical* change, either through (1) "a distinct, demonstrable, and physical alteration" of a property's structure or (2) a physical intrusion onto the property (such as through a severe contamination of the property by a noxious gas) that also renders it unusable or uninhabitable. *Port Authority*, 311 F.3d at 235-36; *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014) ("direct physical loss of or damage to" property existed where a release of massive amounts of ammonia undisputedly "*physically transformed* the air" within the facility and thus "*physically* rendered the facility unusable for a period of time") (emphasis added).

Here, of course, not only has Plaintiff failed to allege the existence of Covid-19 on its properties, but it has failed to allege that Covid-19—which can be eliminated from property with a disinfectant wipe—could create the type of severe contamination that would cause property to become unusable, or uninhabitable, or to lose its "essential functionality." *Gregory Packaging*, 2014 WL 6675934, at *6 (presence of ammonia "physically transformed air" and made it completely inaccessible for days until remediation could occur). By contrast, Covid-19 has no impact whatsoever on a property's structure, nor does it physically transform a property into one that is "unusable" or "uninhabitable." After all, businesses deemed "essential" could and did continue operating throughout the pandemic even in jurisdictions with Stay-At-Home Orders in place.[11] Even Plaintiff's "non-essential" retail stores remained open for pickups and deliveries, and certain types of employees were expressly allowed to continue to use the premises. *See*

[11] Plaintiff's contention that the Stay-At-Home Orders somehow "recognize" that Covid-19 damages property is similarly unavailing. For one thing, the Orders were emplaced to stop the spread of Covid-19 from person to person, not to stop the destruction of property. They thus acknowledged that businesses would and could continue as usual in the absence of government intervention. But even if the Orders had explicitly stated the government's belief that Covid-19 did cause physical damage, that would still be irrelevant here. It is the language of the Policy itself, not a state or local government's assertion, which controls the Policy's interpretation.

Compl. Ex. E at ¶¶ 6, 11. Plaintiff's position is also fundamentally inconsistent with its own allegation that infected individuals "left Covid-19 everywhere in their wake," including at Ralph Lauren stores at which they "work[ed] or shop[ed]." Mot. at 20. If Covid-19 indeed rendered a property "uninhabitable," no one could have been on premises at all.

Wakefern Food Corp. v. Liberty Mutual Fire Ins. Co., 406 N.J. Super. 524, 540 (App. Div. 2011), also cited by Plaintiff, provides further support for FM Global's position. There, it was undisputed that there was a "physical incident or series of incidents" that caused an electrical grid and its generators and transmission lines to be "physically incapable of performing their essential function." Here, Plaintiff is unable to point to a comparable physical incident. *See FAFB, LLC v. Blackboard Ins. Co.*, Docket No. MER-L-892-20, (Nov. 4, 2020), Ex. B at 6 (a loss of use of property "standing alone" is insufficient to show "physical loss and damage" under *Wakefern*). More damning still, the *Wakefern* court expressly noted that it would have reached "a different result if, for example, a governmental agency had ordered the power to be shut off to conserve electricity," at which point there would be no physical impact on the property. *Wakefern*, 406 N.J. Super. at 540 n.7. This is, of course, precisely the situation here, where Plaintiff's alleged losses were directly caused by the Stay-At-Home Orders.

Finally, Plaintiff also contends that FM Global has somehow "admitted" that Covid-19 causes physical loss or damage because of its assertion, in an undecided motion *in limine* dealing with coverage under a different company's insurance policy, that mold had physically damaged property. Mot. at 18-19. But this "admission" is nothing of the sort. In that case, there had been an actual, tangible infestation of a sterile environment by a mold, which necessitated destruction of the antibiotic products stored in that room as well as remediation to restore the property to its original condition. Small Decl. Ex. E at 5, ECF No. 30-7. That Plaintiff has chosen to devote an

entire section of its brief to so attenuated an argument underscores the weakness of its position.

In sum, Plaintiff cannot show that its properties suffered from "physical loss or damage" from either Covid-19 or the Stay-At-Home Orders. As one court put it, "the pandemic impacts human health and human behavior, not physical structures. Those changes in behavior, including changes required by governmental action, caused the Plaintiff economic losses." *Uncork & Create*, 2020 WL 6436948, at *5. So too here. As in *Uncork & Create*, the "unambiguous terms of the Policy do not provide coverage for solely economic losses unaccompanied by physical property damage." *Id.* Ralph Lauren's argument for coverage under each of the seven non-Communicable Disease Provisions is based solely on the mistaken premise that an economic loss is the same thing as physical loss or damage, and thus must be rejected.[12]

3. Plaintiff's Alleged Loss of Use Due to the "Imminent Threat" of Covid-19 Cannot Constitute Physical Loss or Damage.

In what appears to be a tacit concession that it will not be able to demonstrate the actual presence of Covid-19 at many (or any) of its properties, Plaintiff also contends that loss of use due to the "imminent threat" that Covid-19 will be present at a given property also triggers Time Element coverage under the Policy. Mot. at 27-35. Plaintiff is wrong.[13]

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[12] In the case of Civil and Military Authority Coverage, there are two additional reasons to conclude coverage was not triggered. First, Plaintiff has failed to allege that any properties located within five miles of its properties actually suffered physical loss or damage, as required. Policy at 58. Second, Plaintiff does not allege that the Stay-At-Home Orders were in response to or directly resulted from insured physical damage at any of its locations, but in fact concedes that the Orders were issued prospectively to slow the spread of the virus for the purposes of protecting the public's health (Compl. ¶ 33). *See* Compl. Exs. C-E; *see 10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd.*, 2020 WL 7360252, at *4 (S.D.N.Y. Dec. 15, 2020) (finding plaintiff had not alleged civil authority orders were the "direct result of a risk of direct physical loss" where ordered closures were "the direct result of the risk of COVID-19"); *Diesel Barbershop*, 2020 WL 4724305 at *6; *AFM Mattress Co., LLC v. Motorists Com. Mut. Ins.*, 2020 WL 6940984, at *4 (N.D. Ill. Nov. 25, 2020). This too bars Plaintiff's claim under that provision.

[13] Plaintiff's argument that the Communicable Disease Provisions have been triggered are dealt with separately, in Section I.C.

First, Plaintiff's argument depends on an overnice distinction between "physical loss" and "physical damage," with Plaintiff defining the first as encompassing a loss of use stemming from an imminent risk and the second as encompassing a loss of use stemming from an actualized risk. *See* Mot. at 11-12. Even if one were to accept Plaintiff's definition, however, it would make no difference to the viability of its claims. In both instances, the injury being asserted is still an impairment of use due to Covid-19 and associated Stay-At-Home Orders, which does not constitute "physical loss or damage" under *Boulevard Carroll* or *7th Inning*.

Plaintiff's argument also directly contradicts the Third Circuit's decision in *Port Authority*.[14] There, the court analyzed the exact same language ("all risks of physical loss or damage") in a policy issued by an FM Global affiliate. It held that, in order to demonstrate the existence of a "physical loss," a plaintiff needed to demonstrate (1) the *actual presence* of a contaminant on the property that (2) had either already rendered the property unusable or represented an "imminent threat" of doing so. 311 F.3d at 236 (emphasis added). As the Third Circuit explained, the "requirement that the contamination reach such a level in order to come within coverage limitation establishes a reasonable and realistic standard for identifying physical loss or damage." *Id.* Here, of course, Plaintiff simply ignores the first part of the *Port Authority* test, asserting that an "imminent risk" that a property will become unusable is by itself sufficient to constitute physical loss or damage, even when unaccompanied by *any* physical impact to its properties. Mot. at 31. Put differently, Plaintiff is conflating what it *claims* to have pled, *i.e.*, the imminent threat of Covid-19 being present on premises, with what it *needs* to have pled, *i.e.*, the *actual* presence of Covid-19 on premises, *and* the imminent threat that such presence will render

[14] The *Port Authority* decision did not implicate the Contamination Exclusion, which provides a wholly separate ground on which to grant judgment on the pleadings here. *See infra* Section I.B.

the property completely unusable. Plaintiff's position cannot be, and is not, the law.[15]

The fact of the matter is that the risk of contagion presented by Covid-19 does not constitute physical loss or damage to Plaintiff's properties. At most, there is a "general threat" of exposure to the virus which is insufficient "to show a physical loss or damage to trigger coverage under a first-party 'all risks' policy." *Port Authority*, 311 F.3d at 236; *see also, e.g.*, *Water Sports Kauai*, 2020 WL 6562332, at *3 (holding that "the mere threat of coronavirus cannot cause a 'direct physical loss of or damage to' covered property" under "all risk" policy). For these reasons, Plaintiff cannot sidestep its obligation to plead "physical loss or damage" to its insured property in order to receive coverage for Time Element losses.

Additionally, Plaintiff's argument is based on an isolated (mis)reading of the Policy's very first line, which states generally that the Policy covers "all risks of physical loss or damage." According to Plaintiff, "all means all," and "risk" means a "possibility of loss or injury." Mot. at 33. On that basis, Plaintiff concludes that "the plain language of the [P]olicy requires coverage for losses resulting from all possibilities of physical loss or damage." *Id.*[16]

This is spurious. Plaintiff is essentially asking this Court to ignore the next 60 pages of

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[15] Plaintiff's citation to *Customized Distribution Servs. v. Zurich Ins. Co.*, 373 N.J. Super. 480, 490 (App. Div. 2004) is wholly inapposite. In that case, which involved a completely different type of insurance (warehouseman's liability coverage), the court found that the expiration of a beverage due to a shipping error was "the functional equivalent of damage of a material nature or an alteration in physical composition," "as if it had turned sour or gone bad in some more tangible or material way." Such *permanent* loss of use—which destroyed the value of that beverage in perpetuity—bears no similarity to this case. Plaintiff also relies on a South Carolina state court case, but that does not strengthen its position. There, because the property "suffered 'substantial structural impairment'" from water infiltration and termite damage, it suffered from the very type of physical damage or contamination missing here. *Ocean Winds Council of Co–Owners, Inc. v. Auto–Owner Ins. Co.*, 350 S.C. 268, 269 (2002).

[16] This quote is selectively culled from a case that has nothing to do with interpreting insurance policies—let alone "all risk" policies of the type at issue here. *See App. States Low-Level Radioactive Waste Comm'n v. O'Leary*, 93 F.3d 103, 109 (3d Cir. 1996) (interpreting a statute).

the Policy, which lay out in great detail the metes and bounds of Ralph Lauren's coverage and lack thereof. Moreover, the Third Circuit has unambiguously explained that "in the insurance industry, *'all risks' does not mean 'every risk.'*" *Port Authority*, 311 F.3d at 234 (emphasis added). Instead, due to the exclusions that exist in an insurance contract, it is "rather a misnomer," and "a loss which does not properly fall within the coverage clause cannot be regarded as covered thereby merely because it is not within any of the specific exceptions." *Id.* The Policy, of course, contains just such an exclusion: that for Loss of Use, which plainly excludes from coverage the "loss of use" of covered properties. *See* Policy at 23 (excluding "any cost due to contamination including the inability to use or occupy property"). Construing the Policy's requirement of "direct physical loss or damage" to include mere loss of use—and indeed, loss of use due to a "risk" that *has not even materialized*—would read that term entirely out of the Policy. That is at odds with basic canons of contract law. *See Cumberland Cty. Improvement Auth. v. GSP Recycling Co.*, 358 N.J. Super. 484, 497 (App. Div. 2003) (a contract "should not be interpreted to render one of its terms meaningless.").

4. The Language of the "Communicable Disease" Provisions Does Not Establish That Covid-19 Causes Physical Loss or Damage.

Plaintiff also suggests that the existence of the Communicable Disease Response provision somehow establishes that the mere presence of Covid-19 must cause physical loss or damage. Mot. at 16. This argument is based on a fundamental misreading of the Policy. Contrary to Plaintiff's suggestion, the unambiguous terms of the Communicable Disease Response provision (or its Interruption by Communicable Disease counterpart) do *not* contain a requirement that Plaintiff demonstrate "physical loss or damage," whether actual or imminent. Policy at 31. This places that provision in stark contrast to the seven non-Communicable

Disease coverages which Plaintiff claims apply to its losses. And "Additional Coverages" which are triggered by physical loss or damage also include specific language to that effect.[17]

As FM Global has repeatedly informed Plaintiff, the Communicable Disease Provisions involve only two prerequisites: (1) "the actual, not suspected presence of a communicable disease" and (2) the resulting limitation or preclusion of access to such property by a governmental order or an officer of the insured company. *Id.* at 31, 65. So long as those conditions are satisfied, there is no need for a further showing of physical loss or damage, which is why those words do not appear within either of the Communicable Disease Provisions themselves. Indeed, given Plaintiff's inability to demonstrate physical loss or damage based on loss of use (*see* Sections I.A.1 and I.A.2, *supra*), its apparent desire to write that requirement into two provisions where it does not appear—and, as discussed in Section I.C below, the only two provisions under which it could potentially recover—is, at the very least, puzzling.

Plaintiff's argument that the Policy "reflects that the presence of Covid-19 causes damage" because the Communicable Disease Response provides reimbursement costs for the "cleanup" of communicable diseases is similarly confusing. Mot. at 17. Presumably, Ralph Lauren employs custodial staff at its facilities, yet the dust, trash, and packaging materials these employees "clean up" do not constitute physical damage to Plaintiff's property. Plaintiff's argument on this score should be recognized for what it is—a transparent effort to get around the Policy's requirement of physical loss or damage—and rejected.

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[17] *See, e.g.*, Policy at 26 ("Data, Programs or Software" coverage requires "*physical loss or damage* to electronic data, programs or software"), 27 ("Off Premises Data Services Property Damage" requires "*physical loss or damage*"), 28 ("Accidental Interruption of Services" requires "*physical damage*"), 29 ("Accounts Receivable" requires "*physical loss or damage*"), 30 ("Automatic Coverage" requires *"physical loss or damage*") (emphasis added).

B. Even if Plaintiff Could Demonstrate the Existence of Physical Loss or Damage, the Contamination Exclusion Would Independently Bar Coverage.

As described *supra* at 4-7, the Policy expressly provides coverage "against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, *except as hereinafter excluded*." Policy at 1, 8 (emphasis added)). While exclusions within an insurance policy "are construed narrowly, they will be applied where they are specific, plain, clear, prominent, and not contrary to public policy." *N&S Rest.*, 2020 WL 6501722, at *3 (quotation marks omitted).

Plaintiff's claims are barred by the Contamination Exclusion, through which the Policy excludes from coverage "contamination, and any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy." Policy at 23. "Contamination" includes "any condition of property due to the actual or suspected presence of any … pathogen or pathogenic organism, bacteria, virus, [or] disease causing or illness causing agent." *Id.* at 79. Like the other exclusions in the Policy, the Contamination Exclusion applies "unless otherwise stated." *Id.* at 19.

Once again, *Boulevard Carroll* is determinative. In that case, the insurance policy included an exclusion for loss, damage, or expense stemming from "disease, sickness, any conditions of health, bacteria, or virus." 2020 WL 7338081, at *1. This Court concluded that, as a result of that provision, "the Policy clearly excludes coverage for damage, loss, or expense arising from a virus. Because the Stay-At-Home Orders were issued to mitigate the spread of the highly contagious novel coronavirus, Plaintiff's losses are tied inextricably to that virus and are not covered by the Policy." *Id.* at *2. The same is true here. The virus exception in *Boulevard Carroll* is *nearly identical* to the Contamination Exclusion in this case, which bars coverage for damages or losses caused by a "pathogenic organism, bacteria, virus, [or] disease causing or illness causing agent." Policy at 79. Plaintiff's alleged losses are due to the novel coronavirus

and the Stay-At-Home Orders, and thus are "tied inextricably to that virus and are not covered by the Policy." Thus, even if Plaintiff's properties had suffered "physical loss or damage," it would still be precluded from recovering as a result of the Contamination Exclusion.

Case after case, both in this Court and others, has adopted the same reasoning.[18] In *7th Inning,* this Court again found that a similar exclusion for damages, losses, or expenses due to "any virus, bacterium, or other microorganism that causes disease, illness or any other physical distress that is capable of causing disease, illness or physical distress . . . clearly and explicitly" barred coverage for losses tied to Covid-19. *See 7th Inning*, Ex. A at 3, 4. In *N&S*, Judge Kugler found it "unnecessary to decide whether Plaintiff's claim resulted from direct physical loss or damage" because the virus exclusion "plainly appli[ed], barring coverage." 2020 WL 6501722, at *3 (same exclusion as *7th Inning*). Other New Jersey courts have reached the same conclusion when considering similar provisions. *See, e.g.*, *Mac Property Grp.*, 2020 WL 7422374, at *9; *Mattdogg, Inc. v. Philadelphia Indem. Ins. Co.*, 2020 WL 7702634, at *4 (N.J .Super. L. Nov. 17, 2020); *see also FAFB*, Ex. B at 10; *Precious Treasures, LLC v. Markel Ins. Co., et al.*, No. CAM-L-2690-20 (N.J. Super. L. Nov. 13, 2020), Ex. C at 17-18.

Plaintiff simply ignores all of these decisions other than *Boulevard Carroll*, which it attempts to distinguish by asserting that the Contamination Exclusion "is limited to application in

[18] *See, e.g.*, *Zwillo V v. Lexington Ins. Co.*, 2020 WL 7137110, at *8 (W.D. Mo. Dec. 2, 2020) (holding contamination exclusion that included "virus" plainly barred coverage); *Wilson v. Hartford Cas. Co.*, 2020 WL 5820800, at *7 (E.D. Pa. Sept. 30, 2020) (exclusion applied to loss or damage caused by "[p]resence, growth, proliferation, spread or any activity of 'fungi', wet rot, dry rot, bacteria or virus"); *Kessler Dental Assocs., P.C. v. Dentists Ins. Co.*, 2020 WL 7181057, at *3 (E.D. Pa. Dec. 7, 2020); *Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2020 WL 7024287, at *3 (E.D. Pa. Nov. 30, 2020); *Indep. Barbershop, LLC v. Twin City Fire Ins. Co.*, 2020 WL 6572428, at *4 (W.D. Tex. Nov. 4, 2020); *Natty Greene's Brewing Co., LLC v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 7024882, at *4 (M.D.N.C. Nov. 30, 2020); *Nahmad v. Hartford Cas. Ins. Co.*, 2020 WL 6392841, at *10 (S.D. Fla. Nov. 1, 2020); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp.*, 2020 WL 7342687, at *2 (N.D. Cal. Dec. 14, 2020).

the pollution context." Not so. The majority of contaminants covered by the Exclusion pertain to human illness and have nothing to do with pollution. Besides "virus," these include "pathogen or pathogenic organism," "bacteria," and—in case the point was not explicit enough—a catch-all for "disease causing or illness causing agent." Indeed, the Policy's contamination definition overlaps significantly with the Insurance Services Office's "specific virus exclusion" (covering "virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness, or disease") which Plaintiff attempts to distinguish (Mot. at 37 n.12), as well as the *Boulevard Carroll* exception ("disease, sickness, any condition of health, bacteria, or virus").

Plaintiff also contends that the term "virus" cannot include Covid-19, because Covid-19 is actually a "communicable disease," and thus the Contamination Exclusion would "eviscerate" the Policy's Communicable Disease Provisions. Mot. at 36. But this is a red herring. Although diseases may be caused by viruses (or bacteria, or other disease-causing agents), diseases and viruses are not identical. Plaintiff's argument thus relies on a fundamental misreading of the Policy. The Communicable Disease Provisions, which are triggered by the "actual not suspected" presence of a *disease* at a given property, constitute independent grants of coverage that do not require physical loss or damage and are not subject to the Contamination Exclusion. And, to the extent the virus and the disease overlap, the Communicable Disease Provisions constitute an exception to the Contamination Exclusion. Indeed, that is the *only* reasonable way in which each of those three clauses may be given effect, as they must.

C. Plaintiff Has Not Adequately Alleged Coverage for Communicable Disease.

Although the Policy's requirement of physical loss or damage and the Contamination Exclusion each independently preclude Ralph Lauren's ability to recover under most of provisions it identifies in its Complaint, the same is not true of the Policy's Communicable Disease Provisions, which allow Plaintiff to recover up to $1 million in the aggregate. As

discussed above, those provisions apply if two requirements are met: (1) the "actual not suspected" presence of communicable disease and (2) the requisite "order of an authorized government agency" or "a decision of an Officer of the Insured" relating to the "actual not suspected" presence of communicable disease. Policy at 31, 65.

Although FM Global remains open to the possibility that Plaintiff will at one point be able to meet these preconditions to coverage, it has yet to do so. Plaintiff has never submitted a valid claim to FM Global under either of the Communicable Disease Provisions, and its Complaint fails to plausibly allege the "actual not suspected" presence of communicable disease at any of its properties. To the contrary, Plaintiff has asked this Court to simply assume that prerequisite has been met by creating a "rebuttable presumption" that Covid-19 "was on-site at businesses that were shut down due to the pandemic." Mot. at 24. But this is little more than a transparent attempt to evade its pleading burden, and unjustifiable on its own terms. It would be inequitable to do as Plaintiff suggests and force FM Global to prove the negative—that none of the hundreds of thousands of people who worked or shopped at any of Ralph Lauren's thousand-odd stores scattered all over the world was infected with the disease at the time. That Plaintiff is even making such an argument suggests very strongly that it does not believe it will ever be able to plead facts showing the presence of Covid-19 on any of its properties.

Plaintiff's citation to *Merrimack Mut. Fire Ins. Co. v. Coppola*, 299 N.J. Super. 219 (App. Div. 1997), which Plaintiff describes as imposing an "artificial presumption in the insurance context" (Mot. at 22), is completely inapposite. There, the court determined a presumption of an intent to injure was appropriate in spousal abuse situations for specific deterrence and public policy reasons. 299 N.J. Super. at 230. Here, by contrast, there is no deterrence effect to consider. Nor is this a case in which Plaintiff lacks access to evidence, thus

warranting a presumption for public policy reasons. *See, e.g.*, *Mallon v. Prudential Prop. & Cas. Ins. Co*., 688 F. Supp. 997, 999 (D.N.J. 1988) (employment discrimination suits have presumptions "[b]ecause of the inherent difficulty in acquiring direct evidence of employer motivation"). To the contrary, Ralph Lauren is the *only* entity with access to the requisite evidence, such as employment records from its individual stores (that could be redacted to protect privacy rights). Simply put, there is no basis for Plaintiff's position. Accordingly, given Plaintiff's inability to plead any facts regarding the "actual not suspected presence" of Covid-19 at its properties, this Court should enter judgment in FM Global's favor with regard to the Communicable Disease Provisions as well.[19]

II. PLAINTIFF CANNOT STATE A COGNIZABLE CLAIM UNDER THE NJCFA

The NJCFA is designed to protect the average consumer from "abhorrent deceptive practices." *Lee v. First Union Nat. Bank*, 199 N.J. 251, 258 (2009). There are three elements to a NJCFA claim, which must be pled with particularity, *see Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007): (1) "unlawful conduct" by the defendant; (2) an "ascertainable loss" by the plaintiff; and (3) a "causal relationship" between the two. *Myska v. New Jersey Mfrs. Ins. Co.*, 440 N.J. Super. 458, 484 (App. Div. 2015). Plaintiff's claim, which is based on a disagreement over the scope of a complex insurance policy between sophisticated parties, does not qualify for the protections offered to the "average consumer" by the NJCFA. *Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 139 N.J. 392, 416 (1995). Even if it did, Plaintiff's claim would still fail to adequately allege "unlawful conduct."

A. Insurance Coverage Disputes Are Not Actionable under the NJCFA.

Because the NJCFA is intended to prohibit "abhorrent deceptive [business] practices"

[19] If and when Plaintiff is able to demonstrate that Covid-19 was present on its premises, it should provide that evidence to FM Global, which will then be able to adjust the claim in good faith.

related to consumer purchases (*Lee*, 199 N.J. at 258, 263), it is not "intended as a vehicle to recover damages for an insurance company's refusal to pay benefits." *Smith v. State Farm Fire & Cas. Co.*, 2020 WL 6938432, at *8 (D.N.J. Nov. 25, 2020). While unlawful behavior relating to the underlying insurance contract may be covered, courts routinely reject claims that stem from disputes regarding the scope of insurance coverage or payment of claims. *Id.*; *Myska*, 440 N.J. Super. at 489 ("[T]he CFA does not apply to [a] dispute regarding payment or scope of coverage."); *Hanson v. Allstate New Jersey Ins. Co.*, 2016 WL 3912025, at *2 n.2 (D.N.J. July 19, 2016) (Wigenton, J.) ("[D]isputes over insurance payments are not subject to the CFA.").

Here, the core of Plaintiff's claim stems from its highly subjective assertion that FM Global improperly assessed and denied its claim. Compl. ¶ 144. As Plaintiff alleges, it submitted a claim to FM Global, and the parties then disagreed over the "nature and scope of [Plaintiff's] claim." *Id.* ¶ 108; *see also id.* ¶¶ 116-118, 122. But Plaintiff's disagreement with FM Global's assessment of its claim is not a basis for liability. *See Smith*, 2020 WL 6938432, at *8 ("Plaintiff's claim is about the improper denial of coverage, which is not covered by the CFA."); *Watson v. Liberty Mut. Fire Ins. Co.*, 2020 WL 4016036, at *3 (D.N.J. July 16, 2020) (dismissing NJCFA claim regarding the partial denial of plaintiff's insurance claim); *Ryan v. Liberty Mut. Fire Ins. Co.,* 234 F. Supp. 3d 612, 619 (D.N.J. 2017) (dismissing NJCFA claims because they "related directly to the [parties'] insurance policy dispute over the denial of benefits"); *Nationwide Mut. Ins. Co. v. Caris*, 170 F. Supp. 3d 740, 746-47 (D.N.J. 2016) (same).

Plaintiff attempts to avoid this conclusion by asserting that FM Global engaged in a systematic scheme to "defraud its policyholders" deployed "across all COVID-19 claims," in which FM Global denied coverage other than the Communicable Disease Provisions. *See* Compl. ¶¶ 125, 130, 144. Such bare allegations fail to satisfy the particularity requirements of

Rule 9(b), which requires a plaintiff allege fraudulent conduct with "precision." *Frederico*, 507 F.3d at 200. Plaintiff's allegations are anything but precise, however. They contain no detail regarding the identities of these purportedly defrauded policyholders, whether they have claims similar to Plaintiff's, the date and nature of FM Global's interactions with them, or even whether FM Global ever implemented this alleged scheme in connection with their claims. Conclusory and unsupported allegations of this nature simply cannot sustain a NJCFA claim. *Contra Alpizar-Fallas v. Favero*, 908 F.3d 910, 918 (3d Cir. 2018) (adjuster falsely reported that a claimant had to sign a document to facilitate her claim being approved when the document actually was a broad waiver of claims); *Weiss v. First Unum Life Ins. Co.*, 482 F.3d 254, 256 (3d Cir. 2007) (insured was approved for payouts only for the benefits to be discontinued due to "an illegal policy and scheme" of the insurance company "to reduce expensive payouts").

B. The Policy Is Not "Merchandise" under the NJCFA.

Even where a particular business practice is afforded protection under the NJCFA, the statute's coverage is limited to sales of "merchandise." N.J.S.A. 56:8–2. "Merchandise" is defined as goods and services offered "to the public for sale." *Id.* 56:8–1(c). Consequently, the NJCFA does not apply to every transaction in which a consumer engages, but rather only to those that are intended for "the public at large." *Cetel v. Kirwan Fin. Grp., Inc.*, 460 F.3d 494, 514 (3d Cir. 2006) (quoting *Marascio v. Campanella*, 298 N.J. Super. 491 (App. Div. 1997)). Here, because the Policy cannot be considered the type of "merchandise" that is intended for the public at large, it cannot be the subject of a NJCFA claim. *See Princeton Healthcare Sys. v. Netsmart New York, Inc.*, 422 N.J. Super. 467, 473 (App. Div. 2011) (explaining that not "every contract entered into by a corporation may be the subject of a CFA claim").

When determining whether a business-to-business transaction like this one "fit[s] the

intendment of a sale" to the public, courts look to the "nature of [a] transaction" between companies. *All the Way Towing, LLC v. Bucks Cty. Int'l, Inc.*, 236 N.J. 431, 446-47 (2019). This inquiry involves reviewing a number of factors, including "the complexity of the transaction," "the identify and sophistication of the parties," "the nature of the relationship between the parties," and "the public availability of the subject merchandise." *Id.* Applying these factors here plainly demonstrates that the Policy lies outside the scope of the NJCFA.

As Plaintiff acknowledges, it is a highly sophisticated multinational corporation and a "global leader in the design, marketing, and distribution of premium lifestyle products." Compl. ¶¶ 7, 8. The Policy itself covers the over "1,000 stores around the world" that Plaintiff operates (*Id.* ¶ 9), and insures Plaintiff for losses of up to *$700 million per recoverable incident*. *Id.* ¶ 18. Given the magnitude and complexity of the coverage offered, negotiations between these two sophisticated entities were lengthy and intensive, involving the participation of an insurance broker (for Ralph Lauren) as well as legal and risk management professionals. *Id.* ¶¶ 6, 107-21; *see also id.* Ex. B. Clearly, the Policy is no mere run-of-the-mill consumer purchase intended for the "public at large." *Cetel*, 460 F.3d at 514. Accordingly, it lies outside the scope of transactions the NJCFA is intended to protect. *See, e.g.*, *Princeton Healthcare Sys.*, 422 N.J. Super. at 474 (holding that a contract for the installation and implementation of a complex computer system between "sophisticated corporate entities" did not constitute a sale of "merchandise"). Plaintiff's claim should thus be dismissed on this alternative ground.

C. Plaintiff Cannot Show That FM Global Engaged in "Unlawful Conduct"

Even if Plaintiff alleged both the type of business practice and transaction covered by the NJCFA, its claim would still be deficient because Plaintiff cannot show that FM Global engaged in "unlawful conduct" that caused it harm. The NJCFA requires that the behavior in question involves "substantial aggravating circumstances," meaning that it "stands outside the norm of

reasonable business practice in that it will victimize the average consumer." *Rait v. Sears, Roebuck & Co.*, 2009 WL 250309, at *3 (D.N.J. Feb. 3, 2009) (alteration omitted).

Nothing like that is present here; indeed, Plaintiff's allegations of purportedly unlawful conduct are belied by Plaintiff's own documentary evidence. Plaintiff suggests that the FM Global "Talking Points" constituted a "systemic" attempt to defraud policyholders "across all COVID-19 claims." Compl. ¶¶ 125, 130, 147. The Talking Points, however, state outright that they do "not deal with all the issues associated with" COVID-19 claims given the "variety of ways" clients may be affected, but only address "basic questions" regarding insurance coverage. *Id.* Ex. K. Moreover, correspondence between the parties demonstrates that FM Global's assessment was based on the "limited information" provided by Plaintiff, that more information supporting Plaintiff's claims was requested, and that further assessment of Plaintiff's coverage would be conducted if and when that information was supplied. *Id.* Exs. F, H, J. Far from the aggravated unlawful conduct proscribed by the NJCFA, Plaintiff's allegations show that it was given ample opportunity to provide evidence supporting its claim. Its failure to do so does not transform FM Global's assessment of Plaintiff's insurance coverage into unlawful activity.

CONCLUSION

Judgment should be entered in FM Global's favor on Counts I-IV of the Complaint because Plaintiff cannot show it is entitled to coverage under the Policy. Even if Plaintiff could demonstrate the existence of physical loss or damage to its properties (it cannot), the Contamination Exclusion would still bar its claims. Plaintiff has also failed to plead either of the prerequisites for coverage under the Policy's Communicable Disease Provisions. The Court should also enter judgment in FM Global's favor on Count VI of the Complaint because Plaintiff has no cognizable claim under the NJCFA. For these reasons, the Court should deny Ralph Lauren's Motion and grant FM Global's Cross-Motion in its entirety.

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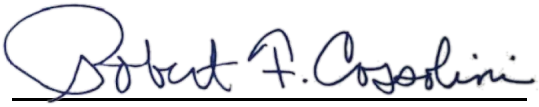
Attorneys for Defendant
Factory Mutual Insurance Company

Dated: January 29, 2021

By: 

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CERTIFICATION OF SERVICE

I hereby certify that a copy of Defendant Factory Mutual Insurance Company's Memorandum in Law in Opposition to Plaintiff's Motion for Partial Judgment on the Pleadings and in Support of Defendant's Cross-Motion for Judgment on the Pleadings were served by electronic filing upon all counsel of record.

s/ Kerry C. Donovan
Kerry C. Donovan

Dated: January 29, 2021