Prepared by the Court

JENKINSON'S SOUTH, INC. and JENKINSON'S PAVILION, Plaintiffs, vs. WESTCHESTER SURPLUS LINES INSURANCE COMPANY, AXIS SURPLUS INSURANCE COMPANY, EVANSTON INSURANCE COMPANY, ARCH SPECIALTY INSURANCE COMPANY, GENERAL SECURITY INDEMNITY COMPANY OF ARIZONA, CERTAIN UNDERWRITERS AT LLOYDS OF LONDON, IRONSHORE SPECIALTY INSURANCE COMPANY and LANDMARK AMERICAN INSURANCE COMPANY, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION OCEAN COUNTY DOCKET NO. OCN-L-1607-20 CIVIL ACTION **OPINION OF THE COURT**

This matter comes before the court by Motion for Summary Judgment filed by plaintiff, Jenkinson's South, Inc. and Jenkinson's Pavilion ("plaintiffs"), seeking recovery from defendants Westchester Surplus Lines Insurance Company, Axis Surplus Insurance Company, Evanston Insurance Company, Arch Specialty Insurance Company, General Security Indemnity Company of Arizona, Certain Underwriters at Lloyds of London, Ironshore Specialty Insurance Company and Landmark American Insurance Company ("defendants"). Plaintiffs held "all risk" policy numbers with the named defendants: D37417853 0006, EAF773479-19, MKLV11XP007241, ESP0054539-06, 34158-00016301901 (issued by General Security and Lloyds), 001650306 and LHD912138 respectively from 2019-2020. Plaintiff held "all risk" policies with the named defendants, above, respectively from 2020-2021. Plaintiffs' policy with Defendant Landmark is a second-level excess policy under number LHD907418. The defendants cross filed for Summary Judgment asserting plaintiffs do not have a valid claim for coverage under the business income or civil authority provisions of the various insurance policies at issues. After entertaining

oral argument on June 9, 2021, reviewing the exhibits and the papers presented to the court, the court hereby issues the following decision on this 2nd Day of July 2021:

BACKGROUND:

This matter has its genesis in the denial of insurance claims submitted by plaintiffs, Jenkinson's South, Inc. and Jenkinson's Pavilion, in May 2020. The claims were made under plaintiffs "all risk" commercial insurance policies, which were issued by Westchester Surplus Lines Insurance Company, Axis Surplus Insurance Company, Evanston Insurance Company, Arch Specialty Insurance Company, General Security Indemnity Company of Arizona, Certain Underwriters at Lloyds of London, Ironshore Specialty Insurance Company and Landmark American Insurance Company.

During March 2020, the COVID-19 pandemic impacted the State of New Jersey, which ultimately resulted in the temporary closure of Jenkinson's boardwalk and amusement businesses in Point Pleasant Beach, New Jersey. Plaintiffs claim an alleged loss well in excess of $10 million.

All policies held by plaintiffs included language insuring "against all risks of direct physical loss or damage to Insured Property, except as excluded." See Insua Cert. Ex. A at 5; Ex. B at 5; Ex. C at 5; Ex. D at 5; Ex. E at 5; Ex. F at 5; Ex. G at 5. Specifically, the policies' "Perils Excluded" language excludes coverage and notifies the insured that the policies do not:

"…insure for loss or damage caused by…delay, loss of market, or *loss of use*. Indirect, remote, or consequential loss or damage except as provided elsewhere by this Policy." (emphasis added). See Insua Cert. Ex. A at 8; Ex. B at 8; Ex. C at 8; Ex. D at 8; Ex. E at 8; Ex. F at 8; Ex. G at 8.

INSURANCE COVERAGE:

The Primary Policies:

Defendant AXIS Surplus Insurance Company and Westchester Surplus Lines Insurance Company (the "Primary Insurers") issued policies under two separate policy periods of a commercial insurance program, bearing the policy numbers: D37417853 006, EAF773479-19, D37417853 007 and

EAF773479-20. These policy periods were from March 19, 2019 to March 19, 2020 and March 19, 2020 to March 19, 2021. The policies issued by AXIS and Westchester include primary policies as well as excess polices issued by the other named defendants.

Primary Policies Scope of Coverage and Exclusions:

The primary policies issued by AXIS and Westchester both define covered losses under Section II – Covered Causes of Loss, Subsection B (e): "PERILS INSURED: This policy insures against all risk of direct physical loss or damage to Insured Property, except as excluded." This coverage of loss is provided to the insured under each Policy for a period of twelve months.

"Section V – Time Element Coverage Gross Earnings" of each Policy provides for the time element of coverage. Section V states:

> "This Policy is extended to cover the actual loss sustained by the Insured during the Period of Interruption directly resulting from a Covered Cause of Loss to any Property." See Insua Cert. Ex. B at 12; Ex. A at 12.

Section V, Subsection B, Period of Interruption states:

> "In determining the amount payable under this coverage, the Period of Interruption shall be: 1) The period from the time of direct physical loss or damage insured against by this Policy to the time when, with the exercise of due diligence and dispatch, either: a) normal operations resume, or b) physically damaged buildings and equipment could be repaired or replaced and made ready for operations under the same or equivalent physical and operating conditions that existed prior to such loss or damage, whichever is less. Such period of time shall not be cut short by the expiration or earlier termination date of policy." See Insua Cert. Ex. B at 13; Ex. A at 12-13.

The Policy goes on to set forth under Section V, Subsection C "Additional Time Element Coverages" which include a "Contingent Time Element", "Interruption by Civil or Military Authority", "Ingress & Egress". See Insua Cert. Ex. B at 13-15; Ex. A at 13-15.

The AXIS and Westchester policies also include sections which set forth exclusions within "Section II – Covered Causes of Los, Subsection B Perils Excluded. 2(a) and (b)", where it is stated:

> "The Company does not insure for loss or damage caused by any of the following: a) delay, loss of market or loss of use. b) Indirect, remote, or consequential loss or damage except as provided elsewhere in this Policy." See Insua Cert. Ex. B at 8; Ex. A at 8.

The policies further state the following exclusion that the companies do not insure for loss or damage resulting from:

> "the actual, alleged or threatened release, discharge, escape or dispersal of Pollutants or Contaminants, all whether or direct or indirect, proximate or remote in whole or in part caused by, contributed to or aggravated by any Covered Cause of Loss under this Policy." See Insua Cert. Ex. B at 6; Ex. A at 6.

The Policies defined "Pollutants or Contaminants" as:

> "Pollutants or Contaminants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause of threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use the property insured hereunder, including, but not limited to, bacteria, virus, or hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency. Waste includes materials to be recycled, reconditioned or reclaimed." See Insua Cert. Ex. B at 30; Ex. A at 30.

The Axis primary policy includes a "Nuclear, Chemical and Biological Exclusion Endorsement", where Subsection B and C state:

> "The following exclusions are added to your Policy. This insurance does not apply to: …B. Loss or damage arising directly or indirectly from the dispersal, application or release of, or exposure to, chemical or biological materials or agents that are harmful to property or human health, all whether controlled or uncontrolled, or due to any act or condition incident to any of the foregoing, whether such loss be direct or indirect, proximate or remote, or be in whole or in part caused by, contributed to, or aggravated by, any physical loss or damage insured against by this Policy, however such dispersal, application, release or exposure may have been caused. C. This exclusion applies to all coverage under the Policy notwithstanding any coverage extension or any other endorsement." See Insua Cert. Ex. B.

The Westchester primary policy, similarly, includes a "Nuclear, Biological, Chemical, Radiological Exclusion Endorsement", where Subsection B states:

> "The following exclusions are added to your Policy. This insurance does not apply to: …B. Loss or damage arising directly or indirectly from the dispersal, application or release of, or exposure to, chemical, radiological or biological materials or agents, all whether controlled or uncontrolled, or due to any act or condition incident to any of the foregoing, whether such loss be direct or indirect, proximate or remote, or be in whole or in part caused by, contributed to, or aggravated by, any physical loss or damage insured against by this Policy or Coverage Part, however, such dispersal, application, release of exposure may have been caused." See Insua Cert. Ex. A.

The Excess Policies:

Evanston Insurance Company, Arch Specialty Insurance Company, General Security Indemnity Company of Arizona and Certain Underwriters of Lloyds of London (issuing a policy together under "Ethos Specialty Insurance Company"), Ironshore Specialty Insurance Company and Landmark American Insurance Company (collectively, the "Excess Insurers") issued policies to plaintiffs containing the same Manuscript Policy Form terms included in the Primary Insurers policies. The Excess Polices were issued under two separate policy periods, also from March 19, 2019 to March 19, 2020 and March 19, 2020 to March 19, 2021.

Excess Policies Scope of Coverage and Exclusions:

The Evanston, Arch Specialty Insurance, Ethos Specialty Insurance Services, LLC, Ironshore Specialty Insurance and Landmark American Insurance policies all include the following language regarding the scope of coverage: "PERILS INSURED: This Policy insures against all risks of direct physical loss or damage to the Insureds Property, except as excluded." See Insua Cert. at Ex. C at 5; Ex. D at 5; Ex. E at 5; Ex. F at 5; Ex. G at 5. Each of the excess policies include the same "loss of use" exclusion language as the primary policies where the policies state the following:

> "The Company does not insure for loss or damage caused by any of the following: a) delay, loss of market, or loss of use. b) Indirect, remote, or consequential loss or damage except as provided elsewhere in this Policy." See Insua Cert. at Ex. C at 8; Ex. D at 8; Ex. E at 8; Ex. F at 8; Ex. G at 8.

The Evanston, Ethos, Ironshore Specialty and Landmark American Protection Polices also incorporates the same "Pollutants or Contaminants" exclusion as the primary policies, with the following definition:

> "Pollutants or Contaminants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, virus, or hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency. Waste includes materials to be recycled, reconditioned or reclaimed." See Insua Cert. at Ex. C at 30; Ex. E at 30, Ex. F at 30, Ex. G at 30.

The Evanston excess policy includes the "Exclusion – Biological, Radiological or Chemical Materials," which states:

> "This endorsement modifies insurance provided under all Property and similar or related coverage forms attached to this policy. The following exclusion is added and is therefore not a Covered Cause of Loss: We will not pay for loss or damage caused directly or indirectly by the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. **Biological, Radiological Or Chemical Materials**. Loss or damage caused directly or indirectly by the actual or threatened malicious use of pathogenic or poisonous biological, radiological or chemical materials, whether in time of peace or war, and regardless of who commits the act." See Insua Cert. Ex. C.

The Ethos excess policy includes the "Exclusion of Pathogenic Or Poisonous Biological Or Chemical Materials," which states:

> "This endorsement modifies insurance provided under the following coverage parts: We will not pay for loss or damage caused directly or indirectly by the discharge, dispersal, seepage, migration, release, escape or application of any pathogenic or poisonous biological or chemical materials. Such loss or damage is excluded regardless of any causes of event that contributes concurrently or in any sequence to the loss." See Insua Cert. Ex. E.

The Ironshore Specialty Insurance excess policy does not include a specific exclusion for biological, chemical or radiological materials, but the "Pollutant or Contaminant" manuscript policy exclusion incorporates both viruses and bacteria as cited above.

The Landmark American excess policy includes the "Exclusion of Pathogenic or Poisonous Biological or Chemical Materials," which states:

> "This endorsement modifies insurance provided under the following: All coverage parts. The following exclusion is added: We will not pay for loss or damage caused directly or indirectly by the discharge, dispersal, seepage, migration, release, escape or application of any pathogenic or poisonous biological or chemical materials. Such loss or damage is excluded regardless or any other cause or event that contributes concurrently or in any sequence to the loss." See Insua Cert. Ex. G.

The Arch excess policy contains the following "Loss Due to Virus or Bacteria" exclusion:

> "[Arch] will not pay for loss or damage caused by or resulting from any virus…that induces or is capable of inducing physical distress, illness or disease." See Insua Cert.at Ex. D at 1.

Under the terms of Arch's policy, the virus exclusion applies to "all coverages under all forms and endorsements that comprise" the policies, which includes property damage to buildings, personal property or endorsements that cover business income, extra expense or action of civil authority.

Civil Authority Provisions:

Each of the primary and excess policies include provisions extending coverage to the actual loss sustained during the period of time when the Insured's real or personal property is prohibited by an order of civil or military authority. However, the policies require the civil or military authority orders to be the direct result of a Covered Cause of Loss or of an imminent threat of a Covered Cause of Loss, not insured under the policies. The primary and excess policies all include the following language under "Section V-Time Element Coverage Gross Earnings, Subsection C(5)6":

> "INTERRUPTION BY CIVIL OR MILITARTY AUTHORITY: This Policy is extended to cover the actual loss sustained during the period of time when access to the Insured's real or personal property is prohibited by an order of civil or military authority, provided that such order is a direct result of a Covered Cause of Loss or of an imminent threat of a Covered Cause of Loss to real property not insured hereunder. Such period of time begins with the effective date of the order of civil or military authority and ends when the order expires, but no later than the number of days shown in Section 1., Subparagraph E.6. In no event shall the Company pay more than the Sublimit shown in Section 1., Subparagraph E.6." See Insua Cert. Ex. A at 15; Ex. B at 15; Ex. C at 15; Ex. D at 15; Ex. E at 15; Ex. F at 15.

In response to the COVID-19 pandemic, New Jersey's Governor Philip D. Murphy declared a State of Emergency and a Public Health Emergency on March 9, 2020. On March 16, 2020 Governor Murphy issued Executive Order No. 104, which limited the size of in-person gatherings, closed schools, and directed certain facilities to close to the public. See Exec. Order No. 104 (March 16, 2020). Governor Murphy's following Executive Order No. 107 directed all New Jersey residents to remain at home and mandated the closure of all non-essential businesses. See Exec. Order No. 107 (March 21, 2020). Executive Order No. 107 became effective on March 21, 2020. Id. On May 18, 2020 Governor Murphy issued Executive Order No. 147, which continued the closure of amusement parks, arcades and other public places, while authorizing the reopening of beaches and boardwalks. See Exec. Order No. 147 (May 18, 2020).

ANALYSIS:

The court denies plaintiffs' motion for summary judgment and grants defendants' cross-motions for summary judgment. In doing so, the court concludes that plaintiffs' interpretation of the direct

physical loss, the efficient proximate cause doctrine, and interpretation of the "pollutants or contaminants", "loss due to virus or bacteria" and biological material exclusions is misapplied to the facts and policies of the instant case. Further, defendants have met their burden in proving the closure of plaintiffs' business was a direct result of the COVID-19 pandemic and that no direct physical loss was incurred to the Insured's property, thus falling outside the scope of the insurance policies' coverage limits.

The test for determining whether summary judgment must be granted is based on if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." See Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013) (quoting R. 4:46-2(c)). Under the "genuine issue [of] material fact" standard, an opposing party must do more than "point to any fact in dispute" in order to defeat summary judgment. See Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016). The court will not grant summary judgment if the opposing party "only [offers] facts which are immaterial or of an insubstantial nature," if taking the moving party's statements of undisputed facts as true. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995).

New Jersey Courts have long interpreted insurance policies in favor of the insured and against the insurer. Salem Group v. Oliver, 128 N.J. 1, 607 A.2d 138 (1992). The rational for such an interpretation is in part based upon the public policy interest of interpreting the insurance policy against the drafter. Werner Industries Inc. v. First State Insurance Company, 112, N.J. 30, 528, A.2d 188 (1988). Under the rule of contra proferentem, courts construe all ambiguities and uncertainties within the insurance policy against the insurance company and in favor of coverage. See Sparks v. St. Paul Insurance Company, 100 N.J. 325, 495 A.2d 406 (1985).

The clear and unambiguous terms of insurance policies must be enforced by the court. Erdo v. Torcon Construction Company, 275 N.J. Super 117, 645 A.2d 806 (App. Div. 1994). Courts looks to

whether the phrasing of the policy of insurance is sufficiently confusing such that the average policy-holder cannot make out of the boundaries of coverage when assessing whether an ambiguity exists in the policy language. Nunn v. Franklin Mutual Insurance Company, 274 N.J. Super, 543 644 A.2d 1111 (App Div. 1994). The language of an insurance policy is only ambiguous where a reasonably intelligent person would differ regarding its meaning. Aviation Charters, Inc. v. Avemco Insurance Co., 335 N.J Super. 591, 763 A.2d. (App. Div. 2000). The court need not consider the alleged reasonable expectations of the insured where the policy for insurance is clear and unambiguous. Katchen v. Government Employer's Ins. Co., 457 N.J. Super, 600, 607, 202 A.3d. 627 (App. Div. 2019). An ambiguity is not created alone by a disagreement over the interpretation of policy for insurance between the insurer and the insured. See Aviation Charters, 335 N.J. Super at 763.

Courts interpret the words of the insurance policy in accordance with their plain and ordinary meaning. Voorhees v. Preferred Mutual Insurance Company, 128 N.J. 165, 607 A.2d 1266 (1992). If the words of the policy give rise to two interpretations, where only one will support a finding of coverage, the court will choose the interpretation favoring the finding of coverage of the insured. Meeker Sharkey Associates, Inc. v. National Union Fire Insurance Company of Pittsburgh, 208 N.J. Super 354, 506 A.2d 19 (App. Div. 1986).

Here, the defendants first argue that the Covered Cause of Loss provision of the policies do not apply because plaintiffs have not alleged a "direct physical loss or damage" to plaintiffs' property. Defendants assert a "direct physical loss or damage" to the property must be established in order to implicate coverage under the policies.

The defendants also assert that several policy exclusions apply that preclude coverage under the policy. Specifically, defendants cite to the "loss of use" exclusion, the "pollutants or contaminants" exclusion, the "loss due to virus or bacteria" and the "nuclear, chemical and biological exclusion" as policy exclusions for coverage.

Plaintiffs argue that a direct physical loss or damage was sustained because plaintiffs were unable to use their property for its intended purpose and because employees tested positive for COVID-19 at or around the time plaintiffs' facilities closed to the public. Moreover, plaintiffs argue the loss of functionality of its premises constitute physical damage caused by the actual presence of COVID-19.

Plaintiff further contends that a blanket virus exclusion does not exist in any of the defendants' insurance policies except for Arch Specialty Insurance's excess policy. Plaintiff additionally argues to the extent that the policies, other than Arch, include a virus exclusion, the exclusion only applies to viruses listed within the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976.

A. Direct Physical Loss Requirement

Plaintiffs' claim for coverage based on the loss of use of the Jenkinson's facilities does not give rise to a "direct physical loss or damage" to its property, which is required by the following language in all of the polices: "this policy insures against all risks of direct physical loss or damage to Insured Property, except as excluded." See Insua Cert. Ex. A at 5; Ex. B at 5; Ex. C at 5; Ex. D at 5; Ex. E at 5; Ex. F at 5; Ex. G at 5. The policies contain an express exclusion stating the polices do not insure for: "loss or damage caused by…delay, loss of market, or *loss of use*. Indirect, remote, or consequential loss or damage except as provided elsewhere by this Policy." (emphasis added). See Insua Cert. Ex. A at 8; Ex. B at 8; Ex. C at 8; Ex. D at 8; Ex. E at 8; Ex. F at 8; Ex. G at 8. This matter before the court is distinguishable from Wakefern Food Corp. v. Liberty Mutual Fire Ins. Co., 406 N.J. Super. 524 (App. Div.), certify. Denied 200 N.J. 209 (2009). In Wakefern, the insureds claim arose out of an electrical grid failure to the North American grid causing a four-day long electrical blackout effecting portions of the Northeastern United States and Eastern Canada. Liberty Mutual Fire Insurance Company had issued a policy to the insured containing a specific coverage provision for damage due to the loss of electrical power. The Liberty insurance policy required the interruption of coverage caused by physical damage from a covered peril to any power house, generating plant, substation power switching station, gas

compressor station, transformer, telephone exchange, transmission lines, connections or supply pipes which furnish electricity to a covered location. Id. The court found that under the policy's "Services Away Extension" the policy provided coverage for the interruption of electrical service, although the parties disputed whether the electrical blackout resulted in physical damage to the insured electrical equipment and property. Id.

Here, plaintiffs have not successfully alleged "a direct physical loss" to the property. In plaintiffs moving papers and at oral argument, plaintiffs attempted to raise the argument that the presence of COVID-19 at Jenkinson's buildings was a sufficient "direct physical loss" to the property. The court finds plaintiffs' argument without merit. First, the plaintiff relies upon certifications from various employees at plaintiffs' premises that had contracted COVID-19 at or around the time that plaintiffs closed their facilities. There has been no evidence put forth by plaintiffs that employees at plaintiffs' premises contracted COVID-19 because of exposure to the property itself.

Moreover, plaintiffs have failed to make a showing that the concentration of COVID-19 rose to a level where the property was rendered temporarily unsafe or inhospitable. This differentiates plaintiffs' claim from the District Court of New Jersey's ruling in Gregory Packaging, Inc. v. Travelers Property Casualty Company of America, where the court found that the presence and concentration of ammonia in the building required immediate closure and remediation before the property became safe for human occupancy. 2014 WL 6675934 (D.N.J. Nov. 25, 2014). In Gregory Packaging, the court held that the presence of ammonia was a sufficient "direct physical loss" at the property because the amount of ammonia present at the property "rendered the facility unstable for a period of time". Id. Here, it has not been shown that COVID-19 rose to a high concentration like the Gregory Packaging ammonia concentration in a closed space. Nothing in the record demonstrates any level of concentration of COVID-19 at any time during the policy periods in question. The plaintiffs urge the court to speculate on the presence of the virus immediately upon the facilities' closure. Upon the closure of the plaintiffs' facilities and the absence of any large crowds of people indoors, the purpose of reducing the ability of the virus to

be transmitted among humans was accomplished. There is no evidence to suggest that the plaintiffs' buildings were damage by a concentration of COVID-19.

The Executive Orders issued by Governor Murphy in the March and May of 2020, were aimed at slowing the spread of the novel COVID-19 virus. The Executive Orders required plaintiffs to close its doors to the public. The executive action did not require the actual presence of COVID-19 at plaintiffs' property to bar public access. Moreover, the Executive Orders were not issued due to a physical alteration of plaintiffs' property. Since plaintiffs' loss of use of its property does not fall under a covered cause of loss under the insurance policies, plaintiff is precluded from recovery under the civil authority provision of the policies. This is because each of the policies includes the express civil authority exclusion:

> "INTERRUPTION BY CIVIL OR MILITARTY AUTHORITY: This Policy is extended to cover the actual loss sustained during the period of time when access to the Insured's real or personal property is prohibited by an order of civil or military authority, provided that such order is a direct result of a Covered Cause of Loss or of an imminent threat of a Covered Cause of Loss to real property not insured hereunder. Such period of time begins with the effective date of the order of civil or military authority and ends when the order expires, but no later than the number of days shown in Section 1., Subparagraph E.6. In no event shall the Company pay more than the Sublimit shown in Section 1., Subparagraph E.6." See Insua Cert. Ex. A at 15; Ex. B at 15; Ex. C at 15; Ex. D at 15; Ex. E at 15; Ex. F at 15.

This court concurs with the holdings in the following District Court of New Jersey decisions where insurance coverage was denied because plaintiff did not allege any facts to support a showing that its property was physically damaged and the policies at issue exclude coverage for damage, loss or expense arising from a virus. See Boulevard Carroll Entm't Grp., Inc. v. Fireman's Fund Ins. Co, 2020 WL 7338081 (D.N.J. Dec. 14, 2020); 7th Inning Stretch LLC v. Arch Ins. Co., 2021 WL 800595 (D.N.J. Jan. 19, 2021); Arash Emami, M.D., P.C., Inc. v. CNA & Transp. Ins. Co., 2021 WL 1137997 (D.N.J. Mar. 11, 2021).

B. Loss of Use Exclusion

Here, the primary and excess policies each include provisions excluding coverage for loss of use, or damage caused by a loss of use. Considering plaintiffs' damages resulted from the closure of its business during the stated policy periods, the policies' "loss of use" exclusions apply. Plaintiffs' claims

that the Plaintiffs were required to close its doors to the public for a temporary period of time and then limit capacity before being permitted to fully reopen to the public in the spring of 2021. This court further finds that beyond the absence of direct physical loss to the plaintiffs' property, the policies' loss of use exclusion bar recovery under the policy. The plaintiffs' damages arise out of the inability to *use* the property for its intended profit-making function, which is expressly excluded by the policies involved.

C. Efficient Proximate Cause Test and the Policies' "Pollutant or Contaminant", Virus and Various Biological Materials Exclusions

New Jersey law follows to the "efficient proximate cause" test in determining whether coverage for a particular loss is excluded. Under the test, "if an exclusion 'bars coverage for losses caused by a particular peril, the exclusion applies only if the excluded peril was the 'efficient proximate cause' of the loss". See New Jersey Transit Corp. v. Certain Underwriters of Lloyd's London, 461 N.J. Supp. 440, 446 (App. Div. 2019). "Where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the acts and final loss, produces the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss." Id. The proximate cause of a loss is not always determined by the last occurrence in a chain of events, rather the proximate cause is regarded as the predominant cause that set the chain of loss into motion. See Franklin Packaging Co. v. California Union Ins. Co., 171 N.J. Super. 188, 191 (App. Div. 1979).

As stated above New Jersey Courts follow the "efficient proximate cause" test when determining whether a particular loss is excluded under an insurance policy. Here, COVID-19 set in motion the chain of events that caused plaintiffs' losses as the virus prompted state and municipal orders that required plaintiffs to temporarily close its facilities. Within the Westchester and Axis primary policies "Section II – Covered Causes of Loss", "Pollutants or Contaminants" are an expressly stated excluded peril, where the polices state:

> "The actual, alleged or threatened release, discharge, escape or dispersal of Pollutants or Contaminants, all whether direct or indirect, proximate or remote or in whole or in part caused

by, contributed to or aggravated by any Covered Cause of Loss under this Policy." See Insua Cert. Ex. A at 6; Ex. B at 6.

Under "Section VII - Policy Definitions" of the Westchester and Axis primary policy, "Pollutants or Contaminants" are defined as:

> "…any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, virus, or hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency. Waste includes materials to be recycled, reconditioned or reclaimed." See Insua Cert. at Ex. A at 30; Ex. B at 30.

Additionally, plaintiff also raises the argument that the virus exclusion stated by the defendants does not apply as COVID-19 is not listed as a hazardous substance in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976. See Insua Reply Brief. This court is not persuaded by plaintiffs' interpretation of the policy language. A number of courts have recently examined this issue and have denied coverage. See Mac Prop. Grp. LLC & The Cake Boutique LLC v. Selective Fire & Cas. Ins. Co., 2020 WL 7422374 (N.J. Super 2020). It is well settled that the virus exclusion cited in the defendants' policies is intended to include viruses and based on a plain reading of the policy the term "virus" is not intended to be modified by the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976. While plaintiffs' supplemental brief following oral argument on June 10, 2021 provides references to where viruses fall into definitions under the Federal Water Pollution Act, this court interprets the "Pollutants or Contaminants" definition in a disjunctive manner, where the policy excludes both "hazardous substances" found in the Federal Water Pollution Act, as well as viruses.

This court finds that the "Pollutants or Contaminants" exclusion to include an exclusion for a "virus" that "can cause of threaten damage to human health or welfare". See Insua Cert. at Ex. A, B, H and I. Additionally, the excess Arch policy clearly includes an exclusion to coverage due to viruses. See Insua Cert. Ex. D at 1. This issue has been brought before New Jersey Courts since the start of the public

health emergency. In Mac Prop. Grp. LLC., the court found that the plaintiff's complaint put COVID-19 at issue as the virus introduced the cause of loss. 2020 WL 7422374 (N.J. Super 2020). The court in Mac Prop. Grp. LLC dismissed plaintiff's claims because plaintiff's actions taken to slow or stop the spread of COVID-19 fell within the virus and bacteria exclusion. Id. This court concurs with the holding in Mac Prop. Grp. LLC and applies the same analysis. In the instant matter, plaintiffs' closure of its property as a result of COVID-19 makes clear that the virus itself was the proximate cause of loss and thereby excludes coverage under the policies.

The plaintiffs' policies contain stated exclusions for nuclear, chemical and biological materials. Although the plaintiffs dispute the biological nature of COVID-19 based on the premise that a virus is "nonliving" and requires a live host, like a human, to spread the infection this court need not determine whether COVID-19 is viral and/or biological in nature. COVID-19 was the proximate cause of the resulting civil and municipal authority closures and capacity limit requirements that impacted plaintiffs' business. The business interruption is a bar to coverage under the primary and excess policies' virus and biological material exclusions under the defined "Pollutants or Contaminants", "Loss due to Virus or Bacteria", and the various iterations of the biological, chemical, radiological exclusions. Ultimately, plaintiffs have not alleged any physical loss at the property and therefore are barred from coverage.

CONCLUSION:

For the reasons expressed above, this court finds that the defendants are entitled to Summary Judgment and plaintiffs' claims are dismissed with prejudice. Plaintiffs have not successfully alleged a direct physical loss at the property. Loss of use of the insured property is expressly excluded under the primary and excess polices. Moreover, it is undisputed that the presence of COVID-19 at the insureds' property falls within the Pollutant or Contaminant and/or Biological material exclusions. For these reasons, the court dismisses plaintiffs' claims with prejudice.

It is FURTHER ORDERED that a copy of this order shall be served upon all parties within seven (7) days.

/s/ Craig L. Wellerson

WRITTEN DECISION RENDERED
July 2, 2021

HON. CRAIG L. WELLERSON, P.J. CV.