IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

44 HUMMELSTOWN ASSOCIATES, LLC d/b/a COMFORT SUITES HUMMELSTOWN *Plaintiff* v. AMERICAN SELECT INSURANCE COMPANY *Defendant*	CASE 20-cv-02319-YK

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Edward M. Koch, Esquire
Marc L. Penchansky, Esquire
WHITE AND WILLIAMS LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103-7395
215.864.6319/6257
koche@whiteandwilliams.com
penchanskym@whiteandwilliams.com

Attorneys for Defendant,
American Select Insurance Company

Dated: February 22, 2021

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page(s)

CASES

COURT RULES

OTHER AUTHORITIES

I. INTRODUCTION

This dispute involves a straightforward question of insurance coverage: whether a commercial-property insurance policy responds to economic losses unrelated to any discernible, direct physical loss of or damage to property, particularly if the policy clearly and unambiguously excludes those losses. It does not. The adverse impact resulting from the COVID-19 virus outbreak, and the resulting restrictions on business operations, is undeniably unfortunate. However, as the overwhelming majority of courts in Pennsylvania and across the country have held, this does not alter the fundamental tenets of property insurance coverage, which compel dismissal of Plaintiff, 44 Hummelstown Associates, LLC's ("Hummelstown") Complaint.

Hummelstown contends it had to limit hotel occupancy and operations after Pennsylvania issued an order meant to slow COVID-19 infections. Unfortunately, no insurance coverage exists for its claims under its Policy with American Select Insurance Company ("American Select"), because its property did not experience a direct physical loss, no nearby property experienced a direct physical loss that triggered a civil authority order that prohibited access to its property, and, in any event, the Policy's Virus Exclusion plainly bars coverage.

To trigger coverage for lost business income or extra expense, there must be some nexus between the income loss and extra expense and a property's physical

condition. At best, Hummelstown has credibly plead only intangible economic losses such as reduced patronage due to the virus and the resulting orders. Under Pennsylvania law, this does not trigger coverage.

The Policy's Civil Authority provision provides coverage when a nearby property experiences a direct physical loss that causes a civil authority to issue an order prohibiting access to the insured's property. But Hummelstown did not plead that any nearby property suffered physical damage or loss under Pennsylvania law. Further, Hummelstown cannot establish that any order completely prohibited access to its property since it pleaded that it maintained access to its property.

Even if Hummelstown could establish a loss that meets one of these requirements, the Policy would still not provide coverage because the Policy includes a Virus Exclusion that excludes coverage for all damage caused directly or indirectly by any virus, regardless of any concurrent causes of loss.

Finally, because Hummelstown has not, and cannot, allege any facts where its Policy covered COVID-19-related losses, this Court should dismiss the Complaint with prejudice.

II. FACTUAL[1] AND PROCEDURAL HISTORY

A. HUMMELSTOWN PURCHASED A COMMERCIAL INSURANCE POLICY FROM AMERICAN SELECT

Hummelstown owns and operates the Comfort Suite Hummelstown, a hotel located in Hummelstown, Pennsylvania. See Complaint (Ex. A) at ¶ 1. Hummelstown purchased a commercial multiple peril insurance policy (No. BOP 6 151 467) from American Select. See Certified Policy (Ex. B). Under the Policy's terms, American Select agreed to "pay for direct physical loss of or damage to Covered Property . . . caused by or resulting from any Covered Cause of Loss." See id. at Form BP 00 03 07 13, p. 1; Complaint (Ex. A) at ¶ 26. Hummelstown's Policy also provided coverage for lost business income and extra expense if Hummelstown experienced a direct physical loss of or damage to its property. See Policy (Ex. B) at Form BP 00 03 07 13, p. 6, 8. The business income and extra expense provisions each limit coverage to losses or expenses that occur during the "period of restoration." Id. at Form BP 04 46 07 13, p. 4. The period of restoration ends "when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality" or "when business is resumed at a new permanent location." Id.

[1] Because this Court must now accept all well-pleaded allegations as true, American Select restates Hummelstown's allegations as if they were undisputed. See, e.g., Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam).

The Policy also provides civil authority coverage. Under the Civil Authority provision, American Select covers loss of income incurred when a Covered Cause of Loss causes loss to other properties within one mile of Hummelstown's property that results in an order by a civil authority that prohibits access to Hummelstown's property. See Policy (Ex. B) at Form BP 00 30 07 13, p. 9.

The Policy also excludes from coverage damages or losses caused directly or indirectly by any virus:

> We will not pay for loss or damage caused directly or indirectly by . . . [a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

See id. at pp. 18, 20. The Virus Exclusion applies "whether or not the loss event results in widespread damage or affects a substantial area." See id. at p. 18. Any loss or damage due to a virus is "excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Id.

B. PENNSYLVANIA'S GOVERNOR ISSUED ORDERS TO SLOW COVID-19'S SPREAD

On March 19, 2020, Governor Tom Wolf issued an Order that prevented any person or entity from operating a place of business "that is not a life sustaining business." See Governor Wolf's Order (Ex. C), p. 1; Complaint (Ex. A) at ¶ 66. All life-sustaining businesses could remain open as long as they practiced mitigation measures such as social distancing. See Governor Wolf's Order (Ex. C), p. 1;

Complaint (Ex. A) at ¶ 66. Compliance with this Order burdened the hotel business and "impeded upon Plaintiff's revenue." See Complaint (Ex. A) at ¶ 66. On April 1, 2020, Governor Wolf issued a statewide Stay at Home Order. See id. at ¶ 68; Stay at Home Order (Ex. D). This Order also affected Hummelstown's revenue and business. See Complaint (Ex. A) at ¶ 68. The Governor issued these Orders to prevent the spread of COVID-19 by prohibiting or limiting people from entering the Covered Property. See id. at ¶ 73.

Beginning on March 15, 2020, Hummelstown limited its business by suspending certain operations. See id. at ¶ 75. Hummelstown refers to its hotel as a "contamination zone" where "respiratory droplets are more likely to remain in the air or infect surfaces . . . for far longer or with increased frequency as compared to facilities with open-air ventilation." See id. at ¶ 76-79.

C. HUMMELSTOWN SUBMITTED A CLAIM FOR ITS LOSS OF BUSINESS INCOME CAUSED BY COVID-19 AND THE RESULTING CIVIL AUTHORITY ORDERS

Hummelstown submitted an insurance claim to American Select for business interruption, civil authority, and extra expense coverage because of "substantial, ongoing financial losses directly attributed to a series of COVID-19 closure orders." See id. at ¶¶ 7, 82. American Select denied the claim. See id. at ¶¶ 8, 83.

Dissatisfied with American Select's coverage decision, Hummelstown filed this lawsuit against American Select and Westfield Insurance Company.

Hummelstown seeks multiple declarations regarding coverage. Id. at ¶¶ 115-121, Prayer for Relief. Hummelstown also seeks compensatory damages for breach of contract. See id. at ¶¶ 122-132. By stipulation, Hummelstown agreed to dismiss Westfield. See Stipulation (Doc. 7). American Select now moves to dismiss the Complaint with prejudice under Rule 12(b)(6).

III. QUESTIONS PRESENTED

A. Should this Court dismiss the Complaint where Hummelstown has not pled (and cannot plead) any facts which trigger coverage under the Policy?

Suggested Answer: Yes

IV. LEGAL ARGUMENT

A. LEGAL STANDARD

American Select seeks dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a viable claim. A complaint should be dismissed if, accepting all allegations as true, plaintiff has not pled enough facts to state a claim for relief that is plausible on its face. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In this regard, a court is under no obligation to accept unsupported conclusory statements. Phillips v. Cnty. of Allegheny, 515 F.3d 224, 232-233 (3d Cir. 2008).

A claim is plausible only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged." Iqbal, 556 U.S. at 678. A plaintiff must plead "more than labels and conclusions," and factual allegations "must be enough to raise the right to relief above the speculative level." Twombly, 550 U.S. at 555. In evaluating a Rule 12(b)(6) motion, courts may also consider (1) exhibits attached to the complaint, (2) matters of public record, and (3) undisputed authentic documents integral to or explicitly relied upon in the complaint. Schmidt v. Skolas, 770 F.3d 241, 249 (3d Cir. 2014).

A court may dismiss a claim under Rule 12(b)(6) where there is a "dispositive issue of law." See Simmons v. Nationwide Mut. Fire Ins. Co., 788 F. Supp. 2d 404, 407 (W.D.Pa. 2011) (internal quotations omitted). Where, as here, it is "beyond doubt that the non-moving party can prove no set of facts in support of its allegations, then a claim must be dismissed." Id.

B. HUMMELSTOWN HAS NOT PLED ANY FACTS WHICH WOULD TRIGGER COVERAGE UNDER THE POLICY'S BUSINESS INCOME AND EXTRA EXPENSE COVERAGES

Under Pennsylvania law, a court must construe a policy in its plain and ordinary sense, and the policy must be read in its entirety. Pennsylvania Nat. Mut. Cas. Ins. Co. v. St. John, 106 A.3d 1, 14 (Pa. 2014). "When the language of an insurance policy is plain and unambiguous, a court is bound by that language." Id. Moreover, "policy terms should be read to avoid ambiguities," and "a court cannot rewrite the terms of a policy or give them a construction in conflict with the accepted

and plain meaning of the language of the policy." Imperial Cas. & Indem. Co. v. High Concrete Structures, Inc., 858 F.2d 128, 131 (3d Cir. 1988).

Hummelstown's burden is to demonstrate direct physical loss or damage within the Policy's affirmative grant of coverage. See Miller v. Boston Ins. Co., 218 A.2d 275, 277 (Pa. 1966); Koppers Co. v. Aetna Cas. & Sur. Co., 98 F.3d 1440, 1446 (3d Cir. 1996). Here, Hummelstown claims an entitlement to coverage under the Policy's business income and extra expense coverages. See Complaint (Ex. A) at ¶ Prayer for Relief. However, the Complaint's allegations, even construed most favorably toward Hummelstown, are insufficient to establish any right to coverage under the Policy.

To trigger coverage for business-income loss, "direct physical loss of or damage to" Hummelstown's property must cause suspension of its business operations:

> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration". The suspension must be caused by ***direct physical loss of or damage to property*** at the described premises.

See Policy (Ex. B) at Form BP 00 03 07 13, p. 6 (emphasis added).

Similarly, to trigger extra expense coverage, Hummelstown must show that it incurred necessary extra expenses "during the 'period of restoration' that you would not have incurred if there had been no ***direct physical loss or damage to property*** at

the described premises." See Policy (Ex. B) at Form BP 00 30 07 13, p. 8 (emphasis added). Therefore, to allege a *prima facie* claim of coverage for lost business income or extra expense, Hummelstown must show "direct physical loss of or damage to" its property. See, e.g., Kahn v. Pa. Nat'l Mut. Cas Ins. Co., 2021 U.S. Dist. LEXIS 23090 (M.D.Pa. Feb. 8, 2021) (Ex. E). Because Hummelstown cannot make such a showing, the Court must dismiss the Complaint.

1. The Plain Meaning of "Physical Loss of or Damage to" Property Requires a Tangible Injury to Hummelstown's Property.

Hummelstown's Policy expressly and unambiguously provides that business-income losses are only covered if those losses result from direct physical loss of or damage to property at the insured location. See Policy (Ex. B) at Form BP 00 03 07 13, p. 6. Although Hummelstown contends that intangible losses such as limitations on use can meet the definition of "direct physical loss of or damage to property," the overwhelming weight of authority disagrees. According to the leading treatise on insurance law:

> The requirement that loss be "physical," given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.

See 10A Couch on Ins. § 148.46 (3d Ed. West 1998). The Third Circuit also disagrees with Hummelstown: "In ordinary parlance and widely accepted definition, physical damage to property means 'a distinct, demonstrable, and physical alteration' of its structure," such as from fire or water, that "may demonstrably alter the components of a building and trigger coverage." Brian Handel D.M.D., P.C. v. Allstate Ins. Co., 2020 U.S. Dist. LEXIS 207892, at *7 (E.D.Pa. Nov. 6, 2020) (Ex. F) (citing Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co., 311 F.3d 226, 235 (3d Cir. 2002)).

Here, Hummelstown does not allege that the virus or resulting government orders "demonstrably altered the components of its building," nor could it. Cleaning remedies COVID-19 and government orders cause no damage at all. See, e.g., Moody v. Hartford Fin. Grp., Inc., 2021 U.S. Dist. LEXIS 7264, at *18 (E.D.Pa. Jan. 14, 2021) (Ex. G) (holding that COVID-19 contamination does not meet the requirements of physical loss or damage under Port Auth. because surfaces merely need to be cleaned to eliminate COVID-19's presence); Frank Van's Auto Tags v. Selective Ins. Co., 2021 U.S. Dist. LEXIS 15781, at *15 (E.D.Pa. Jan. 27, 2021) (Ex. H) (holding that civil authority orders do not create physical loss or physical damage).

2. Limitation on Use of Property is Insufficient to Establish Direct Physical Loss or Damage.

Limitation on the use of its property, which is what Hummelstown alleges here,[2] is insufficient to trigger coverage under the Policy's business income and extra expense provisions. See Complaint (Ex. A) at ¶¶ 75-76. To hold otherwise would mean that a policyholder establishes direct physical loss or damage any time it cannot use an insured property for every possible intended purpose, rendering the words "direct" and "physical" superfluous. See Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co., 400 F.3d 613, 616 (8th Cir. 2005) ("Once physical loss or damage is established, loss of use or function is certainly relevant in determining the amount of loss, particularly a business interruption loss. But [insured's] argument, if adopted, would mean that direct physical loss or damage is established *whenever* property cannot be used for its intended purpose." (emphasis in original)). See also Plan Check Downtown III, LLC v. AmGuard Ins. Co., 2020 U.S. Dist. LEXIS 178059, *14 (C.D.Cal. Sept. 10, 2020) (Ex. I) ("Ultimately, the Court finds that Plan Check's interpretation is not a reasonable one because it would be a sweeping

[2] Hummelstown also alleges a complete loss of use caused a physical loss. See Complaint (Ex. A) at ¶ 58, 88, 120(b), Prayer for Relief at (a), (b). However, Hummelstown's factual allegations do not support a complete loss of use or a prohibition on access to the property. Rather, as mentioned above, Hummelstown merely alleges a curtailment of its property's use. See id. at ¶ 75.

expansion of insurance coverage without any manageable bounds"). Moreover, as the Honorable John E. Jones III recognized, "[t]o rule here that a building without any presence of the COVID-19 virus was rendered physically or functionally unusable such that Plaintiffs sufficiently alleged a 'distinct loss' would squarely contradict the Third Circuit's holding in Port Authority." Kahn, 2021 U.S. Dist. LEXIS 23090, *17-18.

Pennsylvania federal courts have repeatedly rejected Hummelstown's argument that a limitation on use is akin to direct physical loss or damage. See, e.g., Kahn, 2021 U.S. Dist. LEXIS 23090, *18 ("we are persuaded by the unanimity among our colleagues on this exact issue. We have yet to identify a decision within the Third Circuit that has reached a result contrary to the one we reach today"). See also Handel, supra; Kessler Dental Assocs. v. The Dentists Ins. Co., 2020 U.S. Dist. LEXIS 228859 (E.D.Pa. Dec. 7, 2020) (Ex. J); 4431 Inc. v. Cincinnati Ins. Cos., No. 5:20-cv-4396-JFL, 2020 U.S. Dist. LEXIS 226984 (E.D.Pa. Dec. 3, 2020) (Ex. K); Toppers Salon & Health Spa, Inc. v. Travelers Property and Casualty Co. of Am., 2020 U.S. Dist. LEXIS 223356 (E.D.Pa. Nov. 30, 2020) (Ex L); Newchops Rest. Comcast LLC v. Admiral Indem. Co., 2020 U.S. Dist. LEXIS 238254, --- F. Supp. 3d. --- (E.D.Pa. Dec. 18, 2020) (Ex. M); Clear Hearing Solutions, LLC v. Cont'l Cas Co., 2021 U.S. Dist. LEXIS 7273 (E.D.Pa. Jan. 14, 2021) (Ex. N); 1 S.A.N.T., Inc.

v. Berkshire Hathaway, Inc., No. 2:20-cv-00862, 2021 U.S. Dist. LEXIS 8590 (W.D.Pa. Jan. 15, 2021) (Ex. O).

In Kahn, plaintiff sought coverage for economic losses stemming from the loss of use of its restaurants resulting from shut down orders issued by South Carolina's Governor. In that case, Judge Jones, applying Pennsylvania law, held that the term "physical loss" required "some tangible issue with the physical structure of the business's premises." Id., at *14. Judge Jones expressly rejected plaintiff's contention that a "physical loss" includes "a loss of the business's intended function." Id. The result here should be no different.

Similarly, in Handel, the court considered whether a dentist's office experienced a direct physical loss of or damage to its property when it was limited to emergency procedures during the early months of the pandemic. The court found that to establish a physical loss, the insured must show that the property's functionality was "nearly eliminated or destroyed" or "made useless or uninhabitable." Id. at *8 (citing Motorists Mut. Ins. Co. v. Hardinger, 131 F. App'x 823, 826 (3d Cir. 2005)).

The dental practice did not meet that standard because it pleaded only that civil authority orders forced it to limit its practice to emergency procedures. Id. Therefore, the property remained usable and accessible and not lost as required by its policy. Id. at *9. Here too, Hummelstown does not contend that its property was

physically rendered unusable. Rather, Hummelstown alleged that it limited its business by suspending certain operations. See Complaint (Ex. A) at ¶ 75. Therefore, Hummelstown cannot show a direct physical loss of or damage to its property.

Pennsylvania state courts have also adopted American Select's position. See The Scranton Club v. Tuscarora Wayne Mut. Grp., Inc., 2021 WL 261540 (Lackawanna C.C.P. Jan. 25, 2021) (Ex. P). There, a private social club sought coverage for lost revenue incurred due to the same governmental closure orders at issue here. Id. at *1. Judge Nealon concurred with the opinions of the Pennsylvania federal courts on this issue. Id., at *13-16. In sum, the Scranton Club court held that "direct physical loss of or damage to" property required "distinct and demonstrable damage to the physical condition of the Scranton Club's premises that made its property uninhabitable or unusable." Id., at *16. Hummelstown's Complaint, like that of The Scranton Club, lacks any allegation that would satisfy this standard.

It also bears mention that, on February 17, 2021, Judge Calabrese of the U.S. District Court for the Northern District of Ohio granted a dismissal motion filed by Westfield Insurance Company (an affiliate of American Select), based on policy language identical to the language at issue here. See Mikmar, Inc. v. Westfield Ins. Co., 2021 U.S. Dist. LEXIS 29591 (N.D.Ohio Feb. 17, 2021) (Ex. Q).

The overwhelming majority of courts that have interpreted the phrase "direct physical loss of or damage to" property require "a direct nexus between the alleged loss and the physical conditions of the covered property." Frank Van's, 2021 U.S. Dist. LEXIS 15781, at *13. That is, "the phrase 'physical loss of or damage to property' unambiguously requires some issue with the physical premises that impedes business operations and causes a loss of business income." Kahn, 2021 U.S. Dist. LEXIS 23090, at *12-13; see Frank Van's, 2021 U.S. Dist. LEXIS 15781, at *13 ("there must be some issue with the *physical* premises which precludes or impedes the business operations, thereby causing the losses complained-of."). Therefore, a policyholder must show something more than COVID-19 or the related civil authority orders temporarily or permanently curtailed the function or usefulness of the property. Rather, it must show loss of use or impairment connected to physical injury to the building.

3. The Policy is Not Ambiguous.

Hummelstown tries to avoid the Policy's physical loss or damage requirement by alleging the phrase "direct physical loss of or damage to" property is somehow ambiguous. See id. at ¶ 36. Hummelstown bases this argument (which courts across America have repeatedly rejected) on the Policy not defining "loss" and "damage." See id. at ¶ 33. However, the lack of a definition does not render an insurance policy ambiguous. See, e.g., Kahn, 2021 U.S. Dist. LEXIS 23090, at *13 (citing

Telecomms. Network Design & Paradise Distrib. v. Brethren Mut. Ins. Co., 5 A.3d 331, 336-37 (Pa. Super. 2010)).

As recognized in Kahn, "the term [physical loss] is clear when one considers the ordinary meaning of the words and when read in the context of the policy." Kahn, at *13. The word "direct" means "characterized by close logical, causal or consequential relationship." E.g., Frank Van's, 2021 U.S. Dist. LEXIS 15781, *12 (citing Direct, BLACK'S LAW DICTIONARY (11th ed. 2019)). The word "physical" means "'[o]f, relating to, or involving material things; pertaining to *real, tangible* objects." See, e.g., Kahn, 2021 U.S. Dist. LEXIS 23090, at *13 (emphasis added by the Court) (citing Physical, BLACK'S LAW DICTIONARY (11th ed. 2019)). The words "direct" and "physical" modify both "loss" and "damage." E.g., id.; Frank Van's, 2021 U.S. Dist. LEXIS 15781, *11.

Black's Law Dictionary defines "loss" as "the disappearance or diminution of value," while Merriam-Webster provides that it means "the act of losing possession." Loss, Black's Law Dictionary (10th ed. 2014); Loss, Merriam-Webster.Com Dictionary, https://www.merriam-webster.com/dictionary/loss, (last visited Feb. 11, 2021). Black's Law Dictionary defines "damage" as "loss or injury to person or property," and Merriam-Webster's definition is substantially the same. Damage, Black's Law Dictionary (10th ed. 2014); Damage, Merriam-Webster.Com Dictionary, https://www.merriam-webster.com/dictionary/damage, (last visited Feb.

11, 2021) (defining "damage" as "loss or harm resulting from injury to person, property, or reputation"). See Henry's Louisiana Grill v. Allied Ins. Co. of Am., 2020 U.S. Dist. LEXIS 188353, at *14 (N.D.Ga. Oct. 6, 2020) (Ex. R) (applying these definitions to business interruption claim); 1 S.A.N.T., 2021 U.S. Dist. LEXIS 8590, at *14 (evaluating similar definitions).

A court must give effect to all the terms in the context of the policy language. 1 S.A.N.T., Inc., 2021 U.S. Dist. LEXIS 8590, at *14. The word "direct . . . presupposes a level of immediacy" not present in a matter where the policyholder is seeking coverage for the limitation of use in its property. Id. at *14. When combined with a physicality requirement, it is clear that the "[p]olicy language presupposes that the request for coverage stems from *actual impact* to the property's structure, rather than the diminution of its economic value. . . ." Id. (emphasis in the original).

Furthermore, American Select does not treat "loss" and "damage" as synonyms, as Hummelstown apparently implies. See Complaint (Ex. A) at ¶ 34. The ordinary usage of "loss of" or "damage to" is reasonably interpreted to extend coverage to events that affect the physical premises completely (loss) or partially (damage). 1 S.A.N.T., Inc., 2021 U.S. Dist. LEXIS 8590, at *14. A Georgia federal court illustrated the distinction, "a tornado that destroys the entirety of the restaurant results in a 'loss of' the restaurant, while a tree falling on part of the kitchen would

represent 'damage to' the restaurant. See Henry's Louisiana Grill, 2020 U.S. Dist. LEXIS 188353, at *14-15.

Such an interpretation remains faithful to the language of this Policy—and the different but complementary meanings of the phrases "loss of" and "damage to"—without negating the use of the words "direct" and "physical." Conversely, defining "direct physical loss" to mean an intangible loss of value, as Hummelstown suggests, requires the court to improperly read the words "direct" and "physical" out of the Policy altogether. See Kahn, 2021 U.S. Dist. LEXIS 23090, at *15-16.

4. Government Orders Do Not Create Physical Loss of or Damage to Property.

Beyond alleging a covered loss due to limitation of use, Hummelstown also contends that the Pennsylvania civil authority orders themselves somehow caused its loss. See Complaint (Ex. A) at ¶¶ 69-71, 74. Other courts have rejected this contention. Civil authority orders cannot create physical damage on the property. See, e.g., Frank Van's, 2021 U.S. Dist. LEXIS 15781, at *15; Newchops, 2020 U.S. Dist. LEXIS 238254, at *9-11; Rose's 1, LLC v. Erie Ins. Exch., 2020 D.C. Super. LEXIS 10, at *7 (D.C. Cir. Aug. 6, 2020) (Ex. S) (mayor's orders were not a "direct physical intrusion."). And nowhere in those orders did any Pennsylvania civil authority conclude that COVID-19 contaminated Hummelstown's property or that the property experienced a direct physical loss due to COVID-19.

Pennsylvania measured whether a Pennsylvania business had to limit or close

its properties by weighing the business's utility to society not by the damage caused by COVID-19. It would then follow under Hummelstown's civil-authority argument that essential businesses avoided physical impact from COVID-19 while non-essential businesses did not. This type of reasoning simply reads the physicality requirements out of the Policy and allows the government's classification of a business's utility to determine whether there is physical damage.

Of course, this contention is closely tied to the limitation (and loss) of use argument considered in the previous section. At its core, Hummelstown is arguing that the government's orders curtailed its ability to operate its business. To permit such coverage in this situation would render superfluous the Civil Authority provision (discussed in more detail in section IV(C)) that identifies the circumstances when a policyholder is entitled to coverage due to a government order. Frank Van's, 2021 U.S. Dist. LEXIS 15781, at *14. Under Hummelstown's interpretation, an insured could seek and obtain coverage any time there is any type of loss of use under the Business Income provision. If that were so, "[t]here is no way to reconcile the existence of this separate carve-out under the Civil Authority provision, or why it would be needed." Id. at *15; Indep. Rest. Grp. v. Certain Underwriters at Lloyd's, 2021 U.S. Dist. LEXIS 7256, at *15 (E.D.Pa. Jan. 14, 2021) (Ex. T); Clear Hearing, 2021 U.S. Dist. LEXIS 7273, at *18. To rule in Hummelstown's favor would be to foster an ambiguity when none exists.

5. A Review of the Entire Policy Makes Clear that Loss Must Be Tied to the Property's Physical Condition.

Under Pennsylvania law, a court must read an insurance policy as a whole to glean its meaning. Frog. Switch & Mfg. Co. v. Travelers Ins. Co., 193 F.3d 742, 746 (3d. Cir. 1999). When a court must choose between competing interpretations, the court must choose the interpretation that provides meaning to each word. Clarke v. MMG Ins. Co., 100 A.3d 271, 276 (Pa. Super. 2014); Frank Van's, 2021 U.S. Dist. Lexis 15781, at *14-15

Here, requiring a direct nexus between the alleged loss and the covered property's physical conditions is consistent with a holistic interpretation of the Policy, which clearly contemplates the existence of actual tangible damage. In this regard, American Select's interpretation of the Policy is the only reasonable interpretation. See Kahn, 2021 U.S. Dist. LEXIS 23090, at *14-15.

Under the business-income provision, the Policy limits American Select's coverage obligations to the actual loss of business income caused by "the necessary suspension of your 'operations' during the 'period of restoration. . . .'" See Policy (Ex. B) at Form BP 00 03 07 13, p. 6. Similarly, the extra-expense provision limits coverage to expenses incurred during the "period of restoration." See Policy (Ex. B) at Form BP 00 03 07 13, p. 8.

As is relevant to this motion, the period of restoration ends "when the property at the described premises should be *repaired, rebuilt or replaced* with reasonable

speed and similar quality" or "when business is resumed at a new permanent location." Id. at Form BP 04 46 07 13, p. 4 (emphasis added). Moreover, the "period of restoration" includes the time to reconstruct or repair property to comply with the minimum standards of any ordinance or law, in force at the time of loss, that regulates the construction or repair, or requires the tearing down of any property." Id.

This language demonstrates that the Policy contemplates "a range of potential covered damages, ranging from those requiring repairs or replacements to those requiring the relocation of the business. This range of contemplated harms aligns with an understanding that 'loss of' means total destruction while 'damage to' means some amount of harm or injury." Henry's La. Grill, 2020 U.S. Dist. LEXIS 188353, at *15. That is, if the property was lost it must be rebuilt or the policyholder must move to a new location. If the property is damaged, the policyholder must repair or replace the property. Such language "strongly implies that the Policy was only intended to cover business losses sustained over a period when the property had some physical or structural issue that prevented the business from operating." Kahn, 2021 U.S. Dist. LEXIS 23090, at *14.

As other Pennsylvania federal courts have recognized, if there is no physical impairment to the property, there is no need to repair, rebuild, or replace. See, e.g., Kahn, 2021 U.S. Dist. LEXIS 23090, at *14; ATCM Optical, Inc. v. Twin City Fire

Ins. Co., 2021 U.S. Dist. LEXIS 7251, at *14 (E.D.Pa. Jan. 14, 2021) (Ex. U); Newchops, 2020 U.S. Dist. LEXIS 238254, at *11-12. Here, if COVID-19 was actually on its premises, Hummelstown can quickly remedy it through cleaning. "[C]leaning surfaces cannot reasonably be described as repairing, rebuilding, or replacing." Moody, 2021 U.S. Dist. LEXIS 7264, at *17-18.

If this Court were to accept Hummelstown's interpretation that mere economic loss was sufficient to establish a right to coverage, "the language in the definition of 'period of restoration,' plus the phrase itself, would be rendered entirely superfluous."[3] Kahn, 2021 U.S. Dist. LEXIS 23090, at *14. When read in context, the Period of Restoration provision responds to loss or damage that requires the replacement or repair of property—neither of which are implicated by general

[3] Accord Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am., --- F. Supp. 3d ---, 2020 U.S. Dist. LEXIS 168385, at *11 (N.D.Cal. Sept. 14, 2020) (Ex. V) ("The words 'rebuild,' 'repair' and 'replace' all strongly suggest that the damage contemplated by the Policy is physical in nature . . . But here, there is nothing to fix, replace or even disinfect for Mudpie to regain occupancy of its property") (internal quotations omitted); Uncork & Create LLC v. Cincinnati Ins. Co., 2020 U.S. Dist. LEXIS 204152, at *14, 12 (S.D.W.Va. Nov. 2, 2020) (Ex. W) (granting insurer's motion to dismiss because "no repairs or remediation to the premises are necessary for its safe occupation in the event the virus is controlled and no longer poses a threat"); United Airlines, Inc. v. Ins. Co. of State of Pa., 385 F. Supp. 2d 343, 349 (S.D.N.Y. 2005) ("length of time [needed] to rebuild, repair or replace such part of the Insured Location(s) as has been damaged or destroyed" supports a "requirement of physical damage" (alteration in original)), *aff'd* 439 F.3d 128 (2d Cir. 2006); Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co., 17 F. Supp. 3d 323, 332 (S.D.N.Y. 2014) ("The words 'repair' and 'replace' contemplate physical damage to the insured premises as opposed to loss of use of it").

limitations on access and business operations on a statewide basis to limit the spread of a highly contagious virus. This Court should join its colleagues and refuse to expand coverage in the Policy far beyond what the unambiguous language can bear.

C. HUMMELSTOWN HAS NOT PLED FACTS THAT WOULD TRIGGER COVERAGE UNDER THE POLICY'S' CIVIL AUTHORITY COVERAGE

As demonstrated above, Hummelstown has not alleged that COVID-19 caused any direct physical loss of or damage to its property. Similarly, Hummelstown has not alleged any direct physical loss of or damage to other property. For this and other reasons, Hummelstown cannot establish coverage under the Policy's Civil Authority provision.

1. Under the Civil Authority Provision, Hummelstown Must Still Show Direct Physical Loss or Damage, Which It Cannot Do.

Under the Civil Authority provision, American Select will pay for loss of income caused when a Covered Cause of Loss causes damage to other properties within one mile of Hummelstown's property, and such damage results in an action by a civil authority that prohibits access to Hummelstown's property. See Policy (Ex. B) at Form BP 00 03 07 13, p. 9.

Here, Hummelstown does not point to any particular property within one mile of its own property that sustained damage and motivated Pennsylvania to issue a civil authority order. Rather, Pennsylvania issued its civil authority order to ***prevent***

the spread of the virus to other Pennsylvanians. See Complaint (Ex. A) at ¶ 73. This is fatal to Hummelstown's claim. See Kahn, 2021 U.S. Dist. LEXIS 23090, at *24; Frank Van's, 2021 U.S. Dist. LEXIS 15781, *18-19.

2. Because the Civil Authority Order Did Not Prohibit Access to the Insured Location, Hummelstown is Not Entitled to Coverage under the Civil Authority Provision.

There is another reason why Hummelstown cannot claim coverage under the Civil Authority provision—no civil-authority action prohibited access to Hummelstown's property. See Policy (Ex. B) at Form BP 00 03 07 13, p. 9. Indeed, Hummelstown expressly pleads that it was able to continue using its property despite suspending some of its business operations. See Complaint (Ex. A) at ¶ 75.

To trigger coverage under the civil authority provision, access must be completely prohibited, and not merely limited. See, e.g., Ski Shawnee, Inc. v. Commonwealth Ins. Co., 2010 U.S. Dist. LEXIS 67092, at *12 (M.D.Pa. July 6, 2010) (Ex. X) ("[w]ithout a complete inability to access the premises, or a forced closing by a civil authority, the coverage at issue here is not applicable."). In the COVID-19 context, Pennsylvania state and federal courts have refused to find that a limitation of access or prohibition to part of a property is sufficient to trigger coverage under this provision. See, e.g., TAQ Willow Grove, 2021 U.S. Dist. LEXIS 7276, at *18 (E.D.Pa. Jan. 14, 2021) (Ex. Y) (refusing invitation to "create an ambiguity" by interpreting "prohibit" to mean "limit"); Scranton Club, 2021 WL

261540, at *17.

For these reasons, the Civil Authority provision is inapplicable to Hummelstown's losses.

D. EVEN IF HUMMELSTOWN COULD ESTABLISH A DIRECT PHYSICAL LOSS, THE VIRUS EXCLUSION BARS COVERAGE FOR THE LOSSES IT CLAIMS

Hummelstown carries the burden to show that its alleged loss falls within the Policy's grant of coverage. Gen. Refractories Co. v. First State Ins. Co., 855 F.3d 152, 158 (3d Cir.2017) (citing Miller v. Boston Ins. Co., 218 A.2d 275, 277 (Pa. 1966)). Because Hummelstown could not satisfy its burden, the Court does not need to consider whether the Virus Exclusion bars coverage otherwise provided in the policy. See Miller, 218 A.2d at 277. Nevertheless, even if this Court found that Hummelstown adequately pleaded a loss within the scope of the Policy's business income, extra expense, and civil authority coverages, the Virus Exclusion would still bar coverage.

The Virus Exclusion bars coverage for "loss or damage ***caused directly or indirectly*** by . . . [a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." See Policy (Ex. B) at BP Form 00 30 07 13, pp. 18, 20 (emphasis added). Any loss or damage due to the virus is also "excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Id.

In the context of similar claims by businesses, courts have held that this very version of the Virus Exclusion unambiguously bars coverage for lost business income and extra expense due to COVID-19. See, e.g., Frank Van's, 2021 U.S. Dist. LEXIS 15781, at *19-22; Handel, 2020 U.S. Dist. LEXIS 207892, at *10. Hummelstown has provided no reason to deviate from this conclusion.

1. Regardless of How Hummelstown Characterizes Its Losses, the Losses Flow from COVID-19.

Hummelstown attempts to sidestep the coverage barrier erected by the Virus Exclusion by pleading that something other than COVID-19 caused its loss. Specifically, Hummelstown contends that the government orders—which seek to slow the spread of COVID-19—constitute direct physical loss of or damage to property as does "preclusion of access to their property"[4] caused by a civil authority order addressing damage to nearby properties. See Complaint (Ex. A) at ¶¶ 49, 73, 88.

Other federal courts sitting in Pennsylvania have rejected this argument. For example, one court found that even if the civil authority order was a cause of loss, the exclusion includes an anti-concurrent clause that "unambiguously dictates that

[4] As previously discussed, Hummelstown's factual allegation do not match its legal allegations. Hummelstown makes clear that it was not prohibited from accessing its property and does not allege that access was prohibited to its property. Rather, it pleaded that it limited its business and suspended only certain activities taking place on its property. See Complaint (Ex. A) at ¶ 75.

the virus exclusion applies even if a virus is not the sole or proximate cause of loss." Moody, 2021 U.S. Dist. LEXIS 7264, at *27-28 (citing Heller's Gas, Inc. v. Int'l Ins. Co. of Hannover Ltd., 2017 U.S. Dist. LEXIS 151072, at *30 (M.D.Pa. Sept. 18, 2017) (Ex. Z) ("The explicit inclusion of this [anti-concurrent causation] language negates the default 'efficient proximate cause' doctrine under Pennsylvania law.")). See, e.g., Frank Van's, 2021 U.S. Dist. LEXIS 15781, at *19-20 (same); Zagafen Bala, LLC v. Twin City Fire Ins. Co., 2021 U.S. Dist. LEXIS 7255, at *21 (E.D.Pa. Jan. 14, 2021) (Ex. AA) (same).

Here, Hummelstown pleads that the orders were issued to slow the spread of COVID-19. See Complaint (Ex. A) at ¶¶ 49, 73. Indeed, Governor Wolf's Order explicitly states that he issued it to address the "public health emergency" caused by COVID-19. See Stay at Home Order (Ex. D). Because the government issued its orders to address damage caused by the virus, Hummelstown cannot state a plausible argument that the virus is not, at the very least, the indirect cause of loss. Frank Van's, 2021 U.S. Dist. LEXIS 15781, at *19. Thus, whether the virus was the direct cause or not is not dispositive, it is enough that the virus was at least an indirect cause. Ultimate Hearing Sols. II, LLC v. Twin City Fire Ins. Co., 2021 U.S. Dist. LEXIS 7266, at *29 (E.D.Pa. Jan. 14, 2021) (Ex. BB); TAQ, 2021 U.S. Dist. LEXIS 7276, at *21 (same). A Texas court addressing one of the earliest COVID-19 found that the civil authority order might have "technically forced" businesses to close, but

the "presence of COVID-19 . . . was the primary root cause" of the closings. Diesel Barbershop, LLC v. State Farm Lloyds, 2020 U.S. Dist. LEXIS 147276, at *20 (W.D.Tex. Aug. 13, 2020) (Ex. CC). Therefore, any attempt to avoid the application of the exclusion by re-characterizing the cause of loss is futile.

2. The Virus Exclusion Also Bars Coverage for Expenses Related to COVID-19.

As noted above, the Virus Exclusion applies to "loss or damage caused directly or indirectly by . . . [a]ny virus. . . ." As an alternative argument, Hummelstown contends that the exclusion by its own terms does not exclude expenses because expenses are not a "loss" or "damage." See Complaint (Ex. A) at ¶¶ 89-91.

Judge Wolson of the Eastern District of Pennsylvania rejected this same argument, finding that it "ignores both the Policy's language and structure." Toppers, 2020 U.S. Dist. LEXIS 223356, at *7. Specifically, the Toppers court found that "[i]n the insurance context, a 'loss' is the 'amount of financial detriment caused by . . . an insured property's damage." Id. at *7 (citing Black's Law Dictionary 1087 (10th ed. 2009)). The court recognized that "[b]oth the failure to collect income and the payment of continued expenses fall within these definitions of 'loss.'" Id. at *8.

Here, the Policy's language conforms to that understanding of the breadth of loss. The Policy sets forth two components to the definition of "Business Income,"

it includes "(1) [n]et Income (Net Profit or Loss before income taxes) that would have been earned or incurred if no physical loss or damage had occurred. . . ." and "[c]ontinuing normal operating expenses incurred. . . ." See Policy (Ex. B) at Form BP 00 03 07 13, p. 7. By its plain meaning, business income is the "sum" of the net income and continuing operating expenses. Santa Fe Surgery Ctr. v. Sentinel Ins. Co., 2020 U.S. Dist. LEXIS 189382, at *6 (M.D.Fla. Oct. 7, 2020) (Ex. DD); Dictiomatic, Inc. v. U.S. Fid. & Guar. Co., 958 F.Supp.594, 604 (S.D. 1997). Therefore, loss of business income includes expenses and therefore falls within the coverage bar included in the Virus Exclusion.

3. American Select is Not Estopped from Applying the Virus Exclusion.

Unable to avoid the Virus Exclusion's reach, Hummelstown asks this Court to ignore it completely under the regulatory estoppel doctrine. Pennsylvania courts have rejected this argument. Hummelstown alleges that in 2006, insurance-industry trade groups sought approval from state insurance agencies to adopt the Virus Exclusion. See Complaint (Ex. A) at ¶ 101. Hummelstown alleges, "the Virus Exclusion was only meant to 'clarify' that coverage for 'disease-causing agents' has never been in effect and was never intended to be included, in the property policies." Id. at ¶ 102. Specifically, Hummelstown alleges that the trade groups were concerned that its policies might be interpreted to cover pandemics when no coverage was intended. See id. at ¶¶ 103-104. Hummelstown contends that the trade

groups misrepresented to the regulatory agencies that no coverage for virus-based losses existed before the Virus Exclusion. Rather, Hummelstown suggests numerous cases found coverage when disease-causing agents made it impossible to use property for the intended use. See id. at ¶ 106. Even accepting this as true, these allegations fall short of a viable claim for regulatory estoppel.

Regulatory estoppel is a rarely applied doctrine that prohibits an industry from taking an opposite position with its clients than it represented to a regulatory agency to win agency approval. E.g., TAQ, 2021 U.S. Dist. LEXIS 7276, at *23. To convince the Court to apply the doctrine, Hummelstown must show that (1) American Select made a statement to a regulatory agency; and (2) American Select has taken a position in the litigation contrary to the one presented to the regulatory agency. See, e.g., id.

Hummelstown's attempt to invoke regulatory estopped is flawed as it cannot meet a single element of regulatory estoppel.

a. Hummelstown Does Not Allege that American Select Made Any Statements to Regulatory Agencies.

Hummelstown's allegations are insufficient to meet the first factor. Hummelstown does not allege that American Select made any statements to regulators. Rather, it alleges the industry trade groups made statements to regulators regarding the Virus Exclusion. See Complaint (Ex. A) at ¶¶ 101-104. Other courts

have found this insufficient to support the imposition of regulatory estoppel.[5] See ATCM Optical, 2021 U.S. Dist. LEXIS 7251, at *21; TAQ, 2021 U.S. Dist. LEXIS 7276, at *24; Zagafen Bala, 2021 U.S. Dist. LEXIS 7255, at *25.

b. Hummelstown Does Not Allege American Select's Position in Litigation Differs from the Position Offered to Regulators.

Another fundamental flaw in Hummelstown's allegations is that it does not allege that American Select changed its position since the trade groups' presentation to the regulators. As alleged by Hummelstown, the basis for seeking regulatory approval was to resolve the possibility that carriers would be required to cover losses due to a virus when such coverage was never intended. See Complaint (Ex. A) at ¶¶ 101-104. That is correct. American Select continues to contend that its Policy does not cover losses from a virus.

When considering a similar argument, the Newchops court could not discern how the statements to regulators are contradictory or contrary to the position, which the carrier presented to the court. Newchops, 2020 U.S. Dist. LEXIS 238254, at *19-20. Rather, the carrier premised its denial on the same reasons advanced to justify regulatory approval. Id. All federal courts construing Pennsylvania law have

[5] While Hummelstown pleads that the trade groups made their presentation on "behalf of the insurers," it does not specifically plead that the presentation was made on behalf of American Select. In that way, this case is different from Handel where the court found the policyholder alleged that the presentation was made on the carrier's behalf. Handel, 2020 U.S. Dist. LEXIS 207892, at *11.

concluded the same and rejected the invitation to apply the doctrine. See, e.g., Kessler, 2020 U.S. Dist. LEXIS 228859, at *9-10; Handel, 2020 U.S. Dist. LEXIS 207892, at *19-22; ATCM Optical, 2021 U.S. Dist. LEXIS 7251, at *21; TAQ, 2021 U.S. Dist. LEXIS 7276, at *24-25; Zagafen Bala, 2021 U.S. Dist. LEXIS 7255, at *24.

4. The Reasonable Expectations Doctrine Does Not Apply Here, Because the Policy Unambiguously Excludes Coverage.

American Select anticipates that Hummelstown will also raise the Reasonable Expectations Doctrine to avoid application of the Virus Exclusion. However, Pennsylvania federal and state courts have also rejected this argument.[6] See, e.g., The Scranton Club, 2021 WL 261540, fn. 3 (Lackawanna C.C.P. Jan. 25, 2021); Fuel Recharge Yourself, Inc. v. AMCO Ins. Co., 2021 U.S. Dist. LEXIS 26173, *10-12 (E.D.Pa. Feb. 11, 2021) (Ex. EE).

Pennsylvania law does not apply the Reasonable Expectations Doctrine to unambiguous policy language:

[6] American Select further anticipates that Hummelstown will point to Judge Joyner's opinion in Humans & Resources, LLC v. Firstline Nat'l Ins. Co., 2021 U.S. Dist. LEXIS 2998, *26-29 (E.D.Pa. Jan. 8, 2021) (Ex. FF), as support for application of the Reasonable Expectations Doctrine here. It is respectfully submitted that Judge Joyner misapplied that doctrine. Once a court determines that the unambiguous policy language does not provide coverage, the analysis should go no further. See Frederick Mut. Ins. Co. v. Hall, 752 F. App'x 115, 117 (3d Cir. 2018) (non-precedential) (reversing Judge Joyner's application of the reasonable expectations doctrine where the relevant policy language unambiguously excluded coverage).

> It is well-settled [sic] that when policy language is unambiguous [the court must] give effect to that language. It is also well-settled [sic] that the focus of any inquiry regarding issues of coverage under an insurance policy is the reasonable expectations of the insured. An insured, however, **may not complain that its reasonable expectations have been frustrated when the applicable policy limitations are clear and unambiguous**.

Millers Capital Ins. Co. v. Gambone Bros. Dev. Co., 941 A.2d 706, 717 (Pa. Super. 2007) (citations omitted) (emphasis added). See also Liberty Mut. Ins. Co. v. Treesdale, Inc., 418 F.3d 330, 344 (3d Cir. 2005) ("Absent sufficient justification, however, an insured may not complain that his or her reasonable expectations were frustrated by policy limitations that are clear and unambiguous"). Generally, courts cannot use the reasonable expectations doctrine to create an ambiguity where the policy itself is unambiguous. See Matson Diamond, Inc. v. Penn Nat'l Ins. Co., 815 A.2d 1109, 1114 (Pa. Super. 2003). Ultimately, "[i]f [the court] were to allow an insured to override the plain language of a policy limitation anytime he or she was dissatisfied with the limitation by simply invoking the reasonable expectations doctrine, insurance policies' language would cease to have meaning, and, as a consequence, insurers would be unable to project risk." Millers Capital, 941 A.2d at 717-18.

Here, because the Policy provisions discussed above unambiguously precluded coverage for Hummelstown's claimed losses, the Reasonable Expectation Doctrine is inapplicable. See Fuel Recharge Yourself, Inc., supra.

V. CONCLUSION

For these reasons, this Court should dismiss the Complaint. Because amendment of its Complaint would be futile, the dismissal should be with prejudice.

Respectfully submitted,

WHITE AND WILLIAMS LLP

By: s/ Edward M. Koch

Edward M. Koch, Esquire
Marc L. Penchansky, Esquire
Identification No(s). 76337/88934
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103-7395
215.864.6319/6257
koche@whiteandwilliams.com
penchanskym@whiteandwilliams.com

Attorneys for Defendant,
American Select Insurance Company

Dated: February 22, 2021