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

PHILADELPHIA EAGLES LIMITED PARTNERSHIP, Plaintiff, v. FACTORY MUTUAL INSURANCE COMPANY, Defendant.	: : : : : : : : : : :	CIVIL ACTION NO. 2:21-cv-01776-MMB

DEFENDANT FACTORY MUTUAL INSURANCE COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

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I. INTRODUCTION

Plaintiff Philadelphia Eagles Limited Partnership ("Plaintiff"), owner and operator of the Philadelphia Eagles football organization, brought this suit against its property insurer, Defendant Factory Mutual Insurance Company ("FM"), seeking a declaration of coverage under FM's first-party property insurance policy for alleged losses it has incurred due to COVID-19, the disease caused by the novel coronavirus.[1]

Many recent decisions in this District and nationwide have dismissed similar complaints on several grounds that apply here. First, Plaintiff fails to plead facts that could establish "physical loss or damage," a condition precedent to the coverage sought under the policy's Property Damage and Time Element coverage provisions. Second, even if Plaintiff could establish the required "physical loss or damage" to its property (which it cannot), the policy that Plaintiff purchased contains a Contamination Exclusion that expressly excludes from coverage "contamination, and any cost due to contamination." The Policy specifically defines "contamination" to include "virus," as well as "disease causing or illness causing agent," and "pathogen or pathogenic organism." Thus, the Contamination Exclusion also precludes coverage. Finally, the policy contains a "loss of use" Exclusion that operates independently to bar Plaintiff's claims. Plaintiff's inability to use its sports facilities – which is the gravamen of its Complaint – is also excluded

[1] COVID-19 is the disease caused by the virus SARS-CoV-2, also sometimes referred to as the "novel coronavirus." For purposes of simplicity, unless specifically stated otherwise, this Motion will use "COVID-19" to encompass all of these terms.

based on this language. Accordingly, FM requests that this Court dismiss Plaintiff's Complaint in its entirety, with prejudice. [2]

II. PLAINTIFF'S ALLEGATIONS

Plaintiff is a football organization and alleges that it and its insured subsidiaries "incurred and continue to incur substantial financial loss caused by the dangers of Coronavirus and the resulting interruption of the team's business activities." Ex. A, Compl., ¶ 5. Specifically, Plaintiff alleges that due to the "near certain risk of physical harm caused by Coronavirus," as well as various government orders issued due to the Coronavirus in jurisdictions where the Premises are located (collectively, the "Orders"), Plaintiff was forced to cancel or restrict in-person attendance at its stadium and close or restrict access to the teams corporate headquarters, training facility and merchandise stores. *Id.* ¶¶ 5, 87 – 104. Plaintiff alleges that FM issued to it a policy of commercial property insurance, insuring its property against "ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded, while located as described in this Policy" (the "Policy"). *Id.* ¶¶ 6, 37. Plaintiff alleges that it faced and continues to face the "risks associated with the Coronavirus pandemic" and "in compliance with government guidance and orders," it "limited, reduced or suspended operations at its covered premises." *Id.* ¶ 95. Plaintiff contends it has suffered "multiple millions of dollars in loss" as a result. *Id.* ¶ 30. Plaintiff further contends that it made claims for such losses under the Policy's Time Element coverages and FM denied

[2] The policy contains two Communicable Disease coverages (the "Communicable Disease coverages"), a limited exception to the exclusions cited above that do not require "physical loss or damage." The Communicable Disease coverages are subject to a combined annual aggregate sublimit of $1,000,000. The limited Communicable Disease coverages require the "actual not suspected presence of communicable disease" and are subject to other policy requirements, terms and conditions. FM has acknowledged that the Communicable Disease coverages are potentially applicable to Plaintiff's claim and Plaintiff's complaint does not seek any relief in connection with these coverages.

coverage for such claims. *Id.* ¶¶ 146-152. In addition, Plaintiff claims that due to FM's "conduct" (i.e., its alleged breach of the Policy), Plaintiff should be excused from performing its duties under the Policy. *Id.* ¶ 161.

In the only count of the Complaint (Count I), Plaintiff seeks a declaratory judgment under 42 Pa.C.S. §§ 7531-41 rejecting FM's denial of its claim and declaring that it is entitled to be paid for "the full amount of losses incurred as a result of the risks of the Coronavirus pandemic," together with attorneys' fees and costs of suit.

In seeking coverage under the Policy, Plaintiff's legal theory is that coverage for its financial losses is triggered because it limited or ceased operations not only because of actual physical loss or damage to covered property, but also due to the "imminent 'risk' that Coronavirus would cause physical loss or damage to covered property." *Id.* ¶ 118. Plaintiff also maintains that it suffered "physical loss" because it suffered "deprivation, decrease or having less of" its covered property due to the Coronavirus pandemic. *Id.* ¶ 53.

III. RELEVANT TERMS AND CONDITIONS OF THE POLICY

A. General Framework of the Policy

As Plaintiff itself admits, the Policy Declarations state that the Policy insures "property . . . against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded . . . ." *Id.* ¶ 10; Ex. B, Policy, p. 1 (hereinafter cited to as "Policy")[3]. That is, to the extent there is physical loss or damage to property insured by the Policy, such loss or damage will be covered (assuming

[3] All references to page numbers of the Policy correspond to the page numbers on the policy form.

all other Policy requirements are met) unless a specified exclusion applies to bar coverage.[4] Plaintiff bears the burden to meet this threshold coverage requirement to show physical loss or damage.

The Policy's exclusions, in turn, are subject to exceptions set out in the Policy. As the preamble to the "EXCLUSIONS" provisions of the Property Damage section notes: "In addition to the exclusions elsewhere in this Policy, the following exclusions apply unless otherwise stated[.]" Policy, p. 9. Therefore, the basic operation of the Policy is as follows: the Policy will cover an event of physical loss or damage to covered property unless an exclusion applies; and an exclusion will apply unless an exception to that exclusion applies. See *id*.

The Policy sets forth two unambiguous exclusions that apply to Plaintiff's claimed loss: (1) the Contamination Exclusion; and (2) the "loss of use" Exclusion. These exclusions appear under Policy Section 3, entitled "Exclusions," and apply to the entire Policy, including coverages provided under the Time Element section. *Id*. at 10 and 13. The Policy language immediately following the declaration of coverage for Time Element loss reinforces the applicability of these exclusions to Time Element Coverages. It states: "The TIME ELEMENT loss, as provided in the TIME ELEMENT COVERAGES and TIME ELEMENT COVERAGE EXTENSIONS of this section of the Policy. . . is subject to the Policy provisions including applicable exclusions and deductibles, all as shown in this section and elsewhere in the Policy." *Id*. at 33. Sub-section 1.A ("LOSS INSURED") of the Time Element section further notes that the "Policy insures TIME ELEMENT loss . . . directly resulting from physical loss or damage of the type insured: 1. to

[4] Plaintiff contends that the Policy insures not only actual physical loss or damage but also the "risk" of physical loss or damage (i.e. the threat that such loss or damage may occur). Compl. ¶ 66. As addressed in more detail *infra*, "All Risks" refers to fortuitous hazards or perils (i.e., fire, windstorm, etc.). Save for limited exceptions, the Policy requires that the insured "risk" actually cause physical loss or damage.

property described elsewhere in this Policy and **not otherwise excluded by this Policy** . . . ." *Id*. (emphasis added). To eliminate any doubt, the "TIME ELEMENT EXCLUSIONS" section similarly confirms that the exclusions detailed therein apply "[i]n addition to the exclusions elsewhere in this Policy . . . ." *Id.* at 43. The Time Element Coverage section, which includes Gross Profit[5] and Extra Expense, the coverages implicated in Plaintiff's Complaint, necessarily includes these terms, conditions and exclusions. *Id.* at 33.

B. Physical Loss or Damage is Required

With the exception of the limited Communicable Disease coverages, the Policy requires "physical loss or damage" as a prerequisite to coverage under each of the Policy provisions cited by Plaintiff. Specific to the financial losses insured under the Time Element section, the Policy only insures such loss "directly resulting from physical loss or damage of the type insured" under the Policy. *Id.* at 33.

C. Applicable Exclusions: The contamination Exclusion and the Loss of Use Exclusion

The Policy specifically excludes "contamination," which 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 62 (emphasis added). "Contaminant" is further defined as: "anything that causes contamination." *Id*. The definition of "contamination," and its reference to "virus," "pathogen," "pathogenic organism," and "disease causing or illness causing agent," clearly encompasses COVID-19.

[5] The Policy's Gross Profit coverage is akin to coverage often referred to as Business Income or Business Interruption.

With contamination defined, the Policy sets out the following exclusion relating to contamination (the "Contamination Exclusion"):

> **D.** This 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. If contamination due only to the actual not suspected presence of contaminant(s) directly results from other physical damage not excluded by this Policy, then only physical damage caused by such contamination may be insured. This exclusion D1 does not apply to radioactive contamination which is excluded elsewhere in this Policy.

Id. at 13. Thus, the Policy excludes, with respect to all coverages, any contamination by virus and any cost due to such contamination, including the inability to use or occupy insured property, unless there is an exception.

Additionally, the Policy excludes "loss of use" (the "Loss of Use Exclusion"). *Id.* at 10. Plaintiff's claimed losses arise from its inability to use its properties—in full or in part—due to governmental orders and COVID-19. *See, e.g.*, Compl. ¶¶ 11, 118. As such, the Loss of Use Exclusion is also implicated and bars coverage unless an exception applies.

D. The Policy's Communicable Disease Coverages are Narrow Exceptions to the Contamination and Loss of Use Exclusions

The Policy's Communicable Disease coverages are two potentially applicable yet narrow exceptions to the Contamination Exclusion and the Loss of Use exclusion if the conditions of those coverages are met. The Policy defines "communicable disease," in relevant part, as "disease which is: A. transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges . . . ." Policy, p. 62. It then provides certain limited additional coverages specific to communicable disease, Communicable Disease Response coverage and Interruption by Communicable Disease. *Id.* at 21 and 51. The Communicable Disease coverages

are subject to a combined annual aggregate sublimit of $1,000,000 in available coverage, provided that all Policy requirements for these coverages are met. *Id*. at 3 and 5.

Plaintiff's Complaint concedes that FM has acknowledged the possibility that the Communicable Disease coverages have been triggered, provided that Plaintiff can establish, *inter alia*, "the actual not suspected" presence of communicable disease. The Complaint does not seek any relief in connection with these coverages.

IV. LEGAL STANDARDS

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must contain sufficient factual matter, which, if accepted as true, "state[s] a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plaintiff "must plead more than labels and conclusions," and "[f]actual allegations must be enough to raise the right to relief above the speculative level . . . ." *Twombly*, 550 U.S. at 555.

In Pennsylvania, interpretation of an insurance contract is generally performed by a court rather than a jury. *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 106 (Pa. 1999). The goal of interpreting the contract is to ascertain the intent of the parties as manifested by the language of the written instrument. *Id.* The language of an insurance policy "must be construed in its plain and ordinary sense, and the policy must be read in its entirety." *Pennsylvania Nat. Mut. Cas. 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*. Plainly worded exclusions must also be enforced as written. *Sypherd Enterprises, Inc. v. Auto-Owners Ins. Co.*, 420 F. Supp. 3d 372, 377 (W.D. Pa. Nov. 21, 2019). 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).

V. ARGUMENT

A. Plaintiff Fails to Allege Facts that Could Establish "Physical Loss or Damage" to Property

1. The Mere Presence of COVID-19 Does Not Cause Physical Loss or Damage

Federal district courts in Pennsylvania have repeatedly and unanimously held that the presence of COVID-19—whether present at a specific insured property or supposedly "ubiquitous" in a general area—is not physical loss or damage. *See, e.g., 1 S.A.N.T., Inc. v. Berkshire Hathaway, Inc.*, No. 2:20-CV-862, 2021 WL 147139, at *6–7 (W.D. Pa. Jan. 15, 2021); *Indep. Rest. Group v. Certain Underwriters at Lloyd's, London*, CV 20-2365, 2021 WL 131339, at *7 (E.D. Pa. Jan. 14, 2021). Likewise, these courts have held that government orders closing or restricting properties because of COVID-19 are not the result of physical loss or damage. *See, e.g., Moody v. Hartford Fin. Group, Inc.*, CV 20-2856, 2021 WL 135897, at *6 (E.D. Pa. Jan. 14, 2021); *Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, CV 20-3198, 2020 WL 6545893, at *4 (E.D. Pa. Nov. 6, 2020). These courts have done so based on established Third Circuit law.

The principal binding authority cited by Pennsylvania federal courts is *Port Authority of New York & New Jersey v. Affiliated FM Insurance Co.*, 311 F.3d 226, 234 (3d Cir. 2002). In *Port Authority*, the Third Circuit considered whether the presence of asbestos constituted physical loss or damage in the context of a property insurance policy. *Id.* at 230. As with the instant Policy, the policy in that case covered "ALL RISKS of physical loss or damage occurring during the period of this policy including loss of revenue and business interruption. . . except as otherwise

specifically excluded." *Compare id*. at 231 *with* Policy, p. 1 ("This Policy covers property. . .against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded. . .."). The Third Circuit found that in "ordinary parlance and widely accepted definition, physical damage to property means a 'distinct, demonstrable, and physical alteration' of its structure." *Port Authority*, 311 F.3d at 235 (quoting 10 Couch on Ins. § 148:46 (3d ed. 1998)). But "[p]hysical damage to a building as an entity by sources unnoticeable to the naked eye must meet a higher threshold." *Id*. A loss is only covered if the alleged loss or damage is such that the property's "function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable . . . ." *Id*. at 236. Thus, the Third Circuit granted summary judgment to the property insurer on the basis there was no physical loss or damage. *Id*.

Following this precedent, Pennsylvania federal district courts have repeatedly rejected COVID-19-related insurance claims like those made by Plaintiff here. COVID-19 contamination or the threat thereof do not "constitute 'risks of direct physical loss' because properties are not rendered uninhabitable or unusable due to a physical condition of the property caused by COVID-19." *Moody*, 2021 WL 135897, at *8 (quoting *4431, Inc. v. Cincinnati Ins. Companies*, No. 5:20-CV- 04396, 2020 WL 7075318 (E.D. Pa. Dec. 3, 2020)). These include cases where plaintiffs have alleged that COVID-19 can settle on surfaces, creating potential exposure to infection. *Moody*, 2021 WL 135897, at *1; *Indep. Rest.*, 2021 WL 131339, at *1. Because surfaces affected by COVID-19 merely need to be cleaned, COVID-19 "contamination would not meet the requirements under Port Authority" for physical loss or damage. *Moody*, 2021 WL 135897, at *6. A Pennsylvania court has also approvingly cited a New York judge's comment that the virus "damages lungs. It doesn't damage printing presses." *1 S.A.N.T.*, 2021 WL 147139, at *6 n.10 (citing comments from the record in *Social Life Magazine Inc. v. Sentinel Insurance Co.*,

No. 20-cv-3311 (S.D.N.Y.)). In other words, COVID-19 damages people, not property—thus property insurance policies do not cover it as "physical loss or damage".[6]

2. Loss of Use or Access to Insured Property Does Not Constitute Physical Loss or Damage

Government orders restricting or reducing the use of property are issued to help stop the spread of COVID-19 and mitigate the health crisis. Such orders are not issued due to physical loss or damage or even the presence at a particular location, and as such do not trigger coverage under the Policy's Time Element coverages. *See, e.g.*, *Kessler Dental Associates, P.C. v. Dentists Ins. Co.*, No. 2:20-CV-03376-JDW, 2020 WL 7181057, at *4 (E.D. Pa. Dec. 7, 2020). Where governmental orders only restrict the use of a business that has remained partially open, it is even more apparent that neither COVID-19 nor any related orders have made the structure useless or uninhabitable. *Brian Handel*, 2020 WL 6545893, at *3. The same is true if the business is able to reopen following the lifting of governmental orders, even with mitigation measures. *Moody*, 2021 WL 135897, at *6. As numerous courts have found, the government shutdown orders do not satisfy the requirements of business interruption coverages similar to the Policy's Time Element coverages and coverage extensions of the type claimed here. *See, e.g., Clear Hearing Sols., LLC v. Cont'l Cas. Co.*, CV 20-3454, 2021 WL 131283, at *7 (E.D. Pa. Jan. 14, 2021).

Plaintiff alleges that because of actual cases of COVID-19, the "near certain risk of physical harm caused by Coronavirus" and a variety of governmental orders designed to combat the spread of COVID-19, it was forced to "cancel or significantly restrict in-person attendance at

[6] Plaintiff's Complaint includes reference to a Motion in Limine filed on behalf of FM in litigation in New Mexico. Compl., Ex. C. The matter involved mold damage to a clean room used to manufacture pharmaceuticals. Plaintiff cannot seriously argue that FM's position in that matter is contrary to its position in the instant case, namely that presence or threat of COVID-19 in a football stadium and related properties is not physical loss or damage.

all games at Lincoln Financial Field stadium," and close or restrict access to their training facility and retail locations. Compl. ¶¶ 5, 87-105. Claims that policyholders can trigger coverage under a property insurance policy because they and their customers were denied access to insured properties or prevented from using them for their intended purposes have been resoundingly rejected in this Court and nationwide. "[N]early every court to address this issue has concluded that loss of use of a premises due to a governmental closure order does not trigger business income coverage premised on physical loss to property." *Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405, at *8 (S.D.N.Y. Dec. 11, 2020). These courts have reasoned, for example, that "[l]osing the ability to use otherwise unaltered or existing property simply does not change the physical condition or presence of that property and therefore cannot be classified as a form of 'direct physical loss' or 'damage.'" *Id.* at *6.

Judges in this District have repeatedly and consistently rejected similar claims. *See, e.g.*, *4431, Inc.*, 2020 WL 7075318, at *12 ("loss of business income as a result of COVID-19 and the Governor's Orders does not constitute direct 'physical loss' under the Policies" because "there is no physical component to Plaintiffs' loss; there are no allegations that any physical conditions of or on the covered premises have been altered in a way that has resulted in or affected Plaintiffs' loss"); *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, 2020 WL 7395153, at *5 (E.D. Pa. Dec. 17, 2020).[7]

[7] *See also Moody*, 2021 WL 135897, at *6 (loss of use theory fails because "losses do not bear a causal connection to the physical condition of its premises"); *1 S.A.N.T., Inc.*, 2021 WL 147139, at *5–6 (a "growing body of case law rejects the contrived definition of 'direct physical loss of or damage to' that would provide coverage for economic losses unrelated to physical impact to the covered structure"); *Indep. Rest. Grp.*, 2021 WL 131339, at *7 ("loss of use caused by government orders cannot constitute 'direct physical loss of . . . property'").

This result is further supported by reading the Policy as a whole. As numerous courts have held, the Policy's definition of the "period of liability," under which the time period for a covered Time Element claim ends when the property should be "repaired or replaced; and made ready for operations" further demonstrates that any "physical loss or damage" must result in physical loss or damage that can be repaired or replaced. Policy, p. 40-43. *See, e.g., Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2020 WL 7024287, at *4 (E.D. Pa. Nov. 30, 2020) (parties' "agreement to measure the period of restoration against the time it takes to repair the premises indicates that they intended the Policy to cover losses for physical damage"); *4431, Inc.*, 2020 WL 7075318, at *12 n.17 ("'there can be no 'Period of Restoration' for pandemic-related losses as that term is used in the Policies"); *Michael Cetta, Inc.*, 2020 WL 7321405, at *6–7 (similar). The Policy also contains an exclusion for "loss of use." Policy, p. 9. This exclusion has been cited as an additional basis for dismissal where loss of use is claimed to be evidence of physical loss or damage. *See, e.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 5525171, at *6 (N.D. Cal. Sept. 14, 2020) (loss of use exclusion "suggests that the 'direct physical loss of . . . property' clause was not intended to encompass a loss where the property was rendered unusable without an intervening physical force"); *Whiskey River on Vintage, Inc. v. Ill. Cas. Co.*, 2020 WL 7258575, at *18 (S.D. Iowa Nov. 30, 2020).

3. The "Threat" of Coronavirus Contamination is not an Insured Risk of Physical Loss or Damage under the Policy

The Policy insures all risks of physical loss or damage to covered property unless otherwise excluded. Recovery under an all risk policy extends to any fortuitous loss that is not specifically excluded under the terms of the policy. *Intermetal Mexicana v. Insurance Company of North America*, 866 F.2d 71, 74 (3d Cir.1989). As described by the Third Circuit, an "all-risk" policy:

> is to be considered as creating a special type of coverage extending to risks not usually covered under other insurance, and recovery under an "all-risk" policy will, as a rule, be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage.

Id. at 75, citing (13A Couch Cyclopedia of Insurance Law § 48:141, at 139 (1982)).

In this context, it has long been understood that the perils insured against are "risks." *Mellon v. Fed. Ins. Co.*, 14 F.2d 997, 1002 (S.D.N.Y. 1926). *See also All Risks of Loss v. All Loss: An Examination of Broad Form Insurance Coverages*, Notre Dame Law Review, Vol. 34, Issue 3, May 1, 1950.

Plaintiff attempts to contort the well-accepted meaning of "risk" by arguing that coverage applies both to loss or damage from the risk, and also from the risk itself (*i.e.*, the threat), absent any loss or damage. This would require the court to construe the Policy to insure "all risks of physical loss or damage" as well as "all risk of risks of physical loss or damage." This is not what the Policy says. Moreover, similar arguments have been rejected by Pennsylvania courts, s*ee Cleland Simpson Co. v. Firemen's Ins. Co. of Newark, N. J.*, 140 A.2d 41, 44 (Pa. 1958) (policy that insured the risk of fire did not insure the "apprehension of either the possibility or probability of a fire which never occurred."), and by this Court as well, *see Brian Handel*, 2020 WL 6545893, at *3 (rejecting the argument that the anxiety about public health and the safety of indoor spaces, "is the functional equivalent of damage of a material nature or an alteration in physical composition.").

B. The Contamination Exclusion Bars Coverage

As a separate and independent basis for dismissal, the Policy clearly excludes "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, p. 13. This

exclusion incorporates the definition of contamination, which is defined in relevant part as "any condition of property due to the actual or suspected presence of any pathogen or pathogenic organism, . . . **virus, [or] disease causing or illness causing agent.**" *Id.* at 62 (emphasis added).

District courts in Pennsylvania have uniformly denied coverage for COVID-19 losses where the insurance policy at issue contains a virus exclusion. *E.g. Kessler*, 2020 WL 7181057, at *3; *Moody*, 2021 WL 135897, at *8–9. These denials include claims that government orders due to COVID-19 are the true cause of the insured's loss, for the reason that the virus exclusions considered in those cases (and in the Policy) do not limit their "applicability to situations where a virus is on the covered property." *Moody*, 2021 WL 135897, at *9. To the extent that Plaintiff intends to argue that FM's exclusion is distinguishable because it is a "contamination" exclusion rather than a virus exclusion, courts have not drawn any meaningful distinction between the terms "contamination" or "virus," or between contamination by virus or the presence of virus. *See Indep. Rest.*, 2021 WL 131339, at *7. This Court should hold, as in each of these cases, that the Contamination Exclusion unambiguously applies to Plaintiff's COVID-19 losses.

As explained *supra* in Section III.A, the Policy Exclusions, including the Contamination Exclusion, applies equally to the Policy's Time Element Coverages. Policy, at 43; *see also Moody*, 2021 WL 135897, at *9 (applying a virus exclusion to a civil authority provision due to similar connecting language). The Contamination Exclusion in the Policy unambiguously applies, with the potential exception of the limited Communicable Disease coverages.

Plaintiff alleges several reasons why it believes the Contamination Exclusion does not apply, all of which have been rejected. Compl. ¶¶ 59–65; 141–45. First, Plaintiff claims there were two differently worded virus exclusions FM could have used. *Id.* ¶ 63. This Court has rejected similar arguments. *Newchops Rest.*, 2020 WL 7395153, at *9 ("lack of a specific reference

to a pandemic in the policy does not render the provision ambiguous"); *Moody*, 2021 WL 135897, at *9 (similar); *see also Riverwalk Seafood Grill, Inc. v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 81659, at *3 (rejecting argument that policy "could have been more specific" by referencing "pandemic").

Second, Plaintiff's conclusory assertion of the reasonable expectations doctrine, Compl. ¶ 143, fails because Plaintiff fails to allege facts showing "any change in the policy they actually applied and paid for" that would implicate that doctrine. *See Moody*, 2021 WL 135897, at *7; *see also Zagafen Bala, LLC v. Twin City Fire Ins. Co.*, 2021 WL 131657, at *6 (E.D. Pa. Jan. 14, 2021). As the Third Circuit has held, an insured cannot "override the plain language of a policy limitation anytime he or she was dissatisfied with the limitation by simply invoking the reasonable expectations doctrine." *Frederick Mut. Ins. Co. v. Hall*, 752 F. App'x 115, 119 (3d Cir. 2018) (quoting *Millers Capital Ins. Co. v. Gambone Bros. Dev. Co.*, 2007 PA Super 403, ¶ 43, 941 A.2d 706, 717–718 (2007) (without "latent ambiguity, the reasonable expectations doctrine is inapplicable")). The Contamination Exclusion is clear and unambiguous, and Plaintiff cannot override it with a conclusory allegation of "reasonable expectations."[8] Moreover, Plaintiff, owner of a professional sports franchise, is "not the type of 'unsophisticated' consumer that the reasonable expectations doctrine is primarily meant to protect." *Downey v. First Indem. Ins.*, 214 F. Supp. 3d 414, 425 (E.D. Pa. 2016).

Third, Plaintiff argues that FM's failure to include "communicable disease" in the definition of "contamination" evidences an intention to except it from the contamination exclusion.

[8] *See Griffin v. Erie Ins. Exch.*, No. 3350 EDA 2014, 2015 WL 5971184, at *3 (Pa. Super. Ct. Aug. 28, 2015) (if the policy is "clear and unambiguous[,] . . . the reasonable expectations doctrine is inapplicable"); *Regis Ins. Co. v. All Am. Rathskeller, Inc.*, 976 A.2d 1157, 1166 n.11 (Pa. Super. Ct. 2009) ("insured may not complain that his or her reasonable expectations were frustrated by policy limitations which are clear and unambiguous") (citations and quotations omitted).

Plaintiff's argument ignores the well-settled rule that a policy may exclude coverage for particular injuries or damages in certain circumstances while providing coverage in other circumstances. *Julian v. Hartford Underwriters Ins. Co.*, 35 Cal. 4th 747, 759 (2005). It is not unusual for an insurance policy to contain an exception to an exclusion. *See e.g. White v. Metro. Direct Prop. & Cas. Ins. Co.*, No. CIV.A. 13-434, 2014 WL 3732135, at *7 (E.D. Pa. July 29, 2014) (insurance policy that excluded collapse except as granted in an additional for coverage for collapse including collapse caused by "hidden decay of the structure"). The exception, however, may not be construed to broadly as to eliminate the exclusion. *GTE Corp. v. Allendale Mut. Ins. Co.*, 372 F.3d 598, 614 (3d Cir.2004). An insurer may draft and enforce policy provisions that provide or leave intact coverage for some, but not all, manifestations of a particular peril. This is, in fact, an everyday practice. For example, a policy might exclude losses caused by freezing to plumbing, but provide coverage for other types of freezing, or vice versa. The fact that the exclusion does not apply to all types of freezing does not, by itself, render it invalid. A reasonable insured would readily understand from the policy language which perils are covered and which are not.

Here the Policy broadly excludes all contamination, yet provides limited coverage for the actual, not suspected presence of communicable disease. The definition of contamination does not need to identify "communicable disease" in order for it to apply to Coronavirus because it explicitly identifies "virus." The exclusion, which applies to "virus," is unambiguous as applied to the Coronavirus.

Plaintiff's suggestion that the Contamination Exclusion cannot apply to a "communicable disease" would read the words "virus, disease causing or illness causing agent" in the definition of "contamination" out of the Policy, a result that does not give effect to the clear intention of the parties. The Court should not rewrite contract provisions that are otherwise unambiguous to create

coverage where no coverage exists. *Imperial Cas. & Indem. Co.*, 858 F.2d at 131. Any construction of the Policy's Contamination Exclusion that does not exclude viruses, including the novel coronavirus that causes COVID-19 would create coverage where no coverage was intended to exist.

C. The Policy's Loss of Use Exclusion Also Applies

The Policy's separate Loss of Use Exclusion is a further bar to Plaintiff's claims. Ex. B, Policy, at 10. Plaintiff's Complaint is replete with claims that its losses derive from loss of use of its properties. *See, e.g.*, Compl. ¶¶ 5, 52, 118. Courts throughout the country addressing COVID claims have recognized that the Loss of Use Exclusion precludes coverage for pure loss of use claims, unaccompanied by physical loss or damage. *See, e.g., Whiskey River on Vintage, Inc.*, 2020 WL 7258575, at *18 (loss of use exclusion applied to preclude the insured's COVID-19 claim); *Salon XL Color & Design Grp., LLC v. West Bend Mut. Ins. Co.*, No. CV 20-11719, 2021 WL 391418, at *4 (E.D. Mich. Feb. 4, 2021) (same). Here, the claimed losses directly implicate the Policy's Loss of Use Exclusion. Ex. B, Policy, at 10.

To the extent Plaintiff maintains that its claimed losses stem from the Orders not the Coronavirus, this argument fails because the virus was the "primary root cause" of the loss. *Diesel Barbershop, LLC v. State Farm Lloyds*, 2020 WL 4724305, at *6 (W.D. Tex. Aug. 13, 2020); *Zagafen Bala, LLC*, 2021 WL 131657, at *7 (similar).[9]

[9] *See also Palmdale Estates, Inc. v. Blackboard Ins. Co.*, 2021 WL 25048, at *3 (N.D. Cal. Jan. 4, 2021) ("closure orders were in response to the COVID-19 pandemic, a 'cause of loss' that falls within the Virus Exclusion"); *Natty Greene's Brewing*, 2020 WL 7024882, at *3 (similar).

VI. CONCLUSION

The Complaint should be dismissed, in its entirety, and with prejudice.

Respectfully Submitted,

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Dated: April 22, 2021

CERTIFICATE OF SERVICE

I, Richard D. Gable, Jr., hereby certify that a true and correct copy of the foregoing Memorandum of Law in support of Defendant's Motion to Dismiss, electronically filed this 22nd day of April, 2021, will be served on the following counsel of record via the Court's Electronic Filing System:

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