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

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

PLAINTIFF PHILADELPHIA EAGLES LIMITED PARTNERSHIP'S
MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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Plaintiff Philadelphia Eagles Limited Partnership (the "Eagles") respectfully submit this Memorandum in Opposition to Defendant Factory Mutual Insurance Company's ("FM") Motion to Dismiss Plaintiff's Complaint.

INTRODUCTION

The Eagles allege that COVID-19 is a physical substance that has adhered to and altered physical surfaces and airspace within their property and rendered that property continuously unsafe, unusable, and unfit for its intended purpose whenever present. Complaint ("Compl.") ¶¶ 76-85. Under the Third Circuit standard set forth in *Port Authority of New York & New Jersey v. Affiliated FM Insurance Co.*, 311 F.3d 226 (3d Cir. 2002) ("*Port Authority*"), these allegations are sufficient to survive a Rule 12(b)(6) motion as applied to the unique terms of the FM policy. *See Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.*, No. 4:21-CV-00011, 2021 WL 1851030, at *3 (E.D. Tex. May 5, 2021) (denying FM's motion to dismiss claim by policyholder under the same standard FM property form that alleged "COVID-19 was actually present and actually damaged the property by changing the content of the air").

FM admits that coverage is triggered under Third Circuit standards if property is "made useless or uninhabitable" (FM Memorandum of Law ("Mot.") at 9), but argues that COVID-19 does not meet this standard because COVID-19 supposedly can always be cleaned away. FM's reliance on other cases concluding that the policyholders' allegations could be construed as showing that the insured property remained functional despite the presence of the COVID-19 is misplaced. In this case, the Eagles' Complaint alleges that their property was rendered continuously non-functional because of the risks that COVID-19 posed to the physical airspace and surfaces each time any person entered the property. Compl. ¶¶ 30, 109-10. No court in this District has considered the sufficiency of allegations that COVID-19 ***continuously in the physical***

airspace (or at imminent threat of release into the airspace) of a building renders the function of insured's property nearly eliminated, uninhabitable or unusable. But another federal court that did consider such allegations found in favor of coverage. *See Cinemark*, 2021 WL 1851030, at *3. That determination is consistent with *Port Authority's* conclusion that "the presence of large quantities" of another toxin, asbestos, "in the air of a building making the structure uninhabitable and unusable" would constitute "a direct loss to its owner" triggering coverage. *Port Authority*, 311 F.3d at 236.

This Court should deny FM's motion to dismiss because the Eagles' allegations, which must be accepted as true under Rule 12(b)(6) standards, establish that they have incurred "physical loss or damage" as a result of COVID-19 triggering FM's Policy. In the face of the Eagles' allegations, the contrary assertions advanced in FM's motion to dismiss raise disputed factual issues that cannot be resolved at the pleading stage under Rule 12(b)(6). The Eagles' allegations require that they be afforded the opportunity to prove through factual, scientific and expert evidence that COVID-19 has a physical impact on the airspace within the Eagles' covered facilities—just like the physical impact that results from a natural gas leak, a release of asbestos fibers, or the presence of other non-visible toxins into the air of a covered facility. These settled pleading standards also dictate that the Eagles should be given the opportunity to prove (through experts and testimony from FM's own employees) the dangers presented by using property where COVID-19 is present (or at serious threat of being present) without serious restriction imposed to militate against its deadly spread, and that the disease cannot be simply wiped away, like dust on a machine. Under settled pleading standards, the Eagles' allegations present factual issues that can appropriately be resolved only by the finder of fact on a fully developed record after discovery. None of the COVID-19 coverage cases decided in this District (and relied upon by FM) considered

the factual issues and scientific questions regarding the impact of COVID-19 on airspace within buildings raised by the Eagles' Complaint, and not one of those decisions supports dismissing the Eagles' Complaint with prejudice, as requested by FM.[1]

FM also is not entitled to the relief it seeks because the Policy FM sold to the Eagles insures against all "*risks of*" direct physical loss or damage to property—in other words, it insures against all "threats of" direct physical loss or damage (and as set forth above, COVID-19 in a building's airspace constitutes "direct physical loss." Compl. ¶ 37; Ex. A at 4. Therefore, coverage must be afforded to the Eagles not only in circumstances where COVID-19 is confirmed to be present, but also where the imminent "risks of" or dangers posed by COVID-19 caused physical loss of the Eagles' property. Compl. ¶ 38. The Eagles' Complaint alleges that COVID-19 has presented such imminent risks rendering its property unfit and unusable (Compl. ¶¶ 83, 85, 109), and these allegations also call for denial of FM's motion. As the Third Circuit itself recognized in *Port Authority*, "physical loss or damage" triggering coverage may exist where "***an imminent threat of the release***" of toxins makes a property "useless or uninhabitable." 311 F.2d at 236 (emphasis added).

FM did not have to employ the term "risks of" in its insuring agreement; indeed, the insurance industry's drafting organization, the Insurance Services Office ("ISO"), recommended that insurers wishing to restrict coverage remove that exact language from businessowners property policy forms years ago. Compl. ¶¶ 66-71. Some insurers followed that recommendation—but FM did not. *Id.* FM's arguments that the "risks of" language is not

[1] To the extent that the Court believes such issues can be resolved at the motion to dismiss stage, the Eagles request permission to amend their Complaint to more fully address these complicated issues before the Court renders its decision.

important because the language means the cause of the loss, like "fire," and not a threat of loss, cannot be squared with the Pennsylvania cases reaching a contrary conclusion. *See, e.g.*, *401 Fourth St., Inc. v. Inv'rs. Ins. Grp.*, 879 A.2d 166, 169-70 (2005) (policy language covering "risks of" direct physical loss involving collapse necessarily contemplates broader coverage than language simply insuring against "collapse.").

Moreover, unlike the policies considered in the cases cited by FM, the FM Policy here provides affirmative "Communicable Disease" coverages, which is an express recognition *by FM* that "communicable disease" affects the integrity of property. Ex. A at 31, 61-62. In other words, FM itself represented to its policyholders that communicable disease affects property, so COVID-19 must be held to do so regardless of whether a court reached a different conclusion under different policy language. COVID-19 as a communicable disease causes physical loss or damage sufficient to trigger not only the Communicable Disease coverages, but also the Time Element coverages covering business interruption loss resulting from "physical loss or damage *of the type insured*." *Id.* at 43. If loss or damage from communicable disease was not "of the type insured," the policy would be rendered inherently contradictory. Contrary to FM's assertion that the Eagles' "complaint does not seek any relief in connection with these coverages" (Mot. 2 n. 2), the Eagles expressly seek declaratory relief that the Communicable Disease coverages are triggered, among other coverages. Compl. ¶¶ 124-35. FM's motion must be denied on this basis alone.

There is equally no merit to FM's contention that so-called "contamination" and "loss of use" exclusions support dismissal of the Eagles' Complaint. In seeking dismissal, FM seeks to prevent any discovery into what FM said or acknowledged about how its Policy applies, either prior to or in the immediate aftermath of the pandemic. As set forth below, the limited information presently available shows inconsistencies between FM's pre- and post-pandemic coverage

positions and the Court should be presented with a complete record before deciding any substantive motion bearing on the proper interpretation of the exclusions on which FM relies. Indeed, Pennsylvania Supreme Court precedent establishes that discovery into the drafting and regulatory history of similar exclusions is warranted in order to interpret the meaning of terms in the face of such evidence. *See Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1189, 1193 (2001) (holding that discovery into the drafting history of the qualified pollution exclusion—an exclusion comparable to FM's ambiguous "contamination" exclusion here—was warranted in order to interpret its meaning).

STATEMENT OF FACTS

To avoid duplication, the Eagles hereby incorporate and re-allege the facts laid out in the Complaint, as attached as Exhibit A to FM's Notice of Removal (ECF 1).

LEGAL STANDARDS

I. RULE 12(B)(6) STANDARDS

In deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court must "accept as true all factual allegations in the complaint and view those facts in the light most favorable to the non-moving party." *Doe v. Univ. of Scis.*, 961 F.3d 203, 208 (3d Cir. 2020). A complaint is adequate if it provides enough detail to give the defendant "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The issue in a 12(b)(6) motion is not whether the plaintiff will ultimately prevail, but rather whether the plaintiff would be entitled to relief under any set of facts consistent with the claims set forth in the complaint." *S.E.C. v. Bennett*, 904 F. Supp. 435, 436 (E.D. Pa. 1995). Thus, the Court "cannot resolve factual disputes at the motion to dismiss stage." *Pinnell v. Teva Pharms. USA, Inc.*, No. CV 19-5738, 2020 WL 1531870, at *5 (E.D. Pa. Mar. 31, 2020); *Sang Koo Park v.*

Evanston Ins. Co., No. CV 19-4384, 2020 WL 1284416, at *2 (E.D. Pa. Mar. 6, 2020) ("factual disputes are clearly not appropriate for a motion to dismiss").

In questions of insurance coverage, an insurer moving to dismiss must demonstrate that "the insurance contract unambiguously reveals that an insured is not entitled to coverage." *Amitie One Condo. Ass'n v. Nationwide Prop. & Cas. Ins. Co.*, No. 1:07-CV-1756, 2008 WL 2973097, at *3 (M.D. Pa. Aug. 4, 2008) (citing *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 745 n. 1 (3d Cir. 1999)). Thus, if resolution of a dispute turns on the meaning of undefined policy terms, then "the fact-intensive analysis attendant to the resolution of [the insured's] claims is appropriately reserved for summary judgment." *Id.* at *4 (denying insurer's motion to dismiss where "the parties have not yet had an opportunity to address how such terms are used in the insurance industry," including the terms "risks of direct physical loss involving collapse," "land," and "sudden").

II. INTERPRETATION OF INSURANCE POLICIES

Courts applying Pennsylvania law give effect to policy language that is "clear and unambiguous." *401 Fourth St.*, 879 A.2d at 170. When policy language is ambiguous, the policy is to be construed in favor of the insured "to further the contract's prime purpose of indemnification and against the insurer, as the insurer drafts the policy, and controls coverage." *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888, 897 (2006) (quoting *401 Fourth St.*, 879 A.2d at 170) (internal quotation marks omitted). Policy language is ambiguous if it is reasonably susceptible of different interpretations and "capable of being understood in more than one sense." *Madison Const. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 106 (Pa. 1999). Differing judicial opinions as to the meaning of the same policy language may be evidence of an ambiguity. *See Blocker v. Aetna Cas. & Sur. Co.*, 332 A.2d 476, 479 (Pa. Super. Ct. 1975) ("The

large volume of cases, in this jurisdiction and others, cited by both parties . . . lends great weight to th[e] conclusion [that the policy in question is ambiguous]."); *see also Murray v. State Farm Fire and Cas. Co.*, 509 S.E.2d 1, 9 n.5 (W. Va. 1998) ("A provision in an insurance policy may be deemed to be ambiguous if courts in other jurisdictions have interpreted the provision in different ways.").

LEGAL ARGUMENT

I. THE EAGLES' PROPERTY LOSS OR DAMAGE FALLS WITHIN THE POLICY'S SCOPE OF COVERAGE

FM's motion must be denied because the Eagles have plausibly alleged covered "physical loss or damage" to property that triggers the Policy's Time Element, Communicable Disease, and other coverages. The Policy covers the Eagles' property "against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded." Ex. A at 4. On top of this, the Policy expressly covers communicable disease as one of those insured risks. *Id.* at 31, 61. The Eagles allege that they suffered "direct physical loss or damage" of property under the plain meaning of those terms: COVID-19, a communicable disease, damaged the airspace and other features of the Eagles' property, causing it to become physically unfit and unusable for insured purposes. Compl. ¶ 10.

FM argues the Eagles' claim should be dismissed because it cannot show "the presence of COVID-19" causes "physical loss or damage" to property within the meaning of its insuring agreement. Mot. 15. FM's argument fails for at least three reasons: (1) Third Circuit law merely requires the Eagles to allege that the actual presence of or the "imminent threat of release of" COVID-19 at the Eagles' property "nearly eliminated" the property's function or made it "useless

or uninhabitable,"[2] a standard met by the Eagles' allegations that COVID-19 is a physical substance that alters airspace, rendering it unsafe and unusable for its intended purpose; (2) the Policy insures against "all *risks of*" physical loss or damage, meaning that the Policy covers property deprivation caused by the imminent threats of the pandemic, whether or not COVID-19 was actually present on the Eagles' property, and (3) the Policy expressly insures against "communicable disease" as physical damage. Ex. A at 4. Thus, for the reasons shown below, FM's contention that the Complaint fails to state a claim for relief runs contrary not only to the Policy's plain language and Pennsylvania law, but also to prior positions FM has taken in statements to insurance regulators and the courts.

A. The Eagles' Complaint Alleges that COVID-19 Caused "Physical Loss or Damage" to Its Property

1. The Standard for Physical Loss to Airspace Under the Prevailing Law is Loss of Utility

FM cites to multiple cases in this District as support for its position that the presence of a contaminant like COVID-19 at the Eagles' covered facilities ***cannot ever*** constitute "physical loss or damage to" the Eagles' property, and as a result, this lawsuit should be dismissed at its outset without leave to amend. The Eagles do not challenge that courts in the Eastern District (and other courts) have reached that conclusion as to other insurers and policyholders. However, in not one of those cases was the court asked to consider the scientific impact of COVID-19 on airspace within an insured structure, or the imminent threat of the release of COVID-19 into the airspace if persons are present in a way that they are present at the Eagles' facilities. The Eagles' Complaint as presently drafted includes multiple allegations that when COVID-19 is present at their facilities

[2] *See Port Authority*, 311 F.3d at 234.

(which, until vaccines became readily available, was essentially almost any time patrons entered the Eagles' facilities and coughed, sneezed, spoke—and, as is most often the case during football season—screamed to cheer on the Eagles or jeer the opposing team) the physical airspace in those facilities was so impacted, that the function of those facilities would be nearly eliminated and/or the premises would be rendered "uninhabitable and unusable" for their intended purpose. Compl. ¶¶ 10, 75-85. That purpose, of course, is to sell-out tightly-packed seats of the stadium to crowds of patrons for football (or during the summer months of 2020, concerts, soccer matches and other crowded seating events). To argue that the stadium with packed crowds present would be somehow "usable" without use of the seating section is like suggesting a water park is usable without operating water pipes. Such a conclusion ignores that the main source of the stadium's revenue—its seating function—was entirely eliminated and destroyed by the presence and imminent threat of release of COVID-19 in the stadium's airspace, rendering that part of the property nearly functionally useless and the stadium as a whole unfit for its intended purpose.

The Eagles did not include in the Complaint conclusions of infectious disease and epidemiology experts regarding the transmission rates of COVID-19 when people are packed together in stadiums (the Eagles intend to introduce that evidence through their experts as this matter proceeds in the litigation). Such conclusions, and a resolution of the resulting factual issues that they create, are not necessary at the pleading stage to survive a motion to dismiss. However, if the Court so requests, the Eagles can amend the complaint to include additional allegations to explain the rates at which COVID-19 can move through aerosols in the air from person to person in a crowded sports stadium, and the inability certainly during the early stages of the pandemic and then again during its winter resurgence to easily prevent the spread of the disease. Specifically, scientific studies show that COVID-19 can remain airborne in respiratory

particles for indefinite periods unless removed by ventilation systems, and that removal of airborne COVID-19 particles cannot be achieved with surface cleaning; indeed, surface cleaning may cause virus particles to become airborne. Removing COVID-19 from the air is not possible as a practical matter and no amount of cleaning will prevent reintroduction of the virus when an infected person enters a public space. [3].

For this reason, FM's reliance on earlier issued decisions in this District for the proposition that "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" (Mot. 9) is not decisive, here. Not until the experts testify about the level of contagion of COVID-19 at the Eagles' facilities when open for their intended purpose, and the extent of the necessary protocols to prevent its easy transmission from one spectator to another, can the Court make the factual conclusions suggested by FM in its motion to dismiss that COVID-19 should be considered

[3] Consistent with the physical loss and damage experienced by the Eagles at its covered property, experts have already opined in other similar matters of public record as to the precise mechanism by which such damage occurs. In litigation pending in the Nevada federal court against Factory Mutual's sister company, Affiliated FM Insurance Company, styled *Treasure Island LLC v. Affiliated FM Ins. Co*., No. 2:30- cv-00965-JC-EJY (D. Nev.), the insured's virology expert, Dr. Angela Rasmussen, opined as follows in her November 6, 2020 initial report: "COVID-19 is a communicable disease that impacts and physically damages Treasure Island's property in the following way: persons on site with COVID-19 shed the SARS-CoV-2 virus into the air and surfaces at Treasure Island. This results in tangible, demonstrable, and detectable physical alternation and transformation to the air and surfaces rendering them dangerous transmission vehicles for the potentially deadly disease." *See* Expert Report, Angela Rasmussen, attached to the complaint in *Cinemark Holdings, Inc. v. Factory Mutual Ins. Co.*, No. 4:21-cv-00011 (E.D. Tex.) (ECF No. 21-13). In the same case, the insured's epidemiology expert, Dr. Alex LeBeau, opined in his November 6, 2020 initial report as follows: "Individuals with COVID-19 at Treasure Island altered the physical characteristics of surfaces and the air of occupied spaces at the location and at facilities in the vicinity with respiratory secretions and aerosols. As a result, the surfaces and air of occupied spaces at Treasure Island became vehicles for COVID-19 transmission." *See* Expert Report, Alex LeBeau, attached to the complaint in *Cinemark Holdings, Inc. v. Factory Mutual Ins. Co.*, No. 4:21-cv-00011 (E.D. Tex.) (ECF No. 21-14).

a "no harm, no foul" event for the Eagles because COVID-19 can easily be erased from its facilities. *See Pinnell*, 2020 WL 1531870, at *5 (factual disputes are not appropriate for resolution on motion to dismiss); *Sang Koo Park*, 2020 WL 1284416, at *2 (same).

Also unavailing is FM's claim that because "COVID-19 damages people, not property. . . property insurance policies do not cover it as a physical loss or damage." Mot. 10. FM's position in this regard is undermined by the only Third Circuit opinion that it cites in its brief—*Port Authority.* In *Port Authority*, the court specifically acknowledged that "physical loss" under a property policy is met when airspace in a structure is so dangerous due to the presence or "imminent threat of the release of" an invisible contaminant (asbestos fibers, in that case) that the function of the property is nearly eliminated and/or the property is rendered "uninhabitable and unusable.[4] *Port Authority*, 311 F.3d at 234; *see also Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 826 (3d Cir. 2005) (relying on *Port Authority* to find bacterial contamination of water

[4] The standard articulated in *Port Authority* is consistent with a long line of case law finding coverage for property "loss" absent visible damage due to property being rendered unsafe to use as intended. *See, e.g.*, *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, 2014 WL 6675934, at *5 (D.N.J. Nov. 25, 2014) ("property can sustain physical loss or damage without experiencing structural alteration" where ammonia released inside facility); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 701, 703 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013) (per curiam) (direct physical loss where a home was rendered uninhabitable by toxic gases); *Matzner v. Seaco Ins. Co.*, No. 96-0498, 1998 WL 566658 (Mass. Super. Aug. 12, 1998) (holding the loss of use of apartment building, rendered uninhabitable by carbon monoxide, constituted a direct physical loss); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (because "a building's function may be seriously impaired or destroyed and the property rendered useless by the presence of contaminants . . . . we must conclude that contamination by asbestos may constitute a direct, physical loss to property."); *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 803 (2015) (cat urine odor constituted direct physical loss; "'physical loss' need not be read to include only tangible changes to the property that can be seen or touched"); *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332, 1335-36 (Or. Ct. App. 1993) (policy insuring against "accidental direct physical loss to property" covered methamphetamine odor that physically permeated the house and the cost of removing the odor was a "direct rectification of the problem").

supply could constitute a direct physical loss to property, despite lack of visible physical damage, because substance "reduced the use of the property to a substantial degree").[5]

In other words, FM seems to agree (as it must) that the Policy's coverage is triggered if a dangerous invisible substance is released into the air of an insured property and damages only lungs, not printing presses (like asbestos, natural gas, or other toxins), as long as there is enough of the substance to create dangerous conditions—for lungs—and the condition significantly impacts the use of the premises. The only difference that FM seems to draw between those admittedly covered circumstances, and COVID-19 release, is that COVID-19 is easily remedied, and it is not comparatively dangerous. FM does not cite any science, experts or other evidence to support this conclusion that it asks the Court to reach on a motion to dismiss. Instead, it simply cites to the decisions of other courts, which again do not cite to any actual scientific evidence. *See, e.g.*, *Clear Hearing Sols., LLC v. Cont'l Cas. Co.*, No. CV 20-3454, 2021 WL 131283, at *7 (E.D. Pa. Jan. 14, 2021) (did not consider the impact of COVID-19 because policyholder "expressly disclaim[ed] that the virus was on its property"); *Ultimate Hearing Sols. II, LLC v. Twin City Fire Ins. Co.*, No. CV 20-2401, 2021 WL 131556, at *6 (E.D. Pa. Jan. 14, 2021) (same); *Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:20-CV-03342-JDW, 2020 WL 7024287, at *3 (E.D. Pa. Nov. 30, 2020) (same; policyholder alleged it suspended operations only because of shutdown orders). These are factual issues, to be addressed through experts and supported by science as to whether (1) COVID-19 released into a crowded stadium (whether in use for a football game, concert, or another sporting event) is as dangerous as, or even more

[5] Although *Port Authority* was decided by the Third Circuit under New Jersey law, the Third Circuit has predicted the Pennsylvania Supreme Court would adopt a similar standard "in a case where sources unnoticeable to the naked eye" "reduced the use of the property to a substantial degree." *See Hardinger*, 131 F. App'x at 826.

dangerous than, the release of asbestos fibers, or other toxins, or (2) how easy it was from the very beginning of the pandemic to prevent the spread of this dangerous disease at the Eagles' facilities such that they were rendered unusable by the Eagles.

Nevertheless, FM argues that the presence of COVID-19 *cannot* cause physical loss or damage because it does not render property unusable due to a "physical condition" of the property. Mot. 9. For support, FM cites inapposite cases holding that COVID-19 does not trigger coverage. *Id*. However, none of those cases addresses the precise facts alleged by the Eagles'—which is that COVID-19 physically altered the "condition" of the Eagles' *airspace*, rendering it unfit for human occupancy and normal use. *See* Compl.¶¶ 56-58. In fact, the courts in FM's cases expressly left this issue open—only addressing whether COVID-19 could sufficiently alter *surfaces*.

For example, in *Moody v. Hartford Financial Group, Inc.*, cited by FM on multiple pages of its brief, the court expressly confined its analysis regarding the impact of COVID-19 on property to its impact on *surfaces*: "because *surfaces* would merely need to be cleaned, contamination would not meet the requirements under port authority because presence of the virus would not render the property useless or uninhabitable or nearly eliminate or destroy its functionality." No. CV 20-2856, 2021 WL 135897, at *6 (E.D. Pa. Jan. 14, 2021); *see also Indep. Rest. Grp. v. Certain Underwriters at Lloyd's, London*, No. CV 20-2365, 2021 WL 131339, at *7 (E.D. Pa. Jan. 14, 2021) ("contaminated surfaces can be cleaned and sanitized . . . . Therefore, actual contamination by the virus would not meet the requirements under *Port Authority* because presence of the virus would not render the property useless or uninhabitable or nearly eliminate or destroy its functionality.").

Indeed, FM's argument ignores the findings of multiple Pennsylvania state courts, which have recognized that COVID-19 *does* have an impact on the physical condition of property. *See*

Friends of DeVito v. Wolf, 227 A.3d 872, 888-89 (Pa. 2020) (recognizing the physical threat posed by COVID-19 as comparable to threats posed by a natural disaster); *MacMiles, LLC v. Erie Ins. Exch.*, No. GD-20-7753, at 14 (Pa. Ct. Com. Pl. Mar. 25. 2021) ("Plaintiff's loss of use of its property was both 'direct' and 'physical.' The spread of COVID-19, and a desired limitation of the same, had a close logical, causal, and/or consequential relationship to the ways in which Plaintiff materially utilized its property and physical space."); *Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London*, No. 00375, 2020 WL 6380449, at *1 (Pa. Ct. Com. Pl. Oct. 26, 2020) ("Taking the factual allegations made [by] the plaintiff's complaint as true, as this court must at this time, plaintiff has successfully pled to survive this stage of the proceedings. Moreover, the law and facts are rapidly evolving in the area of COVID-19 related business losses."); *Ridley Park Fitness, LLC v. Philadelphia Indem. Ins. Cos.*, No. 01093, 2020 WL 8613466, at *1 (Pa. Ct. Com. Pl. Oct. 20, 2020) ("The law (and facts) are evolving rapidly in this area and the issues raised herein deserve the full attention of courts and counsel with a complete record.").

This Court previously decided *Chester County Sports Arena v. Cincinnati Specialty Underwriters Insurance Co*., No. 20-2021, 2021 WL 1200444 (E.D. Pa. Mar. 30, 2021) and consolidated cases. In holding that "government-ordered restrictions" do not constitute a direct physical loss to property, the Court distinguished another federal case, *Studio 417, Inc. v. Cincinnati Insurance Co*., 478 F. Supp. 3d 794 (W.D. Mo. 2020), because "plaintiffs there alleged that the virus itself caused the requisite loss to property." 2021 WL 1200444, at *7. The Eagles concede that a "majority" of cases in this District have held that government orders issued in response to COVID-19 do not cause physical loss or damage, but as in *Studio 417*, the Eagles allege that COVID-19 permeated the Eagles' property, including the airspace, causing the requisite physical loss. The reasoning in *Studio 417*, and in other similar cases including in Pennsylvania,

is directly on point with the circumstances before this Court where the Eagles have alleged, or may allege with support from scientific authorities and statistical analyses, the presence of COVID-19 on the surfaces and in the air of its properties; and that COVID-19, a highly contagious and lethal disease, cannot be removed from surfaces using routine cleaning and cannot be removed from the air. Accordingly, this case is outside the ambit of *Chester County Sports Arena*.[6]

In this regard, the same federal court may, and has, decided Rule 12(b)(6) motions differently because of distinctions in the allegations of the complaint. In *Legacy Sports Barbershop LLC v. Continental Casualty Co.*, No. 20 C 4149, 2021 WL 2206161 (N.D. Ill. June 1, 2021), Judge Kocoras denied an insurer's motion to dismiss because the insured alleged "that, as a result of the presence of COVID-19, they needed to build a new outdoor patio, install social distancing barriers and germ sanitation stations, and remove work stations in order to promote proper social distancing," and thus, the insured's properties underwent a "distinct, demonstrable, physical alteration." *Id.* at *3. The motion was denied even though in a previous case, Judge Kocoras had granted a motion to dismiss where insured alleged "that the suspension of service was due to Governor Pritzker's Executive Orders, not for any reason related to the hotel property." *Bradley Hotel Corp. v. Aspen Specialty Ins. Co.*, No. 20 C 4249, 2020 WL 7889047, at *4 (N.D.

[6] FM's citation to other cases in which the policyholder alleged the cause of its loss was shutdown orders, not COVID-19 permeating airspace, are thus wholly inapposite to the question of whether COVID-19 can alter airspace in sufficient quantity to render property uninhabitable under *Port Authority*. *See Mareik Inc. v. State Farm Fire & Cas. Co.*, No. CV 20-2744, 2021 WL 1940647, at *5 (E.D. Pa. May 5, 2021) ("Plaintiff expressly does *not* attribute any loss to an actual contaminant in the air or water but, rather, attributes its loss to the city's Shutdown Order requiring the temporary suspension of non-essential business operations"); *Tria WS LLC v. Am. Auto. Ins. Co.*, No. CV 20-4159, 2021 WL 1193370, at *6 (E.D. Pa. Mar. 30, 2021) ("Plaintiffs' factual allegations differ materially from those of the *Port Authority* plaintiffs . . . Plaintiffs here are not proceeding on a similar 'physical contamination' theory and instead allege only that their loss of use was caused by government use restrictions, untethered to any specific unsatisfactory condition of or on the insured premises.").

Ill. Dec. 22, 2020). *See also Kenneth Siefert d/b/a The Hair Place v. IMT Ins. Co*., No. CV 20-1102 (JRT/DTS), 2021 WL 2228158 (D. Minn. June 2, 2021) (denying insurer's motion to dismiss amended complaint having previously dismissed original complaint without prejudice).

Recent federal court decisions also undermine FM's effort and show that the recently existing "overwhelming weight" of the federal authority is starting to turn. As time progresses and these more detailed questions are presented to the courts in connection with motions to dismiss, the weight may start to change to favor the policyholders—not the insurers. For example, in a decision last month, in which a Texas federal judge addressed an FM form that is nearly identical to the Eagles' policy, *Cinemark Holdings, Inc. v. Factory Mutual Insurance Co.*, the policyholder, like the Eagles here, alleged that COVID-19 was statistically certain to have been present in the air at a covered location, particularly if the insured did not take measures to prevent the presence of COVID-19. No. 4:21-CV-00011, 2021 WL 1851030 (E.D. Tex. May 5, 2021). Significantly, the Court ***denied FM's motion to dismiss*** because the policyholder's claim that "COVID-19 was actually present and actually damaged the property by changing the content of the air" plausibly triggered the Policy's insuring agreement. *Id.* at 4-5.

In fact, a recent decision of this Court also denied an insurers motion to dismiss under similar policy language for similar reasons. *See Susan Spath Hegedus, Inc. v. Ace Fire Underwriters Ins. Co.*, No. 20-2832 (E.D. Pa. May 7, 2021). In that case, the Court found that the policyholders' allegations regarding its business suspension due to COVID-19 plausibly constituted a "direct physical loss of … property at the described premises," in that the policyholder "lost the ability to physically operate its business at the described premises." *See id.* (concluding that the phrase "direct physical loss of or damage" is ambiguous); *see also Serendipitous, LLC/Melt v. Cincinnati Ins. Co.*, No. 2:20-cv-00873-MHH (N.D. Ala. May 6, 2021)

(denying motion to dismiss COVID-19 business interruption claim because "loss" must be interpreted separately from "damage" to mean "policyholder's separation from business property that is physically intact," and policyholder's allegations that they were physically deprived of property triggered coverage because COVID-19 made property "dangerous and unusable."). The reasoning in *Cinemark*, *Susan Spath*, and *Serendipitous* is directly on point with the circumstances before this Court, where the Eagles have alleged (and will prove with support from scientific authorities and statistical analysis) that COVID-19 was present in the air of its facilities, and that COVID-19, a highly contagious and lethal virus, cannot be removed from the air with routine cleaning. Accordingly, this case is outside of the ambit of the cases previously considered in this district, which did not allege that COVID-19 was present in airspace and merely found that COVID-19 can be easily removed from *surfaces*. *See, e.g.*, *Moody*, 2021 WL 135897, at *6; *Indep. Rest. Grp.*, 2021 WL 131339, at *7.

The rulings in the above-cited cases deciding early motions in COVID-19 business interruption cases are consistent with *Port Authority*: when the effect of a dangerous substance invisible to the naked eye, such as COVID-19, is to render the airspace of insured property unsafe, the substance has an effect "comparable to that of fire, water or smoke on a structure's use and function," and should be covered. *See Port Authority*, 311 F.3d at 234 ("the requirement that the contamination reach such a level in order to come within coverage limitation establishes a reasonable and realistic standard for identifying physical loss or damage"). Indeed, none of the concerns noted in *Port Authority* associated with extending coverage for invisible substances that do not render property uninhabitable or unusable apply here. *See id.* (noting that "a less demanding standard would require compensation for repairs caused by the inevitable deterioration of materials used in the construction of the building."). Here, unlike in *Port Authority*, the Eagles

have alleged the actual presence of COVID-19, and/or the near certain threat of such presence in the Eagles airspace. The Eagles will prove through expert testimony and discovery that COVID-19 was present in such quantities that it rendered the Eagles' property unusable for its intended purpose. The Eagles do not seek to transform the Policy into a maintenance policy—rather, the Eagles seek bargained-for indemnity for loss incurred as a result of the actual presence of a deadly communicable disease.

2. FM's Period of Liability Argument Does Not Help FM

FM argues that reading the Policy "as a whole" requires the Court to consider FM's "period of liability, which addresses the amount of time for which the Eagles may recover loss—FM must pay for all loss until the property is "repaired or replaced; and made ready for operations." Mot. 12. According to FM, this standard means that "physical loss or damage" can only be covered if it also can be "repaired," and cites to cases for this unremarkable concept. *Id*. This standard is not inconsistent with the Eagles' allegations of coverage. The Policy does not require that only "tangible property" be damaged for coverage to apply, and such a standard would be inconsistent with *Port Authority* and FM's own admission that toxins in the air can trigger coverage.

If damaged airspace can trigger coverage, then it follows that the Policy must be read such that airspace can be "repaired" and "made ready for operations." The Eagles allege in multiple places in the Complaint that they have been spent substantial sums on COVID-19 mitigation measures. Compl. ¶ 98. These efforts, among other things, included attempts to "repair" the air through air filtration and ventilation systems and make the premises "ready for operations." Multiple courts have found that such activities are sufficient to meet the period of liability standard. *See Ungarean, DMD v. CNA,* No. GD-20-006544, 2021 WL 1164836, at *7 (Pa. Ct. Com. Pl. Mar. 25, 2021) (rejecting FM's "period of liability" argument on the basis that the threat of COVID-19

necessitated many physical changes to business properties including, the "installations or renovation of ventilation systems," which undoubtably constituted "repairs" or "rebuilding" of property); *see also In re Society Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, No. 20 C 02005, 2021 WL 679109, at *9 (N.D. Ill. Feb. 22, 2021) ("There is nothing inherent in the meanings of those words that would be inconsistent with characterizing the Plaintiffs' loss of their space due to the shutdown orders as a physical loss. If, for example, coronavirus risk could be minimized by the installation of partitions and a particular ventilation system, then the restaurants would be expected to 'repair' the space by installing those safety features").

In *Ungarean*, for example, a Pennsylvania court applying the *Port Authority* standard recognized that damage to a policyholder's airspace is covered under a property policy's provision for "physical loss." 2021 WL 1164836, at *14. Notably, the *Ungarean* court specifically rejected FM's "repair/restoration" argument on the basis that the definition for "period of restoration" is consistent with the interpretation of "direct physical loss of …. Property" that encompasses loss of use of property, because the threat of COVID-19 necessitated many physical changes to business properties, including the "installations or renovation of ventilation systems," which undoubtably constituted "repairs" or "rebuilding" of property. *Id*. at *15.

Indeed, cases in this District finding the period of restoration to be persuasive against coverage expressly noted that the policyholders failed to allege COVID-19 on the premises that could have caused a physical change to property and, thus, there was nothing for the policyholders to repair or replace.[7]

[7] *See, e.g.*, *Toppers Salon & Health Spa, Inc.*, 2020 WL 7024287, at *3 (period of restoration inapplicable where policyholder specifically alleged it suspended operations only because of shutdown orders); *Clear Hearing Sols., LLC,* 2021 WL 131283, at *7 (noting policyholder "expressly disclaims that the virus was on its property" and thus, period of restoration could not

3. FM Has Admitted to Regulators that Communicable Disease, Such as COVID-19, Can Cause Physical Loss or Damage

FM's claim that COVID-19 can never as a matter of law constitute "physical loss or damage" is contradicted by communications between FM and state insurance regulators, in which FM itself said that the presence of communicable disease is physical damage under the property insurance policy it sells. In 2016, when FM updated the prior version of its Communicable Disease Response endorsement into a newer version—essentially identical to the version in the FM policy that the Eagles purchased—FM submitted a redline of the changes to New York State's insurance regulators, together with an explanation of the impact of the redlined changes. Ex. B at 31.[8] As seen on the redline, the prior version of the Communicable Disease Response coverage *expressly stated* that the presence of communicable disease was "physical damage" under the policy, and that cleaning costs were "repair" costs under the policy: "For the purpose of this Additional Coverage, the presence of and spread of communicable disease will be considered direct physical damage and the expenses listed above will be considered expenses to repair such damage." *Id*.

In other words, the prior version of the endorsement expressly told insureds that if they decided to purchase optional communicable disease coverage, the presence of communicable disease would qualify as physical damage. When FM removed this language from the Communicable Disease Response coverage page, it told regulators that the change *did not effect any material change in coverage*. *Id.* at 17 ("The changes are grammatical and editorial to clarify

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begin or end because there was nothing "affecting the physical condition of its premises"); *Ultimate Hearing Sols. II, LLC*, 2021 WL 131556, at *6 (same, noting policyholder "expressly disclaims that the virus was on its property").

[8] The Court may consider Exhibit B on a rule 12(b)(6) motion as a matter of public record, having been attached to the Second Amended Complaint filed in *Cinemark Holdings, Inc. v. Factory Mutual Ins. Co.*, No. 4:21-cv-00011 (E.D. Tex.) (ECF No. 21-3, filed Mar. 19, 2021).

intent. *There is no material change in coverage*." (emphasis added)). To avoid any doubt, FM further explained to regulators that:

> "[t]his endorsement was previously approved in filing FMIC-2011-13 as Communicable Disease Cleanup, Removal and Disposal Endorsement. The replaced Endorsement was previously available to insureds with healthcare occupancies only. **Grammatical and editorial changes have been made to remove the healthcare facility terms because *this coverage is now offered as optional to all clients***. The coverage also now allows for an officer of the Insured to trigger the coverage. This is an expansion in coverage."

Id. at 25.

FM's statements to regulators, made contemporaneously to its revisions, are compelling evidence of FM's intended meaning for policy language.[9] Under Pennsylvania law, extrinsic evidence such as drafting history is admissible to interpret the parties' intentions, establish ambiguity, or clarify ambiguity. *See*, *e.g.*, *Sunbeam Corp.*, 781 A.2d at 1193 (holding that discovery into the drafting history of the qualified pollution exclusion—an exclusion comparable

[9] Indeed, FM is not the only insurer that has expressly acknowledged that viruses and/or communicable disease can cause "direct physical loss or damage to" property, but which now seeks to argue the opposite. In 2006, ISO submitted a "Circular" to explain its new "Exclusion of Loss Due To Virus Or Bacteria" to state insurance regulators. The ISO Circular acknowledged: "Disease-causing agents may render a product impure (change its quality or substance), ***or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property.*** When disease-causing viral or bacterial contamination occurs, potential claims involve . . . ***business interruption (time element) losses***." Ex. C (emphasis added). In 2010, in an effort to implement virus exclusions distinct from ISO's and make the ISO Virus Exclusion "optional" rather than "mandatory," certain New York-based insurers, including Strathmore Insurance Company, submitted an "Explanatory Memo" to the New York Insurance Department. The Explanatory Memo expressly described the coverage that exists for "pandemic" diseases like COVID-19 in the absence of an ISO virus exclusion. Ex D at 41 ("the ISO position regarding the above Exclusion endorsement is that this exposure represents a 'pandemic exposure to loss'"). These insurers noted that coverage for virus-related losses is simply "provided by omissions of the [ISO Virus Exclusion]." *Id.* at 38. Now, faced with the losses caused by COVID-19, these same insurers who chose to issue policies without the ISO Virus Exclusion, and who admitted coverage was therefore "provided by omission," are arguing the exact opposite in COVID-19 coverage litigation, asserting that virus-related loss can ***never*** be covered.

to FM's ambiguous "Contamination" exclusion here—was warranted in order to interpret its meaning). At the very least, this evidence is important to show why FM's motion cannot be granted at this stage of the proceedings: the evidence shows that discovery is necessary to understand FM's actual intent regarding how its coverage really applies. Rather than simply accept FM's statements as set forth in a motion to dismiss as true, which is *not* the standard, the Eagles and the Court should be afforded the opportunity to review a fulsome record regarding what FM was thinking about the breadth of its coverage for communicable disease both before and after the inception of the pandemic—otherwise, what would be the point of allowing for discovery of drafting history if an insurer's arguments as to the meaning of its policy language in a motion to dismiss could never be tested through discovery.

4. FM Has Previously Argued that the Loss of Functionality Occurs when the Property Cannot Be Used as Intended, Not Only When The Property Fully Closes Down

In the Complaint, the Eagles state in paragraph 58 that FM has taken conflicting positions with respect to the point in time in which a property loses its functionality so as to have suffered "physical loss or damage." In litigation against another insurer, FM argued that the phrase was ambiguous and thus must be interpreted to broadly to allow for coverage when property loses "functionality or reliability" due to mold infestation, even though the property could continue to manufacture products. *See* Plaintiff Factory Mutual Ins. Co.'s Motion in Limine No. 5 Re Physical Loss or Damage, No. 1:17-cv-00760-GJF-LF (D.N.M.) (ECF No. 127, filed Nov. 19, 2019), attached as "Exhibit C" to the Eagles' Complaint [ECF 1]. Here, however, FM argues that the phrase is clear and unambiguous and in no circumstance could be interpreted in favor of coverage for the Eagles' loss of functionality or reliability of its premises due to COVID-19, because—as FM tells it—the property could still be used.

In particular, in *Factory Mutual Insurance Co. v. Federal Insurance Co*., FM argued that even though the insured manufacturer could continue to make products, the products became worthless and unfit for human consumption. FM argued: "Loss of functionality and/or reliability is especially significant, where as here, the property covered involved a product to be consumed by humans. Courts have concluded that the product is damaged where its 'function and value have been seriously impaired, such that the product cannot be sold.'" Compl. Exhibit C at 3-4 (citing numerous cases as support, **including *Port Authority* and *Hardinger*** for the proper interpretation of "physical loss or damage" as loss of functionality).

As FM argued in that case, the Eagles' property was rendered unusable under the *Port Authority* standard when its stadium seating could not be sold and was rendered unfit for human consumption, notwithstanding limited partial use of other parts of their property. Other of the Eagles' properties, such as their retail stores, closed completely. FM's newly crafted argument that COVID-19 cannot render a property non-functional directly contradicts its earlier position that what renders a property useless is its inability to function as intended.

Language cannot mean one thing when it suits FM and something quite different when it doesn't. *Sierra Packaging & Converting, LLC v. Chief Admin. Officer of OSHA*, 406 P.3d 522, 530 (Nev. App. 2017) (Tao, J., concurring) ("Law isn't a looking-glass world where words mean whatever happens to be most convenient in one moment and something very different in the next."). FM's attempt to minimize its prior admission in footnote 6 of its Memorandum is not effective—FM focuses on the fact that the matter involved "mold damage in a clean room," but completely disregards its relevant inconsistent positions in these two litigations. FM's conflicting positions as to the effect of the same policy language shows that even it believes its language is ambiguous. These inconsistencies further amplify the need for discovery.

B. The Policy Expressly Covers the Eagles Against "Risks Of" Communicable Disease and Does Not Require the Actual Presence of COVID-19

The Eagles allege that COVID-19 was present on its property. Compl. ¶ 5, 30, 105, 130. However, actual presence is not required under the plain language of FM's insuring agreement or the law (nor the "imminent threat of release" standard enunciated by *Port Authority*). The Policy does not merely cover "physical loss or damage," as FM suggests. Rather, the Policy promises to pay for loss as a result of "***ALL RISKS OF*** PHYSICAL LOSS OR DAMAGE to covered property, as well as 'TIME ELEMENT loss' directly resulting from physical loss or damage of the type insured." Ex. A at 4, 43 (capitalization in original, emphasis added). FM's deliberate use of "risks of" in the "Property Loss/Time Element" coverage grant means that the Eagles' time element loss incurred as a result of the imminent threat of COVID-19 is covered. This result is consistent with the holding in *Port Authority*, which recognized that coverage may be triggered by the "imminent threat" of the release of a harmful substance in the air, if that substance would cause a loss of utility. *See Port Authority*, 331 F.3d at 236.

1. "Risks Of" Means Threats of Loss or Damage

The plain and ordinary meaning of the undefined word "risk" is a "possibility of loss or injury." *Risk*, Merriam-Webster, www.merriam-webster.com/dictionary/risk. It is synonymous with "danger, chance, threat, possibility." *Risk*, Collins Dictionary, www.collinsdictionary.com/us/dictionary/english/risk. *See, e.g.*, *Westfield Ins. Co. v. Holland*, No. CIV.A. 07-5496, 2008 WL 5378267, at *6 (E.D. Pa. Dec. 19, 2008) (to determine the ordinary meaning of an undefined term, courts look to standard English language dictionaries).

FM's assertion that the Policy does not cover loss due to the threat of physical loss runs afoul of Pennsylvania case law interpreting "risks of" precisely in that manner. In *401 Fourth St.*,

879 A.2d at 169-70, the Pennsylvania Supreme Court found that policy language covering "risks of" direct physical loss involving collapse necessarily contemplates broader coverage than language simply insuring against "collapse." In particular, the court held "risks of" must mean that coverage extends beyond a situation of mere physical loss: "It covers not only loss for a collapse, but also the *risk* of loss *involving* a collapse." *Id.* (contrasting policy insuring against "risks of collapse" with policy language insuring against merely "collapse"). Accordingly, the Court held any interpretation that limited recovery to situations of mere actual collapse would "be to give too narrow an interpretation to the broad language drafted by the insurer." *Id.*

Other courts agree that the term "risks of" means that the Policy does not require actual damage to trigger coverage. *See Customized Distrib. Servs. v. Zurich Ins. Co.*, 862 A.2d 560, 564-65 (N.J. Super. Ct. App. Div. 2004) ("the term 'risk' in the provision 'RISK[ ] OF DIRECT, PHYSICAL LOSS" supports the view that the policy does not require that there be any actual physical damage to or alteration of the material composition of the property"); *Assurance Co. of Am. v. Wall & Assocs. LLC of Olympia*, 379 F.3d 557, 563 (9th Cir. 2004) ("risks of direct physical loss involving collapse" "not only covers actual collapse but also imminent collapse").

A comparison of two cases—*US Airways, Inc. v. Commonwealth Ins. Co.* and *United Airlines, Inc. v. Ins. Co. of State of Pa.*[10]—aptly illustrates the difference between policies containing "risks of" language and those that do not. In both cases, the airlines advanced two similar claims relating to the government's decision to close airports after 9/11. Despite identical facts, the airline whose policy covered "risks of" prevailed in establishing coverage, while the one

[10] *US Airways, Inc. v. Commonwealth Ins. Co.*, 65 Va. Cir. 238, 2004 WL 1637139 (Va. Cir. Ct. July 23, 2004); *United Airlines, Inc. v. Ins. Co. of State of Pa.*, 385 F. Supp. 2d 343 (S.D.N.Y. 2005), *aff'd* 439 F.3d 128 (2d Cir. 2006).

whose policy did not include such language did not. *Compare U.S. Airways*, 2004 WL 1637139, at *5 (policy insuring "against all risk of direct physical loss of or damage," "does not require actual damage or loss of property to invoke coverage"), *with United Airlines*, 385 F. Supp. 2d at 348-49 (policy promising to "indemnify the insured for property damage" did not cover business interruption losses from airport shutdown).

Case law regarding wholly remote threats—such as those cited by FM regarding closure due to the possibility of a fire that never occurred—are inapposite and do not preclude coverage here, where risks due to COVID-19 were imminent. *See* Mot. 13 (citing *Cleland Simpson Co. v. Fireman's Ins. Co. of Newark, N.J.*, 140 A.2d 41 (Pa. 1958)). Courts distinguish between threats that are remote versus imminent as triggering coverage under policies containing "risks of" language. *See Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986). In *Hampton Foods*, the Eighth Circuit found the "commonsense meaning" of the "risks of" language is that "any loss or damage due to the ***danger*** of direct physical loss is covered." *Id.* (emphasis original, internal punctuation omitted). The court rejected the insurer's argument "that construing the policy to cover mere 'danger' or 'risk' of physical loss is unreasonable," noting the insured's property loss was covered because the threat posed to property by the risk of collapse was "direct, concrete and immediate." *Id.* at 351, 352.

As was true for the insured in *Hampton Foods*, the Eagles here have alleged a "direct, concrete and immediate loss" of property due to the imminent threat of COVID-19. The closure of the Eagles' stadium and suspension of games is analogous to a wildfire arriving at the insured's property, prevented only from entering the building because of a fire-proof door. Just as the threat of property damage would be imminent but for a closed fire door, the threat of property damage caused by COVID-19 was imminent, and a near certainty but for the Eagles' closure and other

mitigation measures (as the Eagles will seek to prove through expert testimony and other evidence developed through discovery). Had the Eagles conducted business as usual, COVID-19 would have certainly entered the Eagles' Property and caused physical harm to the airspace and people inside. Compl. ¶¶ 83-85. *See Blue Springs Dental Care, LLC v. Owners Ins. Co.*, No. 20-CV-00383-SRB, 2020 WL 5637963, at *6 (W.D. Mo. Sept. 21, 2020) (insureds plausibly alleged COVID-19 was cause of direct physical loss because of the "continuing threat to health and safety posed by the virus" and common sense that "the *danger* of direct physical loss is covered") (emphasis in original); *see also Murray*, 509 S.E.2d at 8 (imminent risk of rockfall caused homes to become unusable or uninhabitable absent structural damage).

2. FM's Use of the Words "Risks Of" Must Be Given Effect

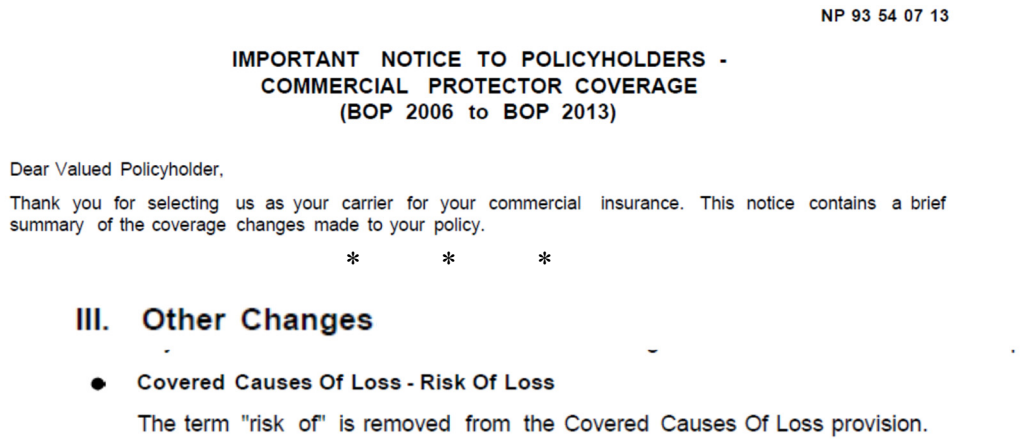
FM's use of the term "risks of" was deliberate and outcome determinative in this case. *See Steuart v. McChesney*, 444 A.2d 659, 662 (Pa. 1982) ("In determining what the parties intended by their contract, the law must look to what they clearly expressed. Courts in interpreting a contract, do not assume that its language was chosen carelessly"). The drafting history of property insurance forms confirm that FM's use of "risks of" in the Policy was a deliberate and meaningful choice. For example, a "Notice to Policyholders" included in a 2016 policy form issued by Cincinnati Insurance Company provides:

> **SECTION A. COVERAGE, 3.a. Covered Causes of Loss**
>
> As ISO has done in reaction to court decisions, we are deleting the word "Risks" from the preamble to the Covered Causes of Loss section of **FM 101**. Item **3.a.** is changed from "Risks of Direct Physical Loss" to "Covered Causes of Loss". (Clarification)

See Ex. E.

The reference to "ISO" in the "Notice to Policyholders" refers to the Insurance Service Office, which in 2013 modified the standard Businessowners Coverage Form by removing the

term "risk of" from the standard definition of "Covered Cause of Loss," as shown below:



NP 93 54 07 13

IMPORTANT NOTICE TO POLICYHOLDERS - COMMERCIAL PROTECTOR COVERAGE (BOP 2006 to BOP 2013)

Dear Valued Policyholder,

Thank you for selecting us as your carrier for your commercial insurance. This notice contains a brief summary of the coverage changes made to your policy.

* * *

III. Other Changes

- **Covered Causes Of Loss - Risk Of Loss**

  The term "risk of" is removed from the Covered Causes Of Loss provision.

See, e.g., Ex. F.

ISO's decision and recommendation to delete "risk of" was substantive, not merely stylistic. *See, e.g.*, *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, No. 20-CV-2211-JAR-GEB, 2020 WL 7078735, at *2 n.62 (D. Kan. Dec. 3, 2020) (suggesting that physical loss due to the imminent threat of COVID-19 contamination would trigger coverage under policy language insuring against "risks of" direct physical loss or damage.). At minimum, FM's deliberate choice to use "risks of" in its policy despite ISO's recommendation to remove such language raises questions of fact warranting discovery. *See Sunbeam Corp.*, 781 F.2d at 1193-94 (extrinsic evidence such as drafting history is admissible to interpret the parties' intentions, establish ambiguity, or clarify ambiguity). The Eagles should be permitted to discover the drafting history of the FM "Global Advantage All Risk Policy" form, ISO's recommendation, and the reason why FM chose not to delete "all risks of" from its Policy. These issues of fact preclude FM's Motion.

3. Any Ambiguity Must Be Resolved in the Eagles' Favor.

For the reasons discussed above, the Eagles' interpretation of FM's insuring agreement is the only reasonable interpretation of its plain language. But to the extent that the Court finds FM's

interpretation is also reasonable, that too means FM's Motion must fail. *See Madison Constr. Co.*, 735 A.2d at 106 (quoting *Hutchison v. Sunbeam Coal Co.*, 519 A.2d 385, 390 (Pa. 1986) (contractual language "is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense.").

None of the cases FM cites address whether coverage for "ALL RISKS OF PHYSICAL LOSS OR DAMAGE" means what FM says it does. Any uncertainty as to the meaning of the language only underscores the need for discovery. *See 401 Fourth St.*, 879 A.2d at 166 (language covering "risks of" direct physical loss involving collapse is ambiguous and must be construed in favor of the insured). In fact, none of the cases that have been decided against policyholders in the COVID-19 context have addressed the application of the "risks of" language as explained by the Eagles, here and in its complaint.

FM's effort on pages 12-13 of its brief to tell a different story is unavailing. Despite the case law existing both in Pennsylvania and elsewhere cited above that confirms that "risks of" as used in a property policy reasonably can be interpreted to mean "threat," FM cites to a New York case from almost 100 years ago addressing coverage under an "all perils" policy, and a 60 year old law review article as the reasons for its proffered interpretation of its "risks of" policy language. That the terms "risks" and "perils" were discussed in this case and article is interesting, but not impactful, particularly given that more recent authority on point—including from the Pennsylvania Supreme Court—holds to the contrary. At best for FM, it has added another possible interpretation of the terms, but its discussion does not eliminate the reasonableness of the Eagles' interpretation.

As the Eagles will show through evidence and testimony in this case, COVID-19 in the airspace of the Eagles' facilities physically impacts the airspace and the Eagles' ability to use its physical space for any relevant purpose (a football stadium without packed-in fans is like a

waterpark without any water—the structure may be standing, but it has no functional utility to its owner). Under applicable law, this constitutes "physical loss." Because FM chose to keep the "risks of" language in its policy, despite the decisions of a majority of insurers to delete it, FM's Policy covers not only loss experienced by the Eagles because of the actual presence of COVID-19, but also because of its inability to use its facilities due to the near certain threat of the release of COVID-19 if it did so, creating a seriously dangerous condition (as the Eagles will prove through evidence developed during litigation).

C. The Policy Expressly Insures Against Communicable Disease

1. The Policy Contemplates That Communicable Disease is Covered "Physical Damage"

FM's claim that the Eagles' business interruption losses do not trigger the Policy also are belied by FM's affirmative "communicable disease" coverage. In particular, FM's Policy insures against "communicable disease." Ex. A at 4, 31, 61. Thus, the Eagles' communicable disease losses are covered unless expressly excluded. *See, e.g.*, *Easy Corner, Inc. v. State Nat'l Ins. Co.*, 154 F. Supp. 3d 151, 155 (E.D. Pa. 2016) (citing *Nationwide Mut. Ins. Co. v. Cosenza*, 258 F.3d 197, 206 (3d Cir. 2001) (under an all-risks policy, once the insured establishes basic coverage, "the burden shifts to the insurer to establish an applicable exclusion to coverage."); *see also PNC Fin. Servs. Grp., Inc. v. Houston Cas. Co.*, 647 Fed. App'x 112, 117 (3d Cir. 2016) (coverage language is interpreted broadly while exclusions are "strictly construed against the insurer and in favor of the insured."). This includes not just the losses compensable under the Communicable Disease coverages, but additional coverages triggered once the Eagles experience a covered loss.[11]

[11] For example, the policy includes "Extra Expense" coverage, which covers the extra expense to temporarily continue the operation of the Eagles' business as nearly normal as practicable after its business was interrupted by communicable disease. Ex. A at 48.

FM argues that the Eagles' losses are excluded under the Policy's Time Element coverage because the presence of communicable diseases like COVID-19 do not constitute "physical loss or damage" under the terms of the policy. For all of the reasons discussed above, FM is wrong. It is also wrong because the Policy covers the presence of communicable disease as physical damage to property, as evidenced by the plain meaning of the Policy language. Compl. ¶ 10. Communicable diseases (including COVID-19) are physical—they spread from one person to another not through magic, but through physical agents capable of transmitting the disease (e.g., respiratory droplets containing a virus). *Id.* ¶¶ 75-81. The agents are often small—even microscopic—but are nonetheless real, physical, and tangible, and exist on surfaces and in the air. *Id.* ¶ 77. Moreover, the Policy contemplates that communicable diseases cause "damage"—it covers the "cleanup, removal and disposal of the actual not suspected presence of communicable diseases from insured property." Ex. A at 31. The Policy also *expressly recognizes* that disease-causing agents cause *physical damage*: "only *physical damage caused by such contamination* may be insured." *Id.* at 23, 72 (emphasis added) (defining "contamination" as "any condition of property due to the actual [] presence of . . . [a] disease causing or illness causing agent").

FM's argument that communicable disease does not cause physical loss or damage is entirely based on inapplicable case law and avoids any analysis of its unique policy language. Here, the Policy's provisions cannot be harmonized unless the presence of communicable disease is physical damage. *See, e.g.*, *S. Dental Birmingham LLC v. Cincinnati Ins. Co.*, No. 2:20-CV-681-AMM, 2021 WL 1217327, at *4-5 (N.D. Ala. Mar. 19, 2021) (denying insurer's motion to dismiss and rejecting physical damage case law cited by insurer because insurer failed to engage in analysis of the actual policy terms according to state law).

Consider, for example, the contamination exclusion at issue in FM's motion. If communicable disease is not physical damage (as FM's motion claims), the plain meaning of the communicable disease coverage directly conflicts with the plain meaning of the exclusion. The exclusion provides that the Policy excludes costs due to "contamination" unless "directly resulting from other physical damage not excluded by this Policy." Ex. A at 23. "Contamination," in turn, is "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 72 (emphasis added). Separately, the Policy defines communicable disease as disease "transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges." *Id.* In other words, the Policy defines disease-causing agents as excluded contamination, while simultaneously providing coverage for Communicable Disease transmitted from person to person, when it is *scientifically impossible* for *any communicable disease* to spread from one person to another without a disease-causing agent. FM's proffered policy interpretation causes these provisions to directly conflict.

If a communicable disease is physical damage, however, the two policy provisions harmonize seamlessly. This is because the contamination exclusion has an express exception for covered physical damage, with physical damage remaining covered despite the contamination exclusion: "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." Ex. A at 23. Because the presence of communicable disease is physical damage covered under the Policy, communicable disease satisfies this physical damage exception to the contamination exclusion.

FM's motion asserts that there is nothing unreasonable about an insurer generally excluding viral contamination while allowing for an exception for covered communicable disease. Mot. 14. But what FM hopes the Court will ignore, is that the exception is articulated as applying to "other *physical damage* not excluded"—confirming that communicable disease is physical damage. Ex. A at 23. For these reasons, FM's interpretation of the Policy as covering communicable disease as physical damage is at least reasonable. Therefore, FM's policy language must be construed in favor of coverage—even if FM's proposed narrower interpretation were *also* reasonable. *See Techalloy Co. v. Reliance Ins. Co.*, 487 A.2d 820, 823 (Pa. Super. Ct. 1984) (citing *Motley v. State Farm Mut. Auto. Ins. Co.*, 466 A.2d 609, 611 (Pa. 1983) ("[I]n close or doubtful cases, we should find coverage for the insured, and if we err in interpreting a policy provision, we should err in favor of the insured.").

2. Coverage for Communicable Disease Applies to The Entire Policy

The Policy's coverage for communicable disease is not an isolated, freestanding coverage, as FM suggests. Mot. 6. Where coverage is extended under an "all risks" policy such as FM's Policy to an additional peril, that extension filters throughout the entire policy unless the policy expressly states otherwise. Here, the Eagles elected to add and pay additional premium for Communicable Disease to be added as covered physical damage, and while the sublimit applies to one component of that coverage, it does not limit the rest—nor does the Policy state as much. In fact, courts have repeatedly rejected FM's stand-alone coverage argument. *See, e.g.*, *Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, 805 F. Supp. 3d 945, 953 (C.D. Cal. 2011) (rejecting FM's identical argument that its policy's specific flood sublimit applied to cap all of insured's coverage under FM's policy following Hurricane Katrina because once Northrop experienced a covered loss from flood, additional coverages were triggered with separate limits); *Hewlett-*

Packard Co. v. Factory Mut. Ins. Co., No. 04 CIV. 2791TPGDCF, 2007 WL 983990, at *3 (S.D.N.Y. Mar. 30, 2007) (rejecting FM's same argument that specific sublimit capped all coverage under policy).

If FM wanted to draft the Policy so that Communicable Disease coverage was freestanding and did not trigger other coverage under the Policy, it could have easily done so. For example, FM did so with regards to the Policy's Off Premises Data Services Time Element Coverage, which expressly states that "Coverage provided in this Extension is excluded from coverage elsewhere in this Policy." Ex. A at 55. FM could have easily included this *exact sentence* in the Communicable Disease coverages if that is how it wanted the coverage to apply. Or, FM could have stated that communicable disease would be covered as "non-physical" damage, so that insureds would not expect the coverage to trigger certain other coverages, as it did with the "Computer Systems *Non Physical Damage*" coverage. *Id.*

FM chose not to draft the Policy to include any of the above. Nor did it clearly state in any other way that Communicable Disease coverage would not trigger additional coverages. FM may not rewrite the policy language now. *See Standard Venetian Blind Co. v. Am. Empire Ins. Co.*, 469 A.2d 563, 566 (Pa. 1983) (refusing to "rewrite the parties' written contract."); *Mohn v. Am. Cas. Co. of Reading*, 326 A.2d 346, 351-52 (Pa. 1974) (the burden rests upon the insurer to phrase exceptions and exclusions in clear and unmistakable language); *see also Northrop Grumman Corp.*, 805 F. Supp. 2d at 952 ("the court declines to read language into the Flood Sublimit that was available and sophisticated parties chose not to employ.").

D. Case Law Holding COVID-19 Does Not Cause Physical Loss or Damage Under Different Policies, Providing Different Coverage, is Irrelevant

The cases FM cites do not warrant the conclusion that COVID-19 does not significantly

impact the function of property or render it uninhabitable or unusable, particularly where FM's Policy expressly covers communicable disease. As FM concedes, insurance policies are contracts whose interpretation is based on the mutual intent of the parties as evidenced by the terms of the policy read as a whole. *See* Mot. 7; *see also Kvaerner Metals*, 908 A.2d at 897 (explaining that the "primary goal in interpreting a policy . . . is to ascertain the parties' intentions as manifested by the policy's terms."). This means that parties to a contract can choose to include coverage in an insurance policy where that coverage would not generally be available and the existence and scope of that additional coverage plainly evidences the intent of the parties as to the coverage being sought. Here, the Eagles were provided with FM's unique, additional coverage for risks related to communicable disease.

Despite this, FM dedicates the majority of its motion to discussing case law interpreting different policies that do not provide coverage for "risks of" physical loss or communicable disease coverage, with different exclusions, applied to different facts, and often not including any allegations of the presence of COVID-19 at insured locations. Such decisions provide no guidance about how the instant policy should be interpreted. FM should not be permitted to sell uniquely broad coverage for an additional premium, and then when faced with a claim for that broader coverage, try to lump itself in with the all the others. *See, e.g.*, *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, No. 1:20 CV 1239, 2021 WL 168422, at *10 (N.D. Ohio Jan. 19, 2021) (concluding that voluminous case law cited by insurer examining whether COVID-19 was physical loss or damage under state law provided "little guidance in interpreting" the policy at issue because, *inter alia*, the "distinct Policies used different language and were applied to different facts."). Indeed, *not a single one* of the cases cited by FM analyzed whether communicable disease

constitutes physical damage under a policy that *expressly covers communicable disease*.[12]

To decide the Eagles' claims, the Court must examine the policy at issue. As discussed above, to date, only one court has considered these issues *under an FM policy providing communicable disease coverage*, and that court ***denied*** FM's motion for judgment on the pleadings. *See Cinemark*, 2021 WL 1851030 (concluding that the FM policy sold to Cinemark Theatres providing Communicable Disease coverage "is much broader than" the policies examined in the purportedly analogous case law cited by FM.).

II. THE EXCLUSIONS FM INVOKES TO SUPPORT DISMISSAL OF THE EAGLES' COMPLAINT DO NOT APPLY

There is no merit to FM's contentions that either the contamination exclusion or the loss of use exclusion warrant dismissal of the Eagles' Complaint. Mot. 13-17. Under Pennsylvania law, FM must show that each of these exclusions unambiguously apply in order to avoid coverage. *Cosenza*, 258 F.3d at 206; *Am. States Ins. Co. v. Md. Cas. Co.*, 628 A.2d 880, 887 (Pa. Super. Ct.

[12] Moreover, unlike the Eagles here, many of the policyholders in the cases cited by FM alleged that the sole cause of loss was government closure orders, not that COVID-19 was necessarily present on the premises. *See, e.g.*, *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); *Zagafen Bala, LLC et al v. Twin City Fire Ins. Co.*, No. 20-3033, 2021 WL 131657, at *3-4 (E.D. Pa. Jan. 14, 2021) (appeal filed); *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, No. 20-1949, 2020 WL 7395153 (E.D. Pa. Dec. 17, 2020) (appeal filed); *Toppers Salon & Health Spa, Inc.*, 2020 WL 7024287, at *3 (appeal filed). Further, many of the policies at issue in those cases did not have language insuring against "risks of" physical loss or damage. *See, e.g.*, *Kessler Dental Assocs. v. Dentists Ins. Co.*, No. 20-3376, 2020 WL 7181057 (Dec. 7, 2020); *4431, Inc. v. Cincinnati Ins. Cos.*, No. 20-4396, 2020 WL 7075318 (Dec. 3, 2020) (appeal filed); *Brian Handel DMD PC v. Allstate Ins. Co.*, No. 20-3198, 2020 WL 6545893 (Nov. 6, 2020). In the few cases where the policies did have such language, the court did not address it. *See, e.g.*, *Indep. Rest. Grp., LLC*, 2021 WL 131339 (appeal filed); *Clear Hearing Sols. LLC*, 2021 WL 131283. Most of the policies also contained explicit "Virus" exclusions—not "contamination" exclusions, like the FM Policy. *See, e.g.*, *Moody*, 2021 WL 135897 (appeal filed); *Brian Handel*, 2020 WL 6545893; *Toppers*, 2020 WL 7024287; *Newchops*, 2020 WL 7395153; *Zagafen*, 2021 WL 131657; *Kessler*, 2020 WL 7181057.

1993); *see also Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1446 (3d Cir. 1996) ("[T]he insurer bears the burden of proving the applicability of any exclusions or limitations on coverage, since disclaiming coverage on the basis of an exclusion is an affirmative defense."). As demonstrated below, FM does not and cannot make the showing required to support dismissal under Rule 12(b)(6) with respect to either exclusion, without any opportunity to test FM's claims through discovery.

A. The Contamination Exclusion Does Not Apply

FM's contention that the contamination exclusion can be read to eliminate coverage for the Eagles' losses flouts settled principles of policy interpretation requiring exclusions to be read narrowly, and for policy provisions that are "either ambiguous, obscure, uncertain or susceptible to more than one construction," to be construed "most strongly against the insurer" and in favor of the insured. *See Carey v. Emp'rs Mut. Cas. Co.*, 189 F.3d 414, 421 (3d Cir. 1999). This exclusion provides as follows:

> 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, the only physical damage caused by such **contamination** may be insured.

Ex. A at 23 (bold in original). The Policy defines "**contamination**" 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 72.

A reasonable interpretation of this exclusion, when read together in context with the definition of contamination, is that it the exclusion applies only to traditional industrial pollutants. This reading is supported by the interpretative cannon known as *noscitur a sociis*, which prescribes that "a word is known by the company it keeps." *Yates v. United States*, 574 U.S. 528, 543 (2015). This cannon exists to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words," so as not to give "unintended breadth" to a provision. *Id.* The terms that surround "virus" and "pathogen or pathogenic organism" refer to traditional pollutants. It follows that the "virus" and "pathogen or pathogenic organism" should be read to narrowly apply to a similar hazardous and/or industrial pollution context, which cannot reasonably include COVID-19, a communicable disease, at the Eagles' Property. *See Paternostro v. Choice Hotel Int'l Servs. Corp.*, No. CIV.A. 13-0662, 2014 WL 6460844, at *14 (E.D. La. Nov. 17, 2014) (bacteria was not deemed a "pollutant" as the term is generally understood for purposes of a pollution exclusion).

The court's decision in in *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, No. A-20-816628-B, 2020 WL 7190023, at *3 (Nev. Dist. Ct. Nov. 30, 2020), is instructive. In that COVID-19 coverage case, the court considered a comparable exclusion and agreed that the policyholder's interpretation that the exclusion applied only to traditional industrial contaminants was reasonable:

> Starr has not shown that it is unreasonable to interpret the Pollution and Contamination Exclusion to apply only to instances of traditional environmental and industrial pollution and contamination that is not at issue here, where [insured's] losses are alleged to be the result of a naturally occurring communicable disease. This is the case, even though the Exclusion contains the word "virus." *See e.g. Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.*, No. 6:20-cv-1174, 2020 WL 5939172, at *4 (M.D. Fla. Sept. 24, 2020), (Denying coverage for losses stemming from COVID-19, however, does not logically align with the grouping of the virus exclusion with other pollutants such that the Policy necessarily anticipated

> and intended to deny coverage for these kinds of business losses.) Accordingly, the Court finds that the Pollution and Contamination Exclusion does not apply to exclude [the insured's] claims.

If FM had desired to exclude viruses in all contexts, including with respect to a communicable disease, FM could have used in the contamination exclusion the words "communicable disease" (the definition of which more closely matches the COVID-19 disease, than the more general terms that FM uses in the contamination definition), but it did not. FM also could have used the standard "loss due to Virus or Bacteria" exclusion drafted by the ISO, an entity charged with drafting policy language for the insurance industry and for the particular purpose of drafting language that protected the insurance industry from coverage for pandemics. FM could have also used an express pandemic exclusion. But it did not. Compl. ¶ 10. FM is one of the world's most sophisticated property insurers. It touts the "depth and breadth of [its] expertise and superior underwriting is second to none…[they] are skilled in anticipating the unique needs of this market…[and] constantly explore new ways to expand and tailor coverage to meet [their] brokers' and clients' ever-evolving business needs."[13] As a huge international property-only insurer, FM directs substantial annual resources to studying risks and those that may in the future cause loss to policyholders and deciding which risks it is willing to cover and those that it intends to avoid. [14] FM has armies of underwriters and experts in drafting policy language to "ensure contracting

[13] See https://www.affiliatedfm.com/about/why-afm (accessed July 15, 2020).

[14] See https://www.fmglobal.com/about-us/why-fm-global (accessed July 15, 2020) (You've probably come across other insurance companies that offer many lines of coverage. At FM Global, we give everything we've got to commercial and industrial property insurance…"[we] ground our recommendations in world-class scientific research.") See also https://www.fmglobal.com/products-and-services/our-approach (accessed July 15, 2020) ("Where other insurance companies rely primarily on actuarial tables, we use a hands-on, engineering-based approach. The result? Property insurance coverage based on the realities of your business and your particular property risk management challenges.")

certainty" for both itself and its policyholders.[15] If any insurer should have understood the multiple risks associated with communicable disease and potential pandemic, FM should have understood these risks and drafted policy language to clearly indicate its appetite to cover, or not cover, those risks. FM is stuck with the words that it used and those words, when narrowly construed in favor of coverage, do not come close to clearly and unambiguously conveying FM's purported intent.

The cases that FM cites in support of its interpretation of the contamination exclusion are inapposite because they involve policies with ISO virus exclusions (or other similar express virus exclusions) rather than contamination exclusions. *See, e.g.*, *Moody*, 2021 WL 135897; *Brian Handel*, 2020 WL 6545893; *Toppers*, 2020 WL 7024287; *Newchops*, 2020 WL 7395153; *Zagafen*, 2021 WL 131657; *Kessler*, 2020 WL 7181057. These cases, which construe very different policies containing very different exclusions, do not establish that the interpretation FM advances is the only reasonable reading of the contamination exclusion in its Policy.[16] *See Cosenza*, 258 F.3d at 206 (under Pennsylvania law, "exclusions are always strictly construed against the insurer and in favor of the insured.").

1. The Contamination Exclusion Only Applies to "Costs" And Does Not Apply to the Eagles' Losses.

FM's contention that the contamination exclusion can be read to eliminate coverage for the business interruption losses and extra expenses that COVID-19 caused the Eagles to incur also

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[15] See https://www.affiliatedfm.com/-/media/Files/AFM/P15220_AFM-Capabilities-Brochure.pdf ("While we have always endeavored to offer the broadest coverage, now are striving to offer the simplest too. Our goal? Clarity before a loss ever occurs." "Its all about reducing opportunity to for error while increasing contract certainty.")

[16] These cases are also inapposite because they considered exclusions that expressly apply to "loss," and the policies not containing coverage for communicable diseases.

disregards express limitations set forth in the exclusion itself. The exclusion applies only to "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." Ex. A at 23 (emphasis added). Thus, by its terms, the exclusion applies only to "costs," not loss. The Eagles' claims are for Time Element *loss* and Extra Expense *loss*, which are not *costs* and therefore cannot properly be read to be subject to the contamination exclusion. Compl. ¶ 7.

Other provisions in the FM Policy reinforce this interpretation. The Policy distinguishes between "loss" and "costs," and certain sections of the Policy deal with only one of the two. For example, the Communicable Disease coverages contain two sections: one covering "the reasonable and necessary ***costs*** incurred by the Insured;" and the other covering the "Actual ***Loss*** Sustained . . . by the Insured." Ex. A at 31, 62. If FM had intended the terms "loss" and "cost" to be synonymous, there would have been no need for separate coverage grants or for use of two different terms. Similarly, when FM wished to exclude both costs and losses, it did so expressly—the Policy excludes "*loss* from enforcement of any law or ordinance . . . requiring the demolition of any property, including the *cost* in removing its debris." *Id.* at 20 (emphasis added). The fact that FM chose to include only costs and not loss in the contamination exclusion, at minimum, shows that it is reasonable to read the exclusion as applying only to costs, not to all damages the policyholder sustains. *See Am. Motorists Ins. Co. v. Trane Co.*, 718 F.2d 842, 845 (7th Cir. 1983) (exclusion "only applied to costs associated with discovering and remedying faulty products . . . [but not] alleged other damages.").

The Southern District of New York recently endorsed precisely this conclusion in another COVID-19 coverage case against FM. *See Thor Equities, LLC v. Factory Mutual Ins. Co.*, No. 20 Civ. 3380 (AT), 2021 WL 1226983, at *4 (S.D.N.Y. Mar. 31, 2021). The contamination exclusion

and definition of contamination in that case are identical to the exclusion and definition in this case. *Compare Thor Equities*, 2021 WL 1226983, at *3 *with* Ex. A at 23, 72. And the Southern District of New York's reasoning was premised on the same interpretation FM advances here:

> [T]he Policy distinguishes between "cost" and "loss" elsewhere, but no such distinction is present here. . . . Moreover, the plain meaning of cost—"the amount paid or charged for something"—could plausibly refer to affirmative outlays, like paying for temporary use of other property. *Cost*, Black's Law Dictionary (11th ed. 2019).

Thor Equities, 2021 WL 1226983, at *3

If FM had intended for the contamination exclusion to apply to Time Element loss and Extra Expense loss, it could have easily included those terms in the exclusion. FM did not and it cannot properly seek to rewrite the exclusion now. *See Carey*, 189 F.3d at 421 ("Where the language of a policy prepared by an insurer is either ambiguous, obscure, uncertain or susceptible to more than one construction, courts will construe the language most strongly against the insurer and accept the construction most favorable to the insured").

2. The Contamination Exclusion Contains Narrower Causation Language Than The Policies in Cases FM Cites

The cases FM cites in favor of its reading of the contamination exclusion also are inapposite because they construed virus exclusions containing broad causation language not found in the Policy FM sold to the Eagles. FM's contamination exclusion applies only to "contamination and any cost *due to* contamination." Ex. A at 23.

The causal showing required by the term "due to" in FM's contamination exclusion is quite specific. It requires a *direct* relationship between an identified contaminant and a resulting injury for the exclusion to apply. As discussed above, that the provision is inapplicable on its face to "communicable disease" is the only common sense reading of the policy language: the policy

explicitly distinguishes a "virus," or any other "disease causing or illness causing agent," from "communicable disease." *Id.* FM's expansive reading of its contamination exclusion would erase its affirmative grant of coverage for "communicable disease." Communicable disease is a trigger of property damage coverage under the Policy, and the Policy pays certain "Additional" Property Damage and Time Element benefits to address communicable disease ("response" costs at the Eagles' properties) and to compensate the Eagles for losses resulting from communicable disease at its properties (interruption by communicable disease).

By contrast, the cases highlighted in FM's brief addressed policies with "virus" exclusions that applied if a virus was a "direct or indirect" cause of loss. These policies also contained "anti-concurrent causation" verbiage activating the exclusion if a "virus" appeared anywhere within the chain of causation resulting in the loss. *See, e.g.*, *Moody*, 2021 WL 135897; *Brian Handel*, 2020 WL 6545893; *Toppers*, 2020 WL 7024287; *Newchops*, 2020 WL 7395153; *Zagafen*, 2021 WL 131657; *Kessler*, 2020 WL 7181057. These provisions seek to capture "remote" causes of loss and not only the "direct" or "immediate" cause of loss, as does FM's "due to" formulation. Regardless of what FM characterizes as the unanimity of viewpoint in the cases dismissing policyholders' claims, these cases are inapplicable to an assessment of the direct and immediate "due to" causation requirements in the FM contamination exclusion. For example, in *Moody*, the policy at issue contained "anti-concurrent causation" verbiage in connection with its "virus" exclusion stating that the insurer would not pay: "for loss or damage caused directly or indirectly by ... Presence, growth, proliferation, spread or any activity of 'fungi', wet rot, dry rot, bacteria or virus." *See Moody*, 2021 WL 135897, at *8. Unlike FM's contamination exclusion, the exclusion in *Moody* applied "regardless of any other cause or event that contributes concurrently or in any

sequence to the loss" and "whether or not the loss event results in widespread damage or affects a substantial area." *Id*.

The "anti-concurrent causation" verbiage in the "virus" exclusions in the cases upon which FM relies means that "the virus need only be one cause of loss, not the sole or proximate cause of loss, for the exclusion to bar coverage . . . ." *Id.* at *9. The question that matters when analyzing an anti-concurrent causation clause is whether an excluded cause "was one contributing cause of the loss at issue." *See, e.g.*, *Mashallah, Inc. v. West Bend Mutual Ins. Co.*, No. 20 C 5472, 2021 WL 679227, at *3-4 (N.D. Ill. Feb. 22, 2021) (finding policyholder could not recover for loss as a result of "virus" even if governor's shut down orders contributed concurrently to the loss, due to the virus exclusions' anti-concurrent causation language.)

Insurance coverage disputes are resolved based on *the actual words used in the policy* at issue. FM's reliance on the foregoing cases only makes more conspicuous the absence of "anti-concurrent causation" verbiage in its contamination exclusion. FM's contamination exclusion applies only to costs and "due to the actual or suspected presence" of a contaminant. Ex. A at 23, 72. This language requires a *direct connection* between the injury and the contamination. The cause and effect must be immediate, and not remote.

There is nothing new about this formulation, and FM was undoubtedly well-aware of it when it chose not to include "anti-concurrent causation" verbiage in its contamination exclusion. The case law construing "due to" causation requirements in "all risk" policies dates to the 1920s, if not earlier. In 1974, the Second Circuit held that:

> The all risk policies exclude "loss or damage due to or resulting from" the various enumerated perils, a phrase that clearly refers to the proximate cause of the loss. Remote causes . . . are not relevant to the characterization of an insurance loss. In the context of this commercial litigation, the causation inquiry stops at the efficient physical cause of the loss; it does not trace events back to their metaphysical

> beginnings. The words "due to or resulting from" limit the inquiry to the facts immediately surrounding the loss.

Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1006 (2d Cir. 1974) (quoting *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co*., 263 U.S. 487, 492 (1924) ("The common understanding is that in construing these policies we are not to take broad views but generally are to stop our inquiries with the cause nearest to the loss. . . . since theoretically at least the parties can shape their contract as they like."). FM shaped the FM Policy as it liked. It did not abrogate "due to causation" in favor of "anti-concurrent causation."

The Eagles do not seek coverage "due to the actual or suspected presence" of a virus at property. As alleged in the Eagles' Complaint, they seek coverage "due to" the presence of communicable disease at property. "Virus" is not the *immediate* cause of the loss for which the Eagles seek coverage from FM; communicable disease is. The contamination exclusion in the FM Policy does not preclude coverage "due to" the presence of communicable disease at property. Ex. A at 23. It could not do so, given that the Policy explicitly *covers* losses due to the presence of communicable disease at property. The "due to" causation standard incorporated into the contamination exclusion "does not trace events back to their metaphysical beginnings," and "limit[s] the inquiry to the facts immediately surrounding the loss." *Pan Am World Airways*, 505 F.2d at 1006.

This conclusion also implicates the basic rule of insurance contract interpretation that courts should construe policy language in favor of the insured unless it has a high degree of certainty that the policy language "clear[ly] and unambiguous[ly]" excludes the claim. *See 401 Fourth St.*, 879 A.2d at 170. The FM Policy does not clearly and unambiguously exclude the Eagles' claim because covered communicable disease is the immediate cause of the Eagles' loss.

"Virus" is, at best, a "remote" cause of the loss and FM chose consciously not to include the type of "anti-concurrent causation" verbiage in its contamination exclusion that would have applied to "indirect" causes of loss, "remote" causes of loss, all proximate causes of loss, or all causes of loss in a long sequence of loss.

3. FM Cannot Establish that the Eagles' Construction Is Unreasonable

For the reasons discussed above, the Eagles' interpretation of the contamination exclusion is the only reasonable interpretation. However, even if the Court were to conclude that FM's interpretation is reasonable, then the Eagles' interpretation is *also* reasonable. The Policy is thus ambiguous and should be construed in the Eagles' favor. *Techalloy Co.*, 487 A.2d at 823 (citing *Motley*, 466 A.2d at 611 ("[I]n close or doubtful cases, we should find coverage for the insured, and if we err in interpreting a policy provision, we should err in favor of the insured.").

As discussed above, in *Thor Equities*, the court found that an identical contamination exclusion was ambiguous because both parties proffered reasonable interpretations. 2021 WL 1226983, at *4. The court explained, "it . . . cannot be said that the exclusion unambiguously forecloses recovery on Thor's losses due to contamination." Accordingly, the Court rejected the insurers' motion because it could not conclude that "there is no reasonable basis for a difference of opinion." *Id.* (quoting *Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990). The same logic applies here.

B. The Loss of Use Exclusion Does Not Apply

FM's attempt to apply the Policy's "loss of market or loss of use" exclusion fares no better. First, FM admits that if "loss of use" results from an event that meets FM's trigger standard ("all risks of physical loss or damage" unless excluded), then the exclusion does not apply: "the Loss of Use Exclusion precludes coverage for pure loss of use claims, unaccompanied by physical loss

or damage." Mot. 17. Accordingly, if the Court agrees that there is any ambiguity as to whether the Eagles meets the trigger standard, then by FM's own words, the exclusion does not apply.

Second, the exclusion is meant to address situations where the insured suffers loss due to conditions wholly unrelated to the physical loss or damage event at issue. For example, if a nearby fire fills an outdoor theatre with smoke and prevents the owner from proceeding with an event due to the smoke, the exclusion does not apply. *Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-CV-01932-CL, 2016 WL 3267247, at *6 (D. Or. June 7, 2016), *vacated on other grounds*, No. 1:15-CV-01932-CL, 2017 WL 1034203 (D. Or. Mar. 6, 2017). However, if on the day of the fire, the performers block the entrance to the theatre in protest of low wages, and the owner loses use of the theater due to the protest, the resulting loss would not be covered because the cause of the "loss of use" is then an external event. *See id.* ("The exclusion only makes sense in the context of the policy when a delay external to the damage causes a loss of use"). The same is true if a manufacturer of red cars loses its manufacturing facility due to fire. If, the day before the fire, the market changed and consumers no longer wanted red cars, losses stemming from that "loss of market" has nothing to do with the fire and thus are excluded. *See id.* (any broader reading of the exclusion would "void the entire purpose of a business interruption policy"); *e.g.*, *Henderson Rd. Rest. Sys.*, 2021 WL 168422, at *3 (rejecting insurers' application of the exclusion to restaurant's COVID-19 claim and refusing to interpret exclusion in a manner inconsistent with the terms of the business income coverage). As a result, the exclusion cannot apply if the insured's inability to use its premises is tied, as here, to a covered peril.

CONCLUSION

For the foregoing reasons, the Eagles respectfully request that this Court deny FM's Motion to Dismiss.

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Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Charles A. Fitzpatrick IV, Esq. hereby certify that on this 4th day of June 2021, I caused a true and accurate copy of the foregoing to be served via the Court's ECF system upon all counsel of record.

/s/ Charles A. Fitzpatrick IV