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

MILKBOY CENTER CITY LLC, individually and on behalf of all others similarly situated, Plaintiff, v. THE CINCINNATI CASUALTY COMPANY, Defendant.	CIVIL ACTION NO. 2:20-CV-02036-TJS

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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Plaintiff, MilkBoy Center City LLC ("Plaintiff" or "MilkBoy"), on behalf of itself and all others similarly situated, respectfully submits this memorandum in opposition to the motion of Defendant Cincinnati Casualty Company ("Defendant" or "Cincinnati") to dismiss the complaint for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6).

I. INTRODUCTION

Plaintiff owns and operates MilkBoy Philadelphia, a music venue, bar, and restaurant. Plaintiff purchased from Cincinnati a property insurance policy that included business income coverage for losses caused by an act of civil authority. Although policies issued by other insurers include so-called "virus exclusions," MilkBoy's policy issued by Cincinnati does not include any such exclusion.

Plaintiff was forced to suspend its business operations due to the Closure Order issued by Pennsylvania Governor Tom Wolf on March 19, 2020, which required all non-life-sustaining businesses in the Commonwealth to cease operations and close all physical locations, in light of the COVID-19 pandemic. Plaintiff timely submitted a claim under the business income coverage provision in the policy, which Defendant denied. As alleged in the Complaint, Defendant has denied all business interruption claims filed by holders of policies similar to MilkBoy's policy when claims were filed based on Closure Orders issued by state, county and municipal executive officers throughout the country as a result of the threat of the virus causing COVID-19.

In its motion to dismiss, Cincinnati attempts to defend its blanket refusal to fulfill the promises it made to its policyholders that their business interruption losses would be covered under Cincinnati's "all-risk" policies. These policies broadly cover the business losses resulting from any kind of "physical loss" or "physical damage," unless otherwise excluded in writing.

Plaintiff alleges that the Closure Orders implementing a governmental suspension, which had a devastating effect on Plaintiff's business, triggered the Policy's business interruption coverage.

It is black-letter law that any ambiguities in an insurance contract must be construed in favor of finding coverage. "Ambiguous provisions in an insurance policy must be construed against the insurer and in favor of the insured; any reasonable interpretation offered by the insured, therefore, must control." *Med. Protective Co. v. Watkins*, 198 F.3d 100, 104 (3d Cir. 1999). *See also 401 Fourth St., Inc. v. Investors Ins. Group*, 583 Pa. 445, 879 A.2d 166, 171 (2005); *Cincinnati Ins. Co. v. Cham's Jewelry Art, Inc*., 31 Fed. Appx. 793, 795 (3d Cir. 2002) ("because insurance policies are frequently considered to be contracts of adhesion, any ambiguity must be construed in favor of the insured; and. . . exceptions and exclusions to the general liability of the insurer are strictly construed against the insurance company.").

Here, as shown below, the express provisions of the Policy—especially when ambiguities are interpreted in Plaintiff's favor—require Cincinnati to cover MilkBoy's business interruption claim. Furthermore, MilkBoy had every reason to expect that its business interruption coverage would be triggered by the terms of the Policy, since the Closure Order issued March 19, 2020 made the premises untenantable and caused an immediate and significant cessation in MilkBoy's ability to conduct each of its business lines: presenting music performances; serving customers at its restaurant; and serving customers at its bar. That expectation was especially apt here because, unlike many other insurance companies that chose to incorporate some form of virus exclusion into their policies, Cincinnati did not. Thus, even in the event that the insurance contract may *not* provide coverage by its terms—which Plaintiff contends is *not* the case here—the Court may nonetheless enforce the agreement to fulfill the reasonable expectations of the policyholder.

For all of these reasons, as further discussed below, Cincinnati's motion to dismiss should be denied.

II. FACTUAL AND PROCEDURAL BACKGROUND

This lawsuit arises from Cincinnati's denial of insurance coverage under its insurance policy, No. ENP 053 39 92, issued to MilkBoy for a policy period of April 29, 2019 to April 29, 2022 (the "Policy") and attached as Exhibit A to the Complaint ("Compl."). Plaintiff owns and operates MilkBoy Philadelphia, a music venue, bar, and restaurant. Compl. ¶1. Plaintiff purchased the Policy in exchange for substantial premiums, based, among other things, on the Policy's provision of coverage for losses not expressly excepted, in writing, in the Policy and endorsements.

The Policy at issue is an "all-risk" insurance policy, meaning that unless the Policy specifically enumerates an exclusion, the peril is covered.[1] Pursuant to the policy's "Building and Personal Property Coverage Form," Form FM 101 05 16, the policy covers "direct 'loss' to Covered Property at the 'premises' caused by or resulting from any Covered Cause of Loss." The Policy defines "Covered Cause of Loss" as "direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part." *See* Policy at 39, 106.[2]

Cincinnati agreed to pay for its insured's actual loss of "Business Income" sustained due to the necessary suspension of its operations during the "period of restoration." Compl. ¶41. Under the Cincinnati policy, a "suspension" means "the slowdown or cessation of your business activities" and "a part or all of the 'premises' is rendered untenantable." Compl. ¶42.

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[1] "All-risk" policies are discussed *infra*, Section III.B.2.

[2] Citations to page numbers of the Policy comport with the pagination of Defendant's Exhibit A to its Motion to Dismiss. Dkt. No. 14-1.

The Policy contained the following relevant provisions (*see* Compl. ¶23):

a. Pursuant to the Business Income coverage provisions within the "Building and Personal Property Coverage Form," Form FM 101 05 16, and "Business Income (and Extra Expense) Coverage Form," Form FA 213 05 16, Cincinnati promised that it that would "pay for the actual loss of 'Business Income'. . . you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration.'"

b. Pursuant to the form's Extended Business Income provision, Cincinnati promised that "[f]or 'Business Income' Other Than 'Rental Value,' if the necessary 'suspension' of your 'operations' produces a 'Business Income' or Extra Expense 'loss' payable under this Coverage Part, we will pay for the actual loss of 'Business Income' you sustain and Extra Expense you incur. . ."

c. Pursuant to the form's Extra Expense provision, Cincinnati promised "[w]e will pay Extra Expense you sustain during the 'period of restoration.'"

d. Pursuant to the Civil Authority coverage extension in FM 101 05 16, Cincinnati promised that "[w]hen a Covered Cause of Loss causes damage to property other than Covered Property at a 'premises', we will pay for the actual loss of 'Business Income' and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the 'premises'. . ."

Plaintiff's future is now threatened by the government-ordered shutdowns prohibiting performances and on-site dining, which prevent patrons' and employees' access to the property and prohibits use of the property for its intended purpose. Compl. ¶1. Efforts to prevent exposure to COVID-19 have caused civil authorities throughout the country to issue similar

orders requiring the suspension of non-essential businesses and preventing citizens from leaving home for non-essential purposes (the "Closure Orders"). Compl. ¶19. Plaintiff's business is not considered "essential," and, therefore, Plaintiff and similarly situated insureds have been subject to a variety of Closure Orders by state and local authorities, preventing them from operating their businesses, limiting their operations, and/or from use of the premises for their intended purpose. Compl. ¶20.

These Closure Orders include Pennsylvania Governor Wolf's Order dated March 19, 2020 requiring all non-life-sustaining businesses in the Commonwealth to cease operations and close all physical locations.[3] The Pennsylvania Supreme Court has clarified that the Governor's Order has resulted in the temporary loss of use of non-essential business premises affected by the Order, and that the Order was issued to protect the lives and health of millions of Pennsylvania citizens. *See Friends of DeVito v. Wolf*, No. 68 MM 2020, 2020 WL 1847100 at *17 (Pa. Apr. 13, 2020). Compl. ¶21.

Following timely notice of its claim, Cincinnati denied MilkBoy business income coverage. Upon information and belief, Cincinnati has, on a wide-scale and uniform basis, refused to pay its insureds for losses suffered due to any executive orders by civil authorities that have required the necessary suspension of business, and any efforts to prevent further property damage or to minimize the suspension of business and continue operations in response to COVID-19. Compl. ¶4.

On April 27, 2020, MilkBoy brought suit against Cincinnati, individually and on behalf of all others similarly situated, asserting counts for breach of contract and declaratory judgment.

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[3] *Available at* https://www.scribd.com/document/452416027/20200319-TWW-COVID-19-Business-Closure-Order.

Dkt. No. 1. On July 9, 2020, Cincinnati filed a Motion to Dismiss Plaintiff's Complaint. Dkt. No. 14.

III. ARGUMENT

A. Standard on a Motion to Dismiss

When considering a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), a court must accept well pleaded allegations in the complaint as true and view them in the light most favorable to the plaintiff. *Powell v. Weiss*, 757 F.3d 338, 341 (3d Cir. 2014). A complaint need not contain "detailed factual allegations" but must include sufficient facts to indicate the plausibility of the claims asserted, raising the "right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plausibility means that the factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

B. Principles Governing Construction of All-Risk Insurance Policies

Under Pennsylvania law, insurance policies must be construed in favor of the insured. "All-risk" policies, like Cincinnati's, constitute a special policy category in which the only relevant coverage inquiries are (a) whether the insured plaintiff has suffered a covered loss, and (b) whether the policy excludes the loss.

1. Ambiguities in Insurance Policies Must Be Construed in Favor of Coverage

The goal in construing and applying the language of an insurance contract is to effectuate the intent of the parties as manifested by the language of the specific policy. *401 Fourth St. Inc.*, 879 A.2d at 171. The language of the policy must be construed in its plain and ordinary sense, and the policy must be read in its entirety. *Riccio v. Am. Republic Ins. Co.*, 550 Pa. 254,

705 A.2d 422, 426 (1997). When the language of an insurance policy is plain and unambiguous, a court is bound by that language. *Pennsylvania Nat. Mut. Cas. Ins. Co. v. St. John*, 630 Pa. 1, 23, 106 A.3d 1, 14 (2014).

When the contract language is ambiguous, however, a different principle governs. Contract language is ambiguous if it is reasonably susceptible to more than one construction and meaning, *Lititz Mut. Ins. Co. v. Steely*, 567 Pa. 98, 104, 785 A.2d 975, 978 (2001), and "the presence of ambiguity is generally measured by an objective standard," *Betz v. Erie Ins. Exch.*, 2008 PA Super 221, 957 A.2d 1244, 1255, n.3 (2008). If an ambiguity is found, it must be construed against the insurer, *Med. Protective Co. v. Watkins*, 198 F.3d at 104, and in favor of finding coverage, *Cincinnati Ins. Co. v. Cham's Jewelry Art, Inc.*, 31 Fed. Appx. at 795.

2. All-Risk Insurance Policies Cover Losses Unless Specifically Excluded

Cincinnati's Policy is an "all-risk" policy of insurance. The Policy defines "Covered Cause of Loss" as "direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part." *See* Policy at 39 & 106.

Cincinnati's policy language is typical of other all-risk policies: *see, e.g.*, *Burgunder v. United Specialty Ins. Co.*, No. 17-1295, 2018 WL 2184479, at *4 (W.D. Pa. May 11, 2018) (in coverage action on an all-risk policy, denying defendant's motion for summary judgment and noting that term "Covered Causes of Loss" in all-risk policy "means direct physical loss unless the loss is excluded or limited in this policy"); *Kimmel v. Nationwide Mut. Ins. Co.*, No. 91-4728, 1992 WL 7198, at *3 n.2 (E.D. Pa. Jan. 15, 1992) (noting that policy's use of term "Covered Cause of Loss," rather than "Specified Causes of Loss," supported the interpretation that the policy was "all-risk" and not "named perils").

The Third Circuit underscored the significance of an all-risk policy in addressing coverage questions:

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

Intermetal Mexicana, S.A. v. Ins. Co. of N. Am., 866 F.2d 71, 75 (3d Cir. 1989) . Under an all-risk policy, "the only questions which need be decided. . . are whether [the plaintiff] has suffered a loss and, if so, whether such loss is excluded from coverage under the policy." *Id.* (citations omitted).

C. The Presence or Threat of the Virus Causing COVID-19 Constitutes a "Covered Cause of Loss"

The first inquiry in determining whether Plaintiff's claim is covered by the Policy is whether there has been a triggering event, or in the parlance of the Policy, a "Covered Cause of Loss." As demonstrated below, the presence (or threatened presence) of the virus that causes COVID-19 constitutes a Covered Cause of Loss.

1. A "Covered Cause of Loss" May Be Physical Loss *or* Physical Damage

As a threshold matter, pursuant to the Policy's definition of Covered Cause of Loss, the policyholder may show *either* "direct physical loss" *or* "direct physical damage" to trigger coverage. Covered Cause of Loss is defined in the Policy as "direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part." *See* Policy at 39, 103. "Loss," in turn, is defined as "accidental physical loss *or* accidental physical damage." Policy at 72, 113 (emphasis added). The term "physical loss" within the definition of "loss" is undefined; the definition is circular, and courts often find that "circular definitions are inherently ambiguous as they require

additional information outside the definition to actually define the term being defined." *Brewington v. State Farm Mut. Auto. Ins. Co.*, 45 F. Supp. 3d 1215, 1219 (D. Nev. 2014).

Under fundamental rules of contract interpretation, Cincinnati's disjunctive definition of "loss" must mean that "accidental physical loss" is something *different* from "accidental physical damage."[4] *See Manpower Inc. v. Insurance Co. of the State of Pa.*, No. 08C0085, 2009 WL 3738099, *5 (E.D. Wis. Nov. 3, 2009) ("'direct physical loss' must mean something other than 'direct physical damage.'"). Therefore, the Covered Cause of Loss triggering the Policy's coverage may arise from two distinct scenarios: physical loss *or* physical damage.

2. Pennsylvania Authority Supports the Finding that a Virus Can Cause a Physical Loss or Physical Damage

In its brief, Cincinnati entirely ignores the existing Third Circuit authority that provides guidance on whether a virus could reasonably cause "physical loss" or "physical damage." Rather, Cincinnati relies on inapposite cases, mostly from other jurisdictions. A brief overview of Pennsylvania and Third Circuit case law demonstrates that there is ample support for the proposition that the presence (or threatened presence) of a virus can cause "physical loss" and/or "physical damage."

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[4] *See Castlepoint Nat. Ins. Co. v. Ins. Co. of Pa.*, No. 14-0792, 2015 WL 2339092, at *7 (M.D. Pa. May 13, 2015) ("The plain meaning of the word 'or' is well settled. Where it is used, it generally connotes an alternative between two or more things."), *citing, inter alia*, *Acosta v. City of Mesa*, 718 F.3d 800, 815 (9th Cir. 2013) ("In its ordinary sense, the function of the word 'or' is to mark an alternative such as this or that."); *Kaufman v. Allstate N.J. Ins. Co*., 561 F.3d 144, 158 (3d Cir. 2009) (noting difference between the disjunctive "or" and the conjunctive "and" and finding that the insurance provision's use of the word "or" plainly invokes the disjunctive); *In re G-I Holdings, Inc.,* 369 B.R. 832, 839 (D.N.J. 2007) ("The use of the disjunctive 'or' indicates that the two options are. . . mutually exclusive and may not be combined.").

Physical loss: The Third Circuit, predicting Pennsylvania law, has determined that the presence of bacteria may constitute a physical loss. *See Motorist Mut. Ins. Co. v. Hardinger*, 131 Fed. Appx. 823, 825 (3d Cir. 2005) (overturning district court's grant of summary judgment to insurer, finding that bacterial contamination could constitute direct physical loss to the property because, despite the lack of physical damage, it rendered home too dangerous to inhabit).

In *Motorist*, the Court of Appeals noted that the Pennsylvania Supreme Court had not determined whether "loss of use" could constitute a physical loss but predicted that Pennsylvania would recognize the loss of use as supporting a finding of physical loss. *Motorist*, 131 Fed. Appx. at 826. The *Motorist* opinion was guided by *Hetrick v. Valley Mut. Ins. Co.*, 1992 WL 524309, 15 Pa. D. & C.4th 271, 273 (Pa. Com. Pl. 1992), which, as the *Motorist* court noted, gave "substantial attention and approval" to the decision of the Colorado Supreme Court in *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 38–39, 437 P.2d 52 (1968). *Motorist*, 131 Fed. Appx. at n.4. In *Western Fire*, the Colorado Supreme Court held the term "direct physical loss" extended to cover the loss of use of the insured property where the accumulation of gasoline around and under the property rendered it uninhabitable.

The *Motorist* panel also reviewed the court's prior holding in *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (predicting New York and New Jersey law). In *Port Auth. of New York & New Jersey*, the court acknowledged there does not have to be actual contamination of property to trigger coverage. *Id.* Instead, an insured could also show "physical loss" from a cause that imminently threatens a property's function or habitability. *Id.*

Ultimately, the *Motorist* panel reversed the District Court's grant of summary judgment for the insurer and remanded the case for further proceedings, recognizing that whether there was

a physical loss on the property was a genuine issue of material fact. *Id.* The District Court subsequently denied the insurer's summary judgment motion, citing, *inter alia*, *Minn. Fire & Cas. Co. v. Greenfield*, 579 Pa. 333, 855 A.2d 854, 861 (2004) ("where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer"). *See* Order, *Motorist Mut. Ins. Co. v. Hardinger*, No. 02-cv-08310-PD, Dkt. No. 62 (Aug. 24, 2005).

The Third Circuit's reasoning vis-à-vis the presence of bacteria in *Motorist* is equally applicable to the presence of a virus in this case—the presence of either a bacteria or virus may result in loss of use. And pursuant to the framework laid out in *Port Auth. of New York & New Jersey*, a property may be rendered useless by the imminent threat of the presence of the virus.

Courts in other jurisdictions have similarly construed "direct physical loss" broadly. In fact, as a Massachusetts court explained:

> I find and rule that the phrase 'direct physical loss or damage' is ambiguous in that it is susceptible of at least two different interpretations. One includes only tangible damage to the structure of insured property. The second includes a wider array of losses. Following the rule of construction that an ambiguous phrase be accorded the interpretation more favorable to the insured, I adopt the latter interpretation.

Matzner v. Seaco Ins. Co., No. 96-0498-B, 1998 WL 566658 at *3, (Mass. Super. Ct. Aug. 12, 1998). *See also Essex Ins. Co. v. BloomSouth Flooring Corp*., 562 F.3d 399, 404-405 (1st Cir. 2009) (following *Matzner*); *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524, 543-544, 968 A.2d 724, 737 (N.J. Super. Ct. App. Div. 2009) (property's temporary and non-structural loss of function was deemed "direct physical loss" even though there was no physical damage to grocery store from electrical blackout); *Gregory Packaging, Inc. v. Travelers Property Cas. Co*., No. 12-04418, 2014 WL 6675934, *6 (D.N.J. Nov. 25, 2014) (citing cases, including *Motorist* and *Port Authority*, noting that "courts considering non-structural property damage claims have found that buildings rendered uninhabitable by dangerous gases or bacteria

suffered direct physical loss or damage); *Farmers Ins. Co. of Oregon v. Trutanich*, 123 Ore. App. 6, 858 P.2d 1332 (1993) (losses caused by odors from illegal methamphetamine cooking were direct physical loss); *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 493, 509 S.E.2d 1, 16–17 (1998) ("Losses covered by the [all-risk] policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the property."); *Sentinel Mgmt. Co v. New Hampshire Ins. Co*., 563 N.W.2d 296, 300 (Minn. App. 1997) ("Direct physical loss may also exist in the absence of structural damage to the insured property. . . . Although asbestos contamination does not result in tangible injury to the physical structure of a building, a building's function may be seriously impaired or destroyed and the property rendered useless by the presence of contaminants"); *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d at 55 (a church building sustained "direct physical loss" when the building was saturated with gasoline vapors, as to make it incapable of being occupied or used).

Further, a condition that renders property unsuitable for its intended use constitutes a direct physical loss, "even where some utility remains." *See Cook v. Allstate Ins. Co.*, No. 48D02-0611-PL-01156, 2007 Ind. Super. LEXIS 32 at *9 (Indiana Super. 2007); *see also Stack Metallurgical Servs., Inc. v. Travelers Indem. Co. of Connecticut*, No. 05-1315, 2007 WL 464715 at *8 (D. Ore. Feb. 7, 2007) (finding insured suffered "direct physical loss of or damage to" covered property when the property could not be used for its "ordinary expected purpose," even though the property could still be used for other income-generating purposes).[5]

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[5] Cincinnati notes, in a footnote, that the policy defines "suspension" to mean "slowdown or cessation of your business activities; and [t]hat a part or all of the 'premises' is rendered untenantable," and argues, without any explanation, that "[n]o facts alleged in the Complaint show the Plaintiff's premises were untenantable." Def. Br. at 4, n.1, Policy at 74. "Untenantable" is not defined in the policy, and Cincinnati does not offer any definition of its own. One reviewing court has discussed the dearth of definitions of the term "untenantable"

Defendant's reliance upon *Source Food Tech., Inc. v. U.S. Fid. Guarantee & Liab. Ins. Co*., 465 F.3d 834 (8th Cir. 2006), and *Pentair, Inc. v. American Guar. & Liab. Ins. Co*., 400 F.3d 613 (8th Cir. 2005), is unavailing. Both *Source Food* and *Pentair* constituted efforts by federal courts to interpret Minnesota law concerning what is sufficient to constitute direct physical loss. Minnesota state courts, however, have actually reached contrary conclusions when assessing whether "physical alteration" is required to show physical loss. *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 149 (Minn. Ct. App.), *review den.* (2001) (direct physical loss or damage may exist without destruction or structural damage of the property); *Lipshutz v. General Ins. Co. of America*, 256 Minn. 7, 15-16, 96 N.W.2d 880, 885-886 (1959) (finding direct loss to insured's grocery store when windstorm caused damage to public utility serving area even though power lines connecting premises remained intact). Inasmuch as a federal court's role in a diversity proceeding is to predict what that state's appellate courts would do, one should carefully weigh the precedential value of those decisions. Thus, Cincinnati's observation that the Complaint does not allege that a virus has physically "altered" property should not control the resolution of Plaintiff's claims.

(both in policies and in legal authority), and adopted the standard that an "untenantable home" is, inter alia, "one which cannot be used for the purposes for which it is intended." *Flores v. Allstate Texas Lloyd's Co*., 229 F. Supp. 2d 697, 700 (S.D. Tex. 2002). Therefore, "untenantable" may reasonably be read as meaning "unable to be used for an intended purpose." This interpretation also comports with the Policy's inclusion of "slowdown" in the definition of "suspension," since the Policy language presupposes that business activities may not cease altogether, but that the property cannot be used for its intended purpose. Because MilkBoy pleads that the Closure Orders prohibit use of the property for its intended purpose as a music venue, bar, and restaurant, Compl. ¶1, the Complaint adequately alleges that the premises were "untenantable."

Physical damage: While wholly ignoring "physical loss" as a distinct category separate from "physical damage," Cincinnati compounds the error by incorrectly arguing that MilkBoy must show "physical alteration to its property" under Pennsylvania law. Def. Br. at 11-13. While some jurisdictions may require "physical alteration to property" to show "physical damage," Pennsylvania is not among them, and Cincinnati fails to cite a single Pennsylvania case stating otherwise.

Furthermore, Cincinnati's argument that Pennsylvania law requires "physical alteration to property" is simply not supported by the cited cases. For this argument, Cincinnati relies largely upon the Southern District of New York's discussion in *Philadelphia Parking Authority v. Fed. Ins. Co.*, 385 F. Supp. 2d 280 (S.D.N.Y. 2005). *See* Def. Br. at 11-13. But this case does not address Cincinnati' purported "physical alteration" requirement anywhere in the decision. The court's reasoning in *Parking Authority* was premised upon the plaintiff's argument that economic loss *in and of itself* is sufficient to trigger business interruption coverage. *See Parking Authority,* 385 F. Supp. 2d at 286. Despite Cincinnati's inaccurate characterization of MilkBoy's Complaint, mere economic loss is not the claimed Covered Cause of Loss in the present action. Simply put, the *Port Authority* decision sheds no light on whether Pennsylvania courts would find "physical damage" in this case.[6]

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[6] Defendant also cites two cases, *Gavrilides Mgt. Co. v. Michigan Ins. Co.*, No. 20-258-CB-C30 (July 2, 2020, Ingham County, Mich.), and *Social Life Magazine, Inc. v. Sentinel Ins. Co., Ltd.*, No. 20-3311 (S.D.N.Y. May 14, 2020), in which trial courts, without issuing written decisions, rejected the insured's claim under the law of Michigan or New York respectively. Def. Br. at 16. As set forth herein, however, Pennsylvania courts and many others adopt a broader definition of what may constitute physical loss or damage, so those oral rulings should have no relevance here. Moreover, these cases were decided within different procedural contexts with different standards of review: *Gavrilides* granted the insurer's motion for summary disposition (Michigan's equivalent to summary judgment under Fed. R. Civ. P. 56) and *Social*

In fact, the Third Circuit has made clear that "physical damage" should *not* be limited to visible structural alteration. *Port Authority*, 311 F.3d at 235. In *Port Authority*, the Third Circuit has acknowledged that "[i]n ordinary parlance and widely accepted definition, physical damage to property means 'a distinct, demonstrable, and physical alteration' of its structure," but the court noted that physical damage may result from "sources unnoticeable to the naked eye." *Id.* (citing *Western Fire Ins. Co.*, 165 Colo. at 437 ("coverage was triggered when authorities ordered a building closed after gasoline fumes seeped into a building's structure and made its use unsafe. Although neither the building nor its elements were demonstrably altered, its function was eliminated.") *See also Gregory Packaging, Inc.*, 2014 WL 6675934 at *6 (rejecting insurer's interpretation of *Port Authority* as contradicting the opinion's "plain text," and noting that "while structural alteration provides the most obvious sign of physical damage, both New Jersey courts and the Third Circuit have also found that property can sustain physical loss or damage without experiencing structural alteration").

Other jurisdictions have also held that an "impairment of function or value" may constitute physical damage. For example, in *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 256 Minn. 404, 98 N.W.2d 280 (1959), the Minnesota Supreme Court addressed losses of a food producer that was under contract with the United States Army to produce milk powder, egg powder, and raw eggs under very specific and rigorous standards. One of the standards was that the plant had to be "free from strong foul odors, dust, and smoke-laden air." *Id.* at 408. The produce company was covered by a fire policy, and a fire at a neighboring property caused the plant to be filled with heavy smoke, although no fire occurred on the premises of the produce

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Life involved a preliminary injunction. Given the differences in controlling authority and relevant legal standard, these cases are inapposite.

company. *Id.* at 407. When apprised of the presence of smoke, the Army rejected the goods, apparently with no attempt to ascertain whether there was actual damage to the product. *Id.* at 409–10. Thus, the product was damaged not necessarily because it was hazardous, but because of army regulations that set forth stringent requirements for the manufacturing environment. The court noted that the impairment of value, not the physical damage, was the measure of damages. *Id.* at 423. *See also General Mills, Inc.*, 622 N.W.2d at 152 (following *Marshall Produce,* and holding that where function of insured property is impaired, it may constitute direct physical loss without actual destruction of or structural damage to the property).[7]

What's more, in drafting its insurance policy, Cincinnati chose not to include the words "structural," "visible" and/or "alteration" as a modifier to the terms "physical loss" and "physical damage." Particularly where, as here, the weight of authority is not on Cincinnati's side, the language of the Policy must be construed in favor of coverage.

Finally, Cincinnati argues that the virus cannot cause damage because "Coronavirus can be wiped off surfaces by cleaning" and that "even where the Coronavirus is or was actually present, there is no direct physical loss because the virus either dies naturally in a short time, or it can be wiped away." Def. Br. at 16-17. The proper remediation of the facility presents obvious factual issues that cannot be resolved on this motion to dismiss, and like Cincinnati's "structural alteration" argument, is not supported by Pennsylvania authority.

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[7] *Accord*, *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 404 (1st Cir. 2009) (predicting that Massachusetts would find "permeating odor" to constitute "physical injury").

3. Unlike Other Insurers, Cincinnati Chose Not to Adopt a Virus Exclusion

The majority of property policies with business interruption provisions issued in the United States contain what is commonly referred to as a "virus exclusion." Had Cincinnati sought to exclude losses relating in any way to viruses from its all-risk coverage, it should have written the Policy in a way that clearly excludes coverage. Many insurers utilized the "standard" virus exclusion drafted by insurance trade associations such as the Insurance Services Office ("ISO") in their policies, but Cincinnati chose not to adopt the ISO or any other form of a virus exclusion.[8]

Defendant's intentional omission of any "virus exclusion" from its Policy is made even more apparent by the fact that Cincinnati *did* choose to create an exclusion for bacteria (which does not include viruses). *See* Policy form FM 101 05 16 at 39, 41 ("bacteria" listed within Policy Exclusion "h"). If Cincinnati made the choice to explicitly exclude any loss caused by *bacteria*, it is clear that Cincinnati could have also adopted a *virus* exclusion, but chose not to do so. By not doing so, Cincinnati intended for viruses to be covered by the Policy.

D. The Policy's Civil Authority Provision Provides Coverage

As stated in the Complaint, the Closure Orders denied use of the MilkBoy's premises by causing a necessary suspension of operations during a period of restoration. Compl. ¶22. The Closure Orders operate as a blockade that prevents employees and patrons from entering and operating the business for its intended purpose. Compl. ¶22. A reading of the Cincinnati Policy in its entirety shows that Plaintiff's business losses resulting from the governmental shutdowns

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[8] Plaintiff does not concede that the industry standard "virus exclusion" actually precludes business interruption claims relating to Closure Orders under policies issued by other insurance companies. But Cincinnati's failure to include any such provision in the Policy at issue provides an additional indication of its intention not to preclude coverage for Plaintiff's claims here.

are covered by the Policy. Each one of the Civil Authority provision's four "prongs" (as articulated by Cincinnati, Def. Br. at 8) is adequately pleaded in Plaintiff's Complaint.

1. The Covered Cause of Loss Caused Damage to Property Other Than the Insured Premises

Under the Policy's Civil Authority provision, "[w]hen a Covered Cause of Loss causes damage to property other than Covered Property at the 'premises', we will pay for the actual loss of 'Business Income' and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the 'premises'. . ." Policy at 106. Cincinnati rehashes its arguments vis-à-vis "Covered Cause of Loss" when attempting to explain the requirements of the Civil Authority provision. Def. Br. at 19-20. Under a plain reading of the Policy, however, there is simply no "physical alteration" requirement in this coverage provision.

The Civil Authority provision's first requirement is that a Covered Cause of Loss result in "damage to property." *See* Policy at 106. For reasons discussed above, MilkBoy has properly pleaded a Covered Cause of Loss. *See* Section III.C, *supra*.[9] Courts nationwide have noted that

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[9] On August 6, 2020, the Superior Court of the District of Columbia granted summary judgment for an insurer based upon an issue not argued in this case: whether a Closure Order itself constituted a Covered Cause of Loss. *Rose's 1, LLC. v. Erie Insurance Exchange*, 2020 CA 002424 B, slip op. (D.C. Super. Ct. Aug, 6, 2020) at *4, *available at* https://www.insurancejournal.com/app/uploads/2020/08/roses-1-v-erie.pdf ("At the most basic level, the parties dispute whether the closure of the restaurants due to Mayor Bowser's orders constituted a 'direct physical loss' under the policy"). This decision is not apposite for at least three reasons. First, the Superior Court's decision analyzed a completely different Covered Cause of Loss. MilkBoy does not assert that the Closure Order alone was a direct physical loss constituting a Covered Cause of Loss. Rather, the *virus* (or threatened presence of the virus) was the Covered Cause of Loss. While MilkBoy does not concede that the Superior Court's decision was correct, the issue is not one raised in this case. Second, the parties in *Rose's 1, LLC* filed cross-motions for summary judgment, thereby asserting that no material facts were at issue and discovery was not required. *Id.* at *2. As discussed *supra* p. 16 and *infra* p.25, MilkBoy and Cincinnati have both raised fact issues that are properly the subject of discovery. Third, the Superior Court's opinion relies upon District of Columbia law, *id.* at *8-*9, and is not binding on this Court—instead, this Court must decide the relevant issues based upon Pennsylvania law.

the term "damage" may be ambiguous, and may encompass more than mere "physical alteration." As one court explained when reviewing the ordinary meaning of "damage,"

> One dictionary defines "damage" as "injury or harm that reduces value or usefulness." Random House Dictionary of the English Language, 504 (2nd ed. 1987). Another defines it as "injury or harm to a person or thing, resulting in a loss in soundness, value, etc." Webster's New World Dictionary, 356 (2nd ed. 1980). A legal dictionary defines "damage" in part as "every loss or diminution" of a person's property. Black's Law Dictionary 389 (6th ed. 1990). Clearly, without qualification the term "damage" encompasses more than physical or tangible damage.

Dundee Mut. Ins. Co. v. Marifferen, 1998 ND 222, ¶ 14, 587 N.W.2d 191, 194 (N.D. 1998).

Elsewhere in the Policy, Cincinnati used the term "physical" when it wanted to include that requirement in a definition. Thus, if Cincinnati wanted to require a "physical alteration" to property to satisfy the "damage" term of the Civil Authority coverage, it could have included this language. Likewise, the cases cited by Cincinnati in support of its argument that "direct physical damage" requires "physical alteration" rely on that all-important "physical" term. In short, the insurer cannot construe the "damage to property" to require "physical alteration," and this term as it appears in the Civil Authority provision should not be construed any more narrowly than the "physical loss" or "physical damage" constituting the Covered Cause of Loss.

Likewise, it is beyond dispute that a Covered Cause of Loss caused damage to property *other* than Covered Property at the insured premises. Pursuant to various Closure Orders, as well as subsequent court cases interpreting and affirming these Orders, it is well established that the virus causing COVID-19 was present at innumerable locations at the time of the Closure Orders. One need only review the plain language of the Closure Orders to understand that governments sought to contain the losses or damage *already caused* by COVID-19, in order to prevent additional spread that could lead to future loss or damage.

Finally, Cincinnati argues that "[n]o facts are alleged that demonstrate that these things happened because of direct physical loss to anybody's property. Instead, as the Plaintiff admits, closing or limiting of business operations protected the public from human to human transmission of the virus." Def. Br. at 20. But the fact that the Closure Orders were designed to prevent harm does not take these orders out of the ambit of the Civil Authority provision.

The Eastern District of Pennsylvania has addressed a similar issue in a case relating to a civil authority coverage issued by Fireman's Fund. *Narricot Indus., Inc. v. Fireman's Fund Ins. Co.*, No. 01-4679, 2002 WL 31247972, at *5 (E.D. Pa. Sept. 30, 2002). Applying Pennsylvania law, Judge Dalzell addressed an insurer's argument that because civil authority orders were "preventative," as they were designed to prevent damage from hurricane and flood, these civil authority orders did not result from a "covered cause of loss." *Id.* The Court rejected this argument, and found that the "covered cause of loss" (*i.e.*, the hurricane or flood) was the cause of the civil authority orders. "Regardless of whether [the municipality] took the measures to prevent hurricane and flood damage or alleviate the perils caused by hurricane and flood damage, the measures still *resulted* from hurricane and flood." *Id.*

In the present action, Pennsylvania Governor Wolf's March 19, 2020 Order was issued to protect the lives and health of millions of Pennsylvania citizens. Compl. ¶21; *and see* Compl. ¶¶18-19. Other closure orders around the country were designed to do the same. Just as the civil authority actions in *Narricot* did not prevent a hurricane, the Closure Orders did not prevent the pandemic—but the losses in both cases are properly covered by the Civil Authority provisions of the respective policies.

2. Access to the Insured Premises is Prohibited by Civil Authority

The second prong of the Civil Authority provision's requirements is met because access to Plaintiff's property is prohibited by the action of a civil authority, specifically Governor

Wolf's orders regarding restaurant and live-music closures. As alleged in the Complaint, the government-ordered shutdowns prohibited performances and on-site dining, which prevented patrons' and employees' access to the property. Compl. ¶1.

Cincinnati cannot dispute that the access to the MilkBoy property was prohibited by virtue of the Closure Orders. First, the Pennsylvania Closure Order prohibited customers from dining inside the premises. Therefore, dine-in customers were prohibited from accessing MilkBoy, a restaurant. Second, the Closure Order prohibited live performances. Customers *and* employees were prohibited from accessing MilkBoy in its capacity as a music venue.

Courts have found that where the order of a civil authority requires an insured's premises to close, there has been a prohibition of access to the insured's business sufficient to trigger coverage for business losses. *See, e.g.*, *Assurance Co. of Am. v. BBB Serv. Co*., 265 Ga. App. 35, 593 S.E.2d 7, (2003) (affirming trial court finding for insured, where county order to evacuate as Hurricane Floyd approached required closure of Plaintiff's restaurant); *Sloan v. Phoenix of Hartford Ins. Co*., 46 Mich. App. 46, 51, 207 N.W.2d 434, 437 (1973) ("A riot ensued, the governor imposed a curfew, and all places of amusement were closed, thus preventing access to plaintiffs' place of business. Therefore, plaintiffs suffered a compensable loss under the terms of the policy.").

Cincinnati's reliance on *Philadelphia Parking Auth*., Def. Br. at 14, is again unavailing. In *Philadelphia Parking Authority*, the FAA's post-9/11 emergency order grounding air traffic did not prohibit any access to parking structures. The plain language of the FAA's order showed that it was directed to aircraft operators, not parking garages. 385 F. Supp. 2d at 289. Here, of course, the Closure Orders directly prohibited customers and workers from accessing Plaintiff's own premises, a situation that falls squarely within the coverage provided by the Policy's Civil

Authority provision. And again, the plaintiff's claims in *Philadelphia Parking Auth*. were premised solely on the economic losses from the slowdown in business from flight stoppages. *See* 385 F. Supp. 2d at 283; *see also* discussion of *Parking Authority*, *supra* p. 14.

Cincinnati's citation to *Ski Shawnee, Inc. v. Commonwealth Ins. Co.*, No. 09-02391, 2010 WL 2696782, 4 (M.D. Pa. July 6, 2010), is equally unavailing. Def. Br. at 21. While in *Ski Shawnee* a bridge repair hindered or dissuaded the majority of customers from visiting a ski resort, it did not constitute prohibition of access to the premises. *Id.* Cincinnati fails to mention that this was because there was another road to get to the *Ski Shawnee* premises, and the ski resort could still be reached and used for its intended purpose. *Id.* This is hardly comparable to the Closure Orders prohibiting *any* indoor dining or performances.

None of the other cases cited by Cincinnati involve Pennsylvania law, nor do they compel a different conclusion. Crucially, not one of these cases addresses a civil authority order *actually directed* at the business in question. *See* Def. Br. at 21-22.

Finally, Cincinnati appears committed to disregarding a major part of the Plaintiff's business. While MilkBoy is a restaurant and bar, it is also a music venue. Defendant cannot refute that a large part of Plaintiff's business is related to live performance. Customers (and performers) are entirely prohibited from entry. Compl. ¶1.

3. Access to the Area Immediately Surrounding the Damaged Property Is Prohibited by Civil Authority as a Result of the Damage to Other Property

The third prong of the Civil Authority provision requires that "access to the area immediately surrounding the damaged property is prohibited as a result of the damage to other property. . ." Again, "the damaged property" at issue under the Civil Authority provision of the policy is property *other* than Plaintiff's property. It is sufficient, therefore, to assert at the pleading stage that for the same reason that access to MilkBoy's property is prohibited

(specifically, as a result to the damage to property caused by exposure to the virus causing COVID-19), access to other properties in the area immediately surrounding MilkBoy is prohibited.

4. The Action of Civil Authority Is Taken in Response to Dangerous Physical Conditions Resulting from the Damage or Continuation of the Covered Cause of Loss That Caused the Damage

There can be no reasonable dispute that the Closure Orders were taken in response to dangerous physical conditions. It is difficult to fathom a more dangerous physical condition than a pandemic. Executive and judicial bodies across the country have themselves characterized the Closure Orders as responding to a virus, which causes, *inter alia*, property damage. For example, at least one Closure Order has expressly found that "the virus physically is causing property loss and damage." *See* New York City's March 16, 2020 Emergency Executive Order addressing the threat of COVID-19.[10]

The fourth prong of the Civil Authority provision requires damage *or* continuation of the Covered Cause of Loss that caused the damage. Given that the presence of the virus is a Covered Cause of Loss, the *continued* presence of the virus (which, in turn, gives rise to the continued enforcement of the Closure Orders) meets the requirements of this prong.

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[10] https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-100.pdf

E. Under Pennsylvania law, the Reasonable Expectations of the Policyholder May Supersede Policy Language Denying Coverage

Even if the language of a policy *appears to preclude* coverage—which the Cincinnati Policy does not—Pennsylvania law provides another path for recovery by the policyholder. The Pennsylvania doctrine of reasonable expectations states that "[t]he reasonable expectations of the insured is the focal point of the insurance transaction. . . regardless of the ambiguity, or lack thereof, inherent in a given set of documents." *UPMC Health Sys. v. Metro. Life Ins. Co.*, 391 F.3d 497, 502 (3d Cir. 2004), *citing Collister v. Nationwide Life Ins. Co.*, 479 Pa. 579, 388 A.2d 1346, 1353 (1978).[11] As the Court of Appeals explained, the court "has recognized and applied this doctrine in cases where the insured reasonably expected certain coverage, even when those expectations were in direct conflict with the unambiguous terms of the policy." *UPMC Health Sys.*, 391 F.3d at 502 (collecting cases).

In *Bensalem Twp. v. International Surplus Lines Ins. Co*., the Third Circuit explained the application of the doctrine of reasonable expectations:

> We are unable to draw any categorical distinction between the types of cases in which Pennsylvania courts will allow the reasonable expectations of the insured to defeat the unambiguous language of an insurance policy and those in which the courts will follow the general rule of adhering to the precise terms of the policy. One theme that emerges from all the cases, however, is that courts are to be chary about allowing insurance companies to abuse their position vis-a-vis their customers. ***Thus, we are confident that where the insurer or its agent creates in the insured a reasonable expectation of coverage that is not supported by the terms of the policy that expectation will prevail over the language of the policy***.

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[11] The "reasonable expectations" test is an objective one. *See, e.g.*, *N. River Ins. Co. v. Mine Safety Appliances Co.*, No. GD-10-007432, 2014 WL 8864943, at *7 (Pa. Com. Pl. Feb. 13, 2014) ("coverage shall be dictated by the reasonable expectations of an objective insured"); R. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970) (general principle may be articulated as "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations").

38 F.3d 1303, 1311 (3d Cir. 1994) (emphasis added). This doctrine has been repeatedly used to enforce the reasonable expectations of the policyholder, notwithstanding the policy language. *See Reliance Ins. Co. v. Moessner*, 121 F.3d 895, 903 (3d Cir. 1997), citing *Collister*, 479 Pa. 579, 388 A.2d 1346 (1978); *Tonkovic v. State Farm Mut. Automobile Ins. Co.*, 513 Pa. 445, 521 A.2d 920 (1987) (explaining Pennsylvania courts' adaptation of the doctrine of reasonable expectations); *Betz v. Erie Ins. Exchange*, 957 A.2d 1244, 1253 (Pa. Super. 2008); *MESA Underwriters Specialty Ins. Co. v. Five Star Hotels, LLC*, No. GD-14-010490, 2015 WL 13838469, at *7 (Pa. Com. Pl. Nov. 2, 2015) (collecting cases).

In the present action, Cincinnati policyholders purchased "all-risk" policies of insurance with business interruption coverage, which included coverage from losses from actions of a civil authority. Other business interruption policies contained specific exclusions for viruses, and the policies issued by Cincinnati did not. Therefore, it was the *reasonable expectation* of purchasers of Cincinnati policies that the absence of any virus exclusion in their Cincinnati policy meant that the Cincinnati policy would cover losses caused by a virus.

This inquiry cannot be made at the pleading stage precisely because it is factual and warrants discovery. *See, e.g.*, *Bensalem Twp.*, 38 F.3d at 1312 ("had the district court permitted Township to amend its complaint and proceed with discovery, Township might have been able to assert one of these types of claims"). Even if the Court ultimately were to find that the language of the Policy appears not to cover the loss, the Court would *still* need to consider whether this conclusion contradicts the objectively "reasonable expectations" of the policyholders.

IV. CONCLUSION

For the foregoing reasons, Cincinnati's motion to dismiss should be denied.

Date: August 7, 2020

Respectfully submitted,

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