UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOR EQUITIES, LLC,	:	
	:	
Plaintiff,	:	Case No. 20-cv-3380 (AT)
	:	
-against-	:	
	:	
FACTORY MUTUAL INSURANCE COMPANY,	:	
	:	
Defendant.	:	
	:	

DEFENDANT FACTORY MUTUAL INSURANCE COMPANY'S COMBINED MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

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Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, Defendant Factory Mutual Insurance Company ("FM Global"), through its undersigned counsel, submits this combined memorandum of law in opposition to Plaintiff Thor Equities, LLC's ("Thor") Motion for Partial Judgment on the Pleadings (Dkt. 32-34) ("Motion") and in support of its Cross-Motion for Partial Judgment on the Pleadings ("Cross-Motion").

PRELIMINARY STATEMENT

Thor, which describes itself as a major commercial real estate company with properties throughout the United States and the world, brought this action against its property insurer FM Global, asserting that it is entitled to millions in coverage for monetary losses stemming from the novel coronavirus (Covid-19) pandemic and, in particular, "shut down" orders issued in response to the pandemic.

Thor's policy, however, specifically excludes "**contamination**, and any cost due to **contamination** *including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy*." Policy No. 1063282 (the "Policy"), Complaint ("Compl.") Ex. A (Dkt. 1-1) at 24[1] (italics for emphasis added; terms in bold appear in bold in the Policy).[2] **Contamination** is defined in the Policy 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." Compl. Ex. A at 76 (italics added). The parties agree that this definition encompasses Covid-19. *See* Motion at 17. Separately, Thor's Policy also excludes coverage for "loss of use"

[1] References to Policy page numbers are to the file-stamped ECF page numbers on Docket 1-1.

[2] Unless otherwise indicated, capitalization and emphasis in language quoted from the Policy appear in the original.

as a general matter. Both of these exclusions clearly and unambiguously apply to Thor's losses and thus preclude the recovery that Thor seeks.

That said, Thor is not without recourse. Specifically, the Policy contains an exception to these exclusions for "communicable disease response" and "interruption by communicable disease" and provides $1 million in coverage for same. But Thor's Motion conveniently skates by that fact, likely because it is seeking more than twenty times that amount as part of this lawsuit. Instead, Thor has asked this Court to effectively read out of the Policy the explicit exclusions on coverage for contamination and "loss of use," and rule that it may nonetheless recover "unpaid rent, significant decreases in percentage of rent paid, as well as lost profits and extra expenses in connection with the coronavirus outbreak." Motion at 10-11.

Thor's position is directly at odds with the explicit language of the Policy. Accordingly, FM Global not only opposes the Motion, but also seeks a determination that the Policy's unambiguous contamination and "loss of use" exclusions each apply to Thor's losses. In an implicit nod to the weakness of its position, Thor falls back onto vague assertions regarding the parties' intent, contending that the Policy was "designed to cover loss of revenue or profit" resulting from "a pandemic and 'stay at home' and business 'shut down' orders." *Id.* at 1. But Thor adduces no evidence for this position, and there is none: indeed, the idea that the Policy could have been intentionally "designed" many years ago to account for an unprecedented and unexpected global pandemic strains credulity. More to the point, it is flatly inconsistent with any reasonable reading of a policy that contains the explicit exclusions described above and does not even mention the term "pandemic" (or "epidemic," for that matter). To the extent the Policy contemplated an event of this sort at all, it did so by ***expressly excluding*** coverage for the contamination and "loss of use" that Thor has allegedly experienced to date, and that it "expect[s]

to continue for the indefinite future." *Id.* at 11. Accordingly, FM Global respectfully requests that the Court deny Thor's Motion and grant FM Global's Cross-Motion.

STATEMENT OF UNDISPUTED FACTS[3]

I. PROCEDURAL BACKGROUND

On or about March 15, 2020, FM Global issued Thor the Policy. Compl. Ex. A at 10. On March 26, 2020, Thor sent a letter to FM Global claiming that Thor had suffered "loss, expense, and/or damage in a number of forms covered under the Policy, including, but not limited to, cleaning and other remediation of property exposed to coronavirus, loss of earnings, loss of profit, extra expenses incurred to operate its business as normal, and loss of rental income." FM Global Response to Thor's Pre-Motion Letter ("FM Global Response Letter") Ex. A at 1 (Dkt. 27-1). Thor admitted that the "scope and extent of covered loss, expense and/or damage that will result from these circumstances is not yet known" but "[o]nce determined, Thor requests that FM provide coverage for its loss, expense and/or damage." *Id.*

FM Global responded on April 14, acknowledging receipt of Thor's letter, describing the Policy's communicable disease coverages—"Communicable Disease Response" and "Interruption by Communicable Disease," which, as mentioned above, are subject to a combined sublimit of $1 million—and requesting information from Thor about its claim. *See* FM Global Response Letter Ex. B (Dkt. 27-2).

Thor responded on April 24, stating that "[w]hile certain of Thor's losses due to coronavirus may be covered under [the communicable disease] coverages," it also believed some or all of its still-unidentified losses were also covered under "the general coverage grants for property damage and time element coverage, as well as multiple time element coverages including

[3] The facts cited herein are matters of public record, asserted by Thor, or undisputed.

civil authority and ingress/egress coverages." FM Global Response Letter Ex. C at 1 (Dkt. 27-3). Thor also said it would "respond to all reasonable requests for information as soon as possible" and would submit a proof of loss to FM Global "as required by the policy." *Id.* Instead, Thor filed this lawsuit for anticipatory breach of contract and declaratory judgment six days later, generally claiming coverage for, among other things, "communicable disease," "extra expense," "rental insurance," "civil or military authority," "contingent time element extended," "logistics extra cost," "attraction property," "ingress/egress" and "delay in startup." *See* Compl. ¶¶ 26, 37, 38, 41, 42, 45, 46, 47, 49, 50.

On July 7, 2020, Thor filed a letter with the Court providing the basis for its anticipated motion for judgment on the pleadings. In it, Thor asserted for the first time, without providing detail, that "*[t]he majority of Thor's losses have been caused not by the confirmed presence of coronavirus at its premises, but by orders of state or local authorities issued in response to the*" pandemic. Thor Pre-Motion Letter at 3 (July 7, 2020) (Dkt. 26) (emphasis added). In fact, the scope of Thor's alleged losses remains unclear to this day. On August 4, 2020, more than four months after first notifying FM Global of its claim, Thor sent FM Global an "initial proof of loss," showing alleged losses as measured by projected lost rental income by tenant. Thor has not provided any further information relating to its proof of loss. Rather, in its Motion, Thor acknowledges that its "COVID-19 related losses from unpaid rent, significant decreases in percentage of rent paid, as well as lost profits and extra expenses . . . are expected to continue for the ***indefinite future*** given that, even after the orders are lifted, a return to normalcy will take many months if not years." Motion at 11 (emphasis added).

II. THE POLICY

a. General Framework of the Policy

As Thor concedes, the Policy "covers property, as described in this Policy, against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, ***except as hereinafter excluded*** . . . ." Compl. Ex. A at 10 (bold and italics added); Motion at 5. That is, to the extent there is physical loss or damage to property that is covered by the Policy, such loss or damage will be covered (assuming other specified factual predicates are met) ***unless*** a specified exclusion applies to bar coverage. The exclusions, in turn, are subject to exceptions specified in the Policy. As the preamble to the "EXCLUSIONS" provisions of the Property Damage section notes, "[i]n addition to the exclusions elsewhere in this Policy, the following ***exclusions apply unless otherwise stated***[.]" Compl. Ex. A at 20 (emphasis added). Therefore, the basic functioning of the Policy is as follows: an event of physical loss or damage to a covered property will be covered if the factual predicate is met, unless an exclusion applies, and an exclusion applies unless an exception to that exclusion is "otherwise stated" elsewhere in the Policy. *Id.*

The Policy details specific coverages (including coverage for business interruption stemming from an event of physical loss or damage) and the requirements to trigger those coverages, which are subject to any applicable exclusions, and specified limits and sublimits. The Policy also covers, as Thor correctly posits, "costs" and "losses," Motion at 5, but Thor's assertion that the Policy treats them as "distinct types of damages," *id.*, is unsupported by clear Policy terms (as described below).

b. Relevant Policy Exclusions

The Policy includes—and this Cross-Motion and Thor's Motion turn on the applicability of—two unambiguous exclusions: the contamination exclusion and the "loss of use" exclusion.

Both exclusions appear under Section 3 of the Property Damage section of the Policy, but apply to the entire Policy, including coverages provided under the Time Element (also known as business interruption) section. The preamble to the Time Element section provides that:

> TIME ELEMENT LOSS as provided in the TIME ELEMENT COVERAGES and TIME ELEMENT COVERAGE EXTENSIONS of this section of the Policy:
> . . .
> C. ***is subject to the Policy provisions, including applicable exclusions*** and deductibles, all as shown in this section and ***elsewhere in this Policy***.

Compl. Ex. A at 45 (emphases added). Section 1 of the Time Element section further notes that the "Policy insures TIME ELEMENT loss . . . directly resulting from physical loss or damage of the ***type insured***: 1) to property described elsewhere in this Policy ***and not otherwise excluded by this Policy***." *Id.* (emphasis added). And, for the avoidance of doubt, the "TIME ELEMENT EXCLUSIONS" section similarly notes that the exclusions detailed therein apply "***[i]n addition to the exclusions elsewhere*** in this Policy." *Id*. at 55 (emphasis added).

i. The Contamination Exclusion

The Policy contains an exclusion relating specifically to "contamination," which is defined as:

> [A]ny 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 76 (emphasis added). Thor agrees, as it must, that this definition, and its reference to "virus," clearly encompasses Covid-19. *See* Motion at 17.

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

> D. **This Policy excludes** the following unless directly resulting from other physical damage not excluded by this Policy:

> 1) **contamination, and any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy**. If contamination due only to the actual not suspected presence of contaminant(s) directly results from other physical damage not excluded by this Policy, then only physical damage caused by such contamination may be insured. This exclusion D1 does not apply to radioactive contamination which is excluded elsewhere in this Policy.

Compl. Ex. A at 24 (emphases altered and added).

ii. The Loss of Use Exclusion

In addition to the Contamination Exclusion, the Policy contains another exclusion that is also relevant here. The Policy provides that it "excludes: . . . 3) loss of market or loss of use." *Id.* at 20-21. Thor's claimed losses stem from its inability to use its properties due to governmental orders or Covid-19 (Thor Pre-Motion Letter at 3; Motion at 1, 10-11, 21), and therefore directly implicate this exclusion (the "Loss of Use Exclusion"), which applies to bar coverage unless an exception is "otherwise stated" in the Policy.

c. <u>The Policy's Communicable Disease Coverages: Narrow Exceptions to the Contamination and Loss of Use Exclusions</u>

While the Contamination Exclusion and Loss of Use Exclusion are implicated by Thor's claimed losses, the Policy provides that exclusions "apply unless otherwise stated." Compl. Ex. A at 20. As mentioned above, to the extent a particular coverage is carved out from applicable exclusions, that coverage could apply to Thor's claimed losses. The Policy's communicable disease coverages are two potentially-applicable narrow exceptions to the Contamination and Loss of Use Exclusions.

The Policy defines "communicable disease," in relevant part, as "disease which is . . . transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges." *Id.* at 75. It then provides two coverages specific to communicable

disease: (1) "Communicable Disease Response" and (2) "Interruption by Communicable Disease." Both provisions provide that coverage is available:

> If a **location** owned, leased or rented by the Insured has the actual not suspected presence of **communicable disease** and access to such **location** is limited, restricted or prohibited by:
>
> 1) an order of an authorized governmental agency regulating the actual not suspected presence of **communicable disease**; or
>
> 2) a decision of an Officer of the Insured as a result of the actual not suspected presence of **communicable disease**.

Id. at 32 & 64-65.

If those requirements are met, the Communicable Disease Response:

> covers the reasonable and necessary costs incurred by the Insured at such **location** with the actual not suspected presence of **communicable disease** for the:
>
> 1) cleanup, removal and disposal of the actual not suspected presence of **communicable diseases** from insured property; and
>
> 2) actual costs of fees payable to public relations services or actual costs of using the Insured's employees for reputation management resulting from the actual not suspected presence of **communicable diseases** on insured property.

Id. at 32. Meanwhile, if Interruption by Communicable Disease is triggered, it "covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY at such **location** with the actual not suspected presence of **communicable disease**." *Id.* at 65. "Actual Loss sustained" under the Policy is measured either by the insured's "Gross Earnings" or "Gross Profit" during the PERIOD OF LIABILITY, subject to certain deductions laid out in the Policy. *Id.* at 37 & 39.

As Thor acknowledges, these coverages apply in "narrow and limited circumstances." Motion at 3. While Thor repeatedly and misleadingly attempts to frame this fact as a "concession"

by FM Global (*see id.* at 3, 8, 11), it simply reflects the unambiguous language of the two communicable disease coverages. Per their plain terms, although these coverages do not require physical loss or damage, they are only triggered upon "the actual not suspected" presence of communicable disease along with the requisite "order of an authorized government agency" or "a decision of an Officer of the Insured" relating to the "actual not suspected" presence of communicable disease.

Although Thor asserts that "there is not any dispute that Thor's losses are potentially covered beyond the Policy's narrow communicable disease coverages," *id.* at 15, this is flat wrong. So too is Thor's assertion that "both parties agree that [is a] factual issue [that] should be resolved after discovery is over." *Id.* at 16. Whether Thor's Covid-19 losses could constitute the "physical loss or damage" required to trigger other coverages beyond the communicable disease coverages is an issue which need not be addressed until and unless the full scope of Thor's losses is determined through discovery.[4]

The only issue before the Court, as teed up by Thor's Motion and this Opposition and Cross-Motion, is whether the Contamination and Loss of Use Exclusions apply to Thor's losses.

ARGUMENT

I. LEGAL STANDARD

a. Standards Governing Motions for Judgment on the Pleadings

Judgment pursuant to Rule 12(c) is appropriate where there exists no issue of material fact such that the moving party is entitled to judgment as a matter of law. *See Burns Int'l Sec. Servs., Inc. v. Int'l Union*, 47 F.3d 14, 16 (2d Cir. 1995); *Apionishev v. Columbia Univ.*, No. 09-cv-6471,

[4] As the Policy makes clear, it is Thor which bears the burden of proving that Covid-19 has actually caused "physical loss or damage" to one or more of its covered properties.

2011 WL 1197637, at *2 (S.D.N.Y. Mar. 25, 2011). A motion under Rule 12(c) for judgment on the pleadings may be filed as soon as the pleadings are closed and the standard is the same as the standard for dismissal under Rule 12(b)(6). FED. R. CIV. P. 12(c); *see also Johnson v. Rowley*, 569 F.3d 40, 43 (2d Cir. 2009); *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 125-26 (2d Cir. 2001). Thus, to survive a motion for judgment on the pleadings, "a complaint must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *accord WC Cap. Mgmt., LLC v. UBS Sec., LLC*, 711 F.3d 322, 328 (2d Cir. 2013).

In evaluating the sufficiency of the complaint, courts employ a "two-pronged approach." *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 430 (2d Cir. 2011) (quoting *Iqbal*, 556 U.S. at 679). First, the court discards any factual pleadings that are nothing more than threadbare legal conclusions. *Id.* at 430; *Sazon Inc. v. State of New York*, No. 11-cv-3666 (B), 2011 WL 5910171, at *3 (S.D.N.Y. Nov. 28, 2011) (court "need not accord legal conclusions, deductions or opinions couched as factual allegations . . . a presumption of truthfulness"). Then, the court considers whether, after accepting all remaining factual allegations as true and drawing all reasonable inferences in favor of the non-moving party, the complaint states a plausible claim for relief. *L-7 Designs*, 647 F.3d at 430. This is necessarily "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* (quoting *Iqbal*, 556 U.S. at 679). "Unless a plaintiff's well-pleaded allegations have nudged [his or her] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Sazon*, 2011 WL 5910171, at *3 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

"Judgment on the pleadings is particularly appropriate in a dispute regarding a breach of contract where the primary issue is determining the parties' legal rights and obligations," and

should be granted "if, from the pleadings, the moving party is entitled to judgment as a matter of law." *Neopharm Ltd. v. Wyeth-Ayerst Int'l LLC*, 170 F. Supp. 3d 612, 615 (S.D.N.Y. 2016).

b. General Principles Governing Interpretation of Insurance Policies

Under New York law, "insurance policies are, in essence, creatures of contract, and, accordingly, subject to principles of contract interpretation." *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, 255 F. Supp. 3d 443, 452 (S.D.N.Y. 2015) (quoting *Porco v. Lexington Ins. Co.*, 679 F. Supp. 2d 432, 435 (S.D.N.Y. 2009)). Consequently, determining whether an insurance policy contains an ambiguity is a question of law. *See Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 113 (2d Cir. 2005) (citing *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998)).

Insurance policies are contracts that are to be accorded their "plain and ordinary meaning." *See Lerner*, 416 F.3d at 116 (quoting *State of New York v. Am. Mfrs. Mut. Ins. Co.*, 593 N.Y.S.2d 885, 886 (N.Y. App. Div. 1993)). Put differently, "language employed in [a] contract of insurance must be given its ordinary meaning, such as the average policyholder of ordinary intelligence, as well as the insurer, would attach to it." *M.H. Lipiner & Son, Inc. v. Hanover Ins. Co.*, 869 F.2d 685, 687 (2d Cir. 1989) (quoting *Abrams v. Great Am. Ins. Co.*, 199 N.E. 15, 16 (N.Y. 1935)). In its interpretation of an insurance policy, "the court must always consider the objective facts and circumstances known to the parties at the time of the transaction—known as the 'factual matrix'—and construe the contract consistently with its commercial purpose in order to arrive at a commercially sensible construction." *In re McMahon*, 236 B.R. 295, 306 (S.D.N.Y. 1999).

Unambiguous terms are to be given their plain and ordinary meaning. *Svensson v. Securian Life Ins. Co.*, 706 F. Supp. 2d 521, 525 (S.D.N.Y. 2010) (quoting *Berkowitz v. N.Y. Life Ins. Co.*, 10 N.Y.S.2d 106, 109 (N.Y. App. Div. 1939)). In fact, "it has long been the rule in New York that, '[i]n an insurance policy[,] the words are to be judged in the light of the understanding of the

average [person] who procures such a policy.'" *Id*. (quoting *Berkowitz*, 10 N.Y.S.2d at 109). Furthermore, "[w]hen the policy's provisions are unambiguous and intelligible, courts should enforce them as drafted." *Id*. (citing *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 42 (2d Cir. 2006)). In other words, "[w]here the provisions of an insurance contract are clear and unambiguous, the courts should not strain to superimpose an unnatural or unreasonable construction." *United Cap. Corp. v. Travelers Indem. Co.*, 237 F. Supp. 2d 270, 274-75 (E.D.N.Y. 2002) (quoting *Maurice Goldman & Sons, Inc. v. Hanover Ins. Co.*, 607 N.E.2d 792, 793 (N.Y. 1992)).

An insurance policy "must be viewed from the vantage point of the 'reasonable expectations and purposes of the ordinary businessman.'" *Id*. (quoting *Avondale Indus., Inc. v. Travelers Indem. Co.*, 697 F. Supp. 1314, 1319 (S.D.N.Y 1988)). Notably, "the mere fact that a contractual term is undefined does not render it ambiguous per se." *E.g.*, *Century Sur. Co. v. Franchise Contrs.*, No. 14-cv-0277, 2016 WL 1030134, at *6 (S.D.N.Y. Mar. 10, 2016); *see also Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 617 (2d Cir. 2001) ("[T]he fact that the language of the contract itself does not specify the meaning of a disputed term does not entail that an ambiguity sufficient to trigger the *contra proferentem* exists."); *Svensson*, 706 F. Supp. 2d at 526 ("The fact that a term is not defined in a[n] [insurance] policy . . . does not alone make it ambiguous.").

If an insurance contract contains an exclusion provision, the "insurer generally bears the burden of proving that the claim falls within the scope of an exclusion." *Lantheus*, 255 F. Supp.3d at 453 (quoting *Seneca Ins. Co. v. Kemper Ins. Co.*, No. 02-cv-10088, 2004 WL 1145830, at *10 (S.D.N.Y. May 21, 2004)). Once "an insurer establishes that [the policy terms at issue are unambiguous and] a policy exclusion applies, the burden shifts [back] to the policyholder to prove

that an exception to that exclusion applies." *Id.* (quoting *Ment Bros. Iron Works Co. v. Interstate Fire & Cas. Co.*, 702 F.3d 118, 122 (2d Cir. 2012)).

II. THE POLICY'S CONTAMINATION EXCLUSION IS BROAD AND UNAMBIGUOUS

a. The Contamination Exclusion Encompasses Covid-19 and Applies to Bar Thor's Claimed Losses

The Policy's unambiguous Contamination Exclusion excludes losses due to contamination caused by Covid-19, such as Thor's alleged loss of rental income. As Thor acknowledges (Motion at 17), the Policy's definition of contamination as "any condition of property due to the actual or suspected presence of any . . . virus" clearly encompasses Covid-19. Compl. Ex. A at 76. There is thus no dispute that Covid-19 falls squarely within the Policy's Contamination Exclusion, which states:

> D. **This Policy excludes** the following unless directly resulting from other physical damage not excluded by this Policy:
>
> 1) **contamination, and any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy**. If contamination due only to the actual not suspected presence of contaminant(s) directly results from other physical damage not excluded by this Policy, then only physical damage caused by such contamination may be insured. This exclusion D1 does not apply to radioactive contamination which is excluded elsewhere in this Policy.

Id. at 24 (emphases altered and added). Just as clearly, the provision's broad, plain language—which excludes coverage for "contamination, and any cost due to contamination including *the inability to use or occupy property*"—applies to Thor's claimed losses, which are all based on its inability to rent out or occupy various commercial and residential units that it owns.

Since the onset of the Covid-19 pandemic, a number of courts have examined contamination exclusions similar to the one at bar and have held that they preclude recovery of

losses related to the pandemic and government shut down orders. For example, in *Martinez v. Allied Insurance Co. of America*, No. 20-cv-00401, 2020 WL 5240218 (M.D. Fla. Sept. 2, 2020), the insured, a dentist, sought coverage for lost revenue and decontamination costs due to Covid-19 and the Florida Governor's emergency order limiting dental services. The policy at issue contained a contamination exclusion that encompassed "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." *Id*. at *2. Applying this exclusion to the insured's claim, the court dismissed the complaint with prejudice finding that, "as a matter of law, the plain language of the insurance policy excludes coverage of the dental practice's purported damages." *Id.*

The court in *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 20-cv-00461, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020), similarly rejected plaintiffs' effort to secure coverage for interruption to their barbershop businesses based, in part, on the contamination exclusion in their policies. The court held that:

> While there is no doubt that the COVID-19 crisis severely affected Plaintiffs' businesses, State Farm cannot be held liable to pay business interruption insurance on these claims as there was no direct physical loss, ***and even if there were direct physical loss, the Virus Exclusion applies to bar Plaintiffs' claims***. Given the plain language of the insurance contract between the parties, the Court cannot deviate from this finding without in effect re-writing the Policies in question. That this Court may not do.

Id. at *7 (emphasis added). So too here. The Policy's unambiguous Contamination Exclusion clearly applies to Covid-19 and Thor's claimed losses stemming from the pandemic.

b. <u>Thor's Flawed Interpretation of the Contamination Exclusion Focuses on Just One Word and Fails to Give Effect to the Provision in its Entirety</u>

Despite acknowledging that Covid-19 constitutes "contamination" under the Policy (Motion at 17), Thor argues that the Contamination Exclusion "cannot possibly" apply to its claims "because that exclusion expressly only applies to Thor's out-of-pocket '<u>costs</u>,'—*i.e.*, costs that

Thor has to pay due to contamination—not to business interruption 'loss' that Thor suffers." *Id.* at 2 (emphasis in original). This strained effort to draw a distinction between "costs" and "loss" does not hold up against the plain language of the full provision, which specifically excludes the precise claim for which Thor seeks coverage: the inability to use or occupy property.

i. Thor's Proposed Distinction Between "Cost" and "Loss" Fails When the Contamination Exclusion is Read as a Whole

In drawing a distinction between "costs" and "loss," Thor narrowly focuses on the exclusion's reference to "any ***cost*** due to contamination" and conveniently ignores the other portions of the provision that are directly relevant and make clear that "costs" in this context includes Thor's inability to use or occupy its property. Indeed, the provision explicitly defines "cost" to encompass an insured's "***inability to use or occupy property***," *e.g.*, the loss of rental income for which Thor seeks coverage.

Faced with this unambiguous language, Thor offers an unconvincing explanation that both stretches the meaning of the plain words of the provision beyond recognition and inserts words that are absent. Thor argues that the phrase "including the inability to use or occupy property" is "just one example of 'costs' sought to be excluded." Motion at 18 n.9. So far, so good. But rather than construing the word "costs" as broad enough to encompass both affirmative outlays like "pay[ing] for temporary use of other property" *in addition to* losses caused by that inability to use, Thor flips the meaning of the phrase on its head. In essence, Thor is arguing that its idiosyncratic definition of costs should limit (and fundamentally change) the plain meaning of the phrase "inability to use or occupy property" so that it *only* includes affirmative outlays, a reading which flies in the face of the plain language of the phrase as well as its grammatical construction, which makes clear that such "inability to use or occupy" is subsumed within and informs the meaning of "costs" as that term is used *in the Policy*. *Id.* Beyond imbuing the word "costs" with a meaning

that directly contradicts the provision itself, Thor's argument also suggests that an affirmative outlay on a replacement property—"pay[ing] for temporary use of other property"— is the same as an "inability to use or occupy property." But this is simply not credible, particularly in the context of a Policy held by a "major commercial property owner" such as Thor (*id.* at 1), who would not be making such affirmative outlays but rather simply losing rental income based on an inability to rent out—that is, to "use or occupy"—its properties.

Thor further argues that "***[c]ourts*** have not hesitated to find that an insurer's use of the word 'costs' in an exclusion limits the exclusions to costs, and only costs." *Id.* at 19 (bold added). But Thor cites ***just one*** almost ***40-year-old, out-of-circuit case*** for that proposition. *See id.* (discussing *Am. Motorists Ins. Co. v. Trane Co.*, 718 F.2d 842 (7th Cir. 1983)). And that one case actually undermines Thor's proposed interpretation of the Contamination Exclusion. In describing the exclusion at issue in *Trane,* Thor takes the same misleading approach it has here of cherry-picking select words from the provision. A comparison of Thor's selective excerpt against the broader exclusion language from *Trane* illustrates the point:

- Thor notes that the exclusion applies to "damages or expense which represents the cost of, [sic] replacing" goods. Motion at 19 (emphasis in original).

- The *full* exclusion in that case applied to "damages or expense which represents the cost of inspecting, repairing, replacing, removing, recovering, withdrawing from use ***or loss of use of***, because of any known or suspected ***defect*** or deficiency" in the policyholder's products. *Trane*, 718 F.2d at 844 (emphases added).

As with the Contamination Exclusion in the Policy, Thor's selective reading (and description) of the exclusion in *Trane* omits that it specifically lists "loss of use" as a cost that is excluded. *Cf.* Compl. Ex. A at 24 (excluding "any cost due to contamination ***including the inability to use*** or occupy property) (emphasis added and altered).

Moreover, Thor's brief omits another critical element of the *Trane* exclusion—that it only applied when the "cost of . . . loss of use" was due to a "defect" in the product. *Compare* Motion at 19 (selectively quoting the *Trane* exclusion), *with Trane*, 718 F.2d at 844 (quoting full exclusion). Accordingly, the district court in that case held that the exclusion was "unambiguous and applicable" in *barring* coverage for "the costs incurred in discovering and replacing the defective [products] *and the damages representing loss of use* caused by attempts to remedy the deficiency in the [policyholder's] product." *Am. Motorists Ins. Co. v. Trane Co.*, 544 F. Supp. 669, 694 (W.D. Wis. 1982) (emphasis added), *aff'd*, 718 F.2d 842 (7th Cir. 1983). The court then held that the exclusion did *not* bar the policyholder's coverage claims for harm to business reputation and contractual liabilities from shortfalls in production only because these claims did "not represent a part of the cost of *remedying a defect*." *Id.* at 695 (emphases altered and added). Neither the district court's holding nor the Seventh Circuit's affirmance was based in any way on a distinction between costs and other damages, as Thor suggests.

Thor's argument that courts "regularly distinguish between 'costs' and 'loss'" is likewise flawed. Motion at 18. Thor cites just two cases to support this proposition, and neither advances the distinction Thor proposes here. *Id.* (citing *7001 E. 71st St. LLC v. Chubb Custom Ins. Co.*, 417 F. Supp. 3d 150 (E.D.N.Y. 2019) and *Granite Ridge Energy, LLC v. Allianz Glob. Risk US Ins. Co.*, No. 10-cv-2430, 2012 WL 13036791 (S.D.N.Y. July 30, 2012)). In fact, *7001 East 71st Street* again undermines Thor's proposed distinction. In that case, contrary to Thor's description, the court used the terms "cost" and "loss or damage" interchangeably. For example, after examining the "*Cost* to Repair Building Damage," including the "*cost* . . . to replace the roof and the entire main floor," the court held that the insurer was required to cover this "*loss or damage* to the building's roof [and] main floor." *7001 E. 71st St.*, 417 F. Supp. 3d at 158-59, 162 (emphases

added). For its part, *Granite Ridge* is completely inapposite: the claims in that case related to applicable coverages and not to exclusions (much less exclusions as broadly-phrased as the Contamination Exclusion here). *See generally* 2012 WL 13036791.

In light of the above, there is simply no support for Thor's unorthodox reading of the Policy. Rather, as in *Diesel* and *Martinez*, the Policy's unambiguous Contamination Exclusion clearly encompasses Covid-19 and bars Thor's claimed losses.

ii. Thor's Proposed Interpretation Ignores That, in Addition to Excluding "Any Cost Due to Contamination," the Provision Also Broadly Excludes "Contamination" as a Free-Standing Term

Thor's proposed interpretation of the Contamination Exclusion fails for a second reason. By focusing on the word "cost," Thor ignores the first two words of the exclusion: "**contamination, and** any cost due to contamination . . . ." Compl. Ex. A at 24. But the full provision—not just one word of it—must be read and given effect. *See Svensson*, 706 F. Supp. 2d at 534 (citing *Sunrise Mall Assocs. v. Import Alley of Sunrise Mall*, Inc., 621 N.Y.S.2d 662, 663 (N.Y. App. Div. 1995)). And the word "contamination" must mean something more than contamination-related "costs," otherwise the separate phrase that follows it—"and any cost due to contamination"—would be superfluous. Rather than address this, Thor simply concludes that the exclusion "should be read only to encompass actual virus contamination and related costs," without explaining what it means to exclude "actual virus contamination" in the context of an insurance policy. Motion at 20.

As noted above, the Policy defines "contamination" broadly as "any condition of property due to the actual or suspected presence of any . . . bacteria, virus, disease causing or illness causing agent." The Policy's exclusion of "contamination" should also be read to encompass contamination as a whole, including any related losses. Thus, the exclusion of "contamination" as

a free-standing term provides a separate basis for the exclusion of Thor's claims related to Covid-19 and government orders. Of course, as noted above, the Contamination Exclusion goes further and specifically identifies Thor's "***inability to use or occupy property***"—*e.g.*, a loss of rental income—as something that the Policy does not cover, eliminating all doubt that Thor's claims are excluded.

c. <u>The Contamination Exclusion Does Not Swallow the Communicable Disease Coverages, Which Are Narrow Exceptions to the Exclusion</u>

Thor argues that even if its proposed cost/loss distinction fails, FM Global's "broad reading" of the Contamination Exclusion "to encompass business interruption losses resulting from contamination would violate basic contract interpretation principles . . . . For example, if the exclusion were read to exclude all 'costs' and 'losses' arising out of the 'actual or suspected presence' of a 'virus,' as FM has suggested, it would swallow the express coverage granted by the communicable disease coverage provisions that FM agrees could apply." Motion at 19-20. Not so. Contrary to Thor's claim, FM Global has not "suggested" that "all" contamination-related costs and losses would be excluded, nor is that true under the Policy. Rather, as discussed above, *supra* 7-9, the Policy contains two clear, narrow exceptions to the Contamination Exclusion. To trigger these coverages, an insured must show the "actual not suspected presence of **communicable disease** and access to such **location** is limited, restricted or prohibited by" either a government order "regulating the actual not suspected presence of communicable disease" or "a decision of an Officer of the Insured as a result of the actual not suspected presence of communicable disease." Compl. Ex. A at 32, 64-65. If those specific requirements are met, the communicable disease coverages apply as an exception to the Contamination Exclusion.

Far from being in "conflict," as Thor suggests (Motion at 20), these provisions are complementary and there is no risk that reading the Contamination Exclusion by its plain terms

would "swallow" the communicable disease coverages. But even if the two provisions were in conflict (they are not), New York law is clear that "[w]here there is an inconsistency between a specific provision and a general provision in a contract, the specific provision controls." *Cronos Grp. Ltd. v XComIP, LLC*, 64 N.Y.S.3d 182, 185 (N.Y. App. Div. 2017); *see also In re Lehman Bros. Holdings Inc.*, 761 F.3d 303, 313 (2d Cir. 2014) ("To the extent that there appears to be conflict between these provisions, the specific governs the general."). Indeed, "it is a fundamental rule of contract construction that specific terms and exact terms are given greater weight than general language." *Aramony v. United Way of Am.*, 254 F.3d 403, 413 (2d Cir. 2001) (internal quotation marks omitted); *accord Global Reinsurance Corp. of Am. v. Century Indem. Co.*, 442 F. Supp. 3d 576, 586 (S.D.N.Y. 2020) ("It is also axiomatic that courts construing contracts must give specific terms and exact terms . . . greater weight than general language." (internal quotation marks omitted)). Here, the broad and general exclusion of coverage pertaining to contamination is explicitly limited—and thus governed—by the Communicable Disease coverages.

On the other hand, reading the Contamination Exclusion as Thor proposes—by adopting Thor's groundless distinction between the words "cost" and "loss" and failing to acknowledge that the communicable disease coverages are exceptions to the Contamination Exclusion—would create a conflict where none exists. Specifically, by limiting the broadly-phrased Contamination Exclusion to cover only Thor's definition of "costs," meaning "affirmative outlays," the Communicable Disease Response coverage (which covers various specified "costs") would be swallowed and rendered illusory by the exclusion, while only the Interruption by Communicable Disease coverage (which covers specified "loss") would survive the exclusion. This result is not tenable under basic principles of insurance contract interpretation, which require that all provisions be given effect and read to be harmonious with one another. *See, e.g.*, *Mastrobuono v. Shearson*

Lehman Hutton, Inc., 514 U.S. 52, 63 (1995) ("[A] document should be read to give effect to all its provisions and to render them consistent with each other.").

III. THE POLICY'S UNAMBIGUOUS "LOSS OF USE" EXCLUSION ALSO EXPRESSLY BARS THOR'S CLAIMED LOSSES

The Policy's separate Loss of Use Exclusion is yet another bar to Thor's claim. *See* Compl. Ex. A at 20-21 ("This Policy excludes: . . . loss of market or loss of use."). Thor's alleged losses stem from its inability to use its properties due to governmental orders or Covid-19 (Thor Pre-Motion Letter at 3; Motion at 1, 10, 21), and they therefore directly implicate the Loss of Use Exclusion, which applies to bar coverage unless specific exceptions are "otherwise stated" in the Policy. *See* Compl. Ex. A at 20 ("In addition to the exclusions elsewhere in this Policy, the following exclusions apply unless otherwise stated").

Thor's assertion that this exclusion fails to state what the unambiguous phrase "loss of use" is "intended to mean in the context of this" Policy (Motion at 10) falls flat. The absence of a definition in a policy does not render an otherwise unambiguous term ambiguous. As the magistrate in *Malaube v. Greenwich Insurance Co.* recently noted in recommending that the court grant the insurer's motion to dismiss claims seeking coverage related to Covid-19 and governmental shut-down orders:

> [T]he mere failure to provide a definition of a term involving coverage [or exclusion] does not render the term ambiguous. When a policy does not define a term, the plain and generally accepted meaning should be applied.

No. 20-cv-22615, 2020 WL 5051581, at *5 (S.D. Fla. Aug. 26, 2020) (internal citation omitted); *see also Bhd. Mut. Ins. Co. v. Ludwigsen*, No. 16-cv-6369, 2018 WL 4211319, at *14 (S.D.N.Y. Sept. 4, 2018) (holding that although the policy did not define certain terms, "unambiguous provisions of an insurance contract must be given their plain and ordinary meaning"). "Loss of use"—a standard phrase that regularly appears in insurance policies—can hardly be considered an

ambiguous term, particularly in the context of property. *See, e.g.*, *Travelers Prop. Cas. Co. of Am. v. Mixt Greens, Inc.*, No. 13-cv-0957, 2014 WL 1246686, at *5 (N.D. Cal. Mar. 25, 2014) ("Under the plain meaning of 'loss of use,' the insured must have been deprived of the use of its tangible property."); *see also* Compl. Ex. A at 24 (Policy's Contamination Exclusion) ("inability to use or occupy property"). Because it is not an ambiguous term, "loss of use" should be accorded its plain meaning.

Rather than acknowledge the ordinary meaning of the term "loss of use"—and as it did with the Contamination Exclusion—Thor again seeks to inject ambiguity where none exists in the hopes of escaping the plain language of the Policy. Thor claims that because the exclusion refers to "loss of market ***or*** loss of use," the two separate exclusions "must be given a complementary meaning" in accordance with the "canon of contract construction known as *noscitur a sociis* [which] dictates that words grouped in a list should be given related meaning. . . . When this concept is applied here, the exclusion reasonably should be read only to exclude coverage for losses suffered by Thor simply because there is no longer a business market or use for the [sic] Thor's property." Motion at 20-21. The only support Thor offers in this regard—a comparative "*cf.*" cite—is to a case that does not address, much less apply, *noscitur a sociis*. *Id.* at 21 (citing *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 279 F. Supp. 2d 235, 240 (S.D.N.Y. 2003)).

Thor's proposed approach to, and reading of, the "loss of use" exclusion fails for three reasons. ***First***, when "the pertinent provisions [of an insurance policy] contain no ambiguity, canons of construction favoring the insured are irrelevant." *Levy v. Nat'l Union Fire Ins. Co.*, 889 F.2d 433, 434 (2d Cir. 1989); *accord Niemuller v. Nat'l Union Fire Ins. Co.*, No. 92-cv-0070, 1993 WL 546678, at *2 (S.D.N.Y. Dec. 30, 1993).

Second, and in any event, Thor's misguided invocation of the principle of *noscitur a sociis* fails because the "loss of market" and "loss of use" exclusions are listed *disjunctively* in the Policy—"loss of market ***or*** loss of use." Compl. Ex. A at 21 (emphasis added). As the Supreme Court held in declining to apply *noscitur a sociis* to the phrase "a congressional, administrative, or Government Accounting Office report," applying the canon to a "list of three items, each quite distinct from the other" may "rob any one of them of its independent and ordinary significance." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 288 (2010) (internal quotation marks omitted). Applying *Graham*, this court explained in *In re Tribune Co. Fraudulent Conveyance Litigation* that "[n]oscitur a sociis has limited application where, as here, there are just two words in a statutory phrase connected by a disjunctive 'or.' That canon is more appropriately applied to a string of statutory terms or items in a list." No. 12-cv-2652, 2019 WL 1771786, at *10 n.10 (S.D.N.Y. Apr. 23, 2019) (internal quotation marks omitted).

Thor tries to skirt this by sleight of word. The Motion repeatedly collapses the distinct exclusions by referring to them as the "loss of market/use exclusion." Motion at 16, 20, 23 & n.11, 24. Despite Thor's efforts to rewrite the Policy, the provision is written in the disjunctive and both the "loss of market" and "loss of use" exclusions must be read as distinct terms and interpreted accordingly.

Third, having conflated the terms, Thor then proposes inserting entire phrases that do not otherwise appear in an attempt to alter the meaning of "loss of use." Specifically, Thor argues that, "as courts have recognized, given the inclusion of the words 'loss of market' alongside 'loss of use,' the exclusion applies only to business income loss ***due to the lack of*** a commercial market or ***use for Thor's property due to changing business market conditions***." Motion at 2-3

(emphases added). As an initial matter, despite claiming that "***courts***" have found this to be the case, Thor (once again) cites ***just one out-of-circuit case*** addressing the issue. Motion at 21 (discussing *Ashland Hosp. Corp. v. Affiliated FM Ins. Co.*, No. 11-cv-0016, 2013 WL 4400516 (E.D. Ky. Aug. 14, 2013)). And, as Thor notes, the policy exclusion in *Ashland* was not written in the disjunctive, but rather excluded "loss of market; loss of use." *Id*. (quoting *Ashland*, 2013 WL 4400516, at *11). Semicolons, of course, do not indicate a disjunctive relationship; to the contrary, they indicate a close relationship between two independent clauses, which is precisely the situation in which the *noscitur a sociis* canon is applicable.

Moreover, the court in *Ashland* noted that the defendant there did not "offer[] the Court . . . an interpretation of" the "loss of use" exclusion, and that "the exclusion cannot be so broad as to encompass *all* loss of use of insured property" as that "would swallow up the coverage portion of the Policy." 2013 WL 4400516, at *11 (emphasis in original). Neither is true here. The term "loss of use" should be accorded its plain meaning and, contrary to Thor's claim that doing so "would swallow most if not all of the coverage provided by the All-Risk Policy" (Motion at 22), as noted above, and as Thor fails to acknowledge, the introductory language to the exclusions provides that they apply "unless otherwise stated." *Supra* at 7 (quoting Compl. Ex. A at 67). Therefore, to the extent specific Policy provisions extend coverage to "loss of use," the exclusion would not apply. *See, e.g.*, Compl. Ex. A at 51 (providing coverage for lost rent payments where a physical loss or damage of the type insured has rendered the property "unusable"). Because Thor has failed to identify any exceptions in the Policy to the Loss of Use Exclusion that would apply to Thor's claimed losses, the exclusion bars the coverage Thor seeks.

CONCLUSION

Defendant FM Global respectfully requests that this Court deny Thor's Motion, and grant FM Global's Cross-Motion for Partial Judgment on the Pleadings.

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Respectfully submitted,

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