UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

SSN HOTEL MANAGEMENT, LLC, et al., Plaintiffs v. THE HARFORD MUTUAL INSURANCE COMPANY, Defendant	CIVIL ACTION NO. 2:20-CV-06228 JURY TRIAL DEMANDED HON. CHAD F. KENNEY

DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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I. INTRODUCTION

SSN Hotel Management, LLC and other affiliated entities ("SSN") seek a declaratory judgment that they are entitled to insurance coverage from The Harford Mutual Insurance Company ("Harford") for claimed business income losses allegedly caused by the coronavirus pandemic and related government Orders. Notwithstanding these contentions, the plain and unambiguous terms of the insurance Policy preclude coverage for the asserted losses because: the Policy provides coverage only for losses caused by direct physical loss of or damage to property; the insurance Policy broadly excludes coverage for business income losses caused by or resulting from a virus; and the requirements for triggering Civil Authority coverage are otherwise unmet. This litigation illustrates the fallacy of the contention that COVID-19 has a direct physical effect on structures because if it actually did, the Plaintiffs would not be able to operate at all. Instead, even with the government Orders, the Plaintiffs hotels remained eligible to be open for business and were, indeed, exempt from forced closure. Business insurance does not provide recourse under these circumstances.

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS

SSN operates a group of hotel properties located in Delaware, New Jersey, Pennsylvania and Virginia. (Am. Complaint ¶1) At the times relevant hereto, SSN was insured under a commercial insurance Policy (the "Policy")[1] issued by Harford Mutual Insurance Company ("Harford"). (Am. Complaint ¶2) The Policy provides coverage in accordance with its terms and conditions. A copy of the relevant Policy documents are attached to the Amended Complaint as Exhibit 1.

[1]There are actually two policies at issue due to the timing of events and the addition and subtraction of some insureds for the respective policy periods. (Am. Complaint, footnotes 1-4) The operative Policy language at issue in this case in each form has no relevant difference and so, we will refer to "the Policy" in the singular in this Brief.

According to the Amended Complaint, on various dates in March of 2020, the Plaintiffs were forced to suspend and/or reduce their business operations at various hotel locations in Pennsylvania, Delaware, New Jersey and Virginia. (Am. Complaint ¶¶5-8) The reduction in business operations was allegedly due to Orders from the Governors of each of the four states. The Orders were all made in an effort to protect the public and limit the spread of COVID-19. (Am. Complaint ¶¶5-8) Notably, none of the Orders of any state Governor compelled the closure of any hotel operation in any of the four states where the Plaintiffs do business.

On March 11, 2020, the World Health Organization declared the coronavirus a pandemic. (Am. Complaint ¶68) Consistent with this situation, Governor Wolf issued a proclamation on March 6, 2020 declaring the pandemic a disaster emergency. (Am. Complaint ¶93) The Governor's proclamation of disaster emergency is plainly tied to the coronavirus and its worldwide spread. The Governor's proclamation declares COVID-19 "a disease capable of causing severe symptoms or loss of life . . . ." The proclamation further identifies the need to implement measures to mitigate the spread of COVID-19. (Am. Complaint, Exhibit 4)

The initial disaster emergency proclamation was followed by a business closure Order. This Order called for non-life-sustaining businesses to close their facilities. Hotels were exempt from the closure Order.[2] Other businesses were permitted to remain open but required to follow social distancing practices and other mitigation measures designated by the Centers for Disease Control. (Am. Complaint, Exhibit 5) These Orders and others subsequently issued were clearly aimed at mitigation and attempts to control the spread of COVID-19.

[2] The business closure Order attached to the Amended Complaint as Exhibit 5 is incomplete as it does not include the list of life-sustaining businesses that were permitted to remain open and that is referenced in the Order at the bottom of page 1. (See, Doc. No. 10-1, p. 506 of 575) Among such businesses are those that provide "traveler accommodation," a category that includes hotels and motels. See, List of Exempt Businesses, p.5, attached hereto as Exhibit A.

On March 12, 2020, Virginia Governor Ralph Northam signed an Executive Order declaring a disaster emergency in Virginia. (Am. Complaint ¶97) On March 23, 2020, Governor Northam signed another Executive Order requiring non-essential businesses to utilize telecommuting or work-from-home procedures and to reduce in-person work force at work locations to ten percent of the business establishment's regular staffing levels. (Am. Complaint ¶98) This was followed by a stay-at-home Order on March 30, 2020. (Am. Complaint ¶99) The Governor's Orders did not close hotels.[3]

On March 9, 2020, New Jersey Governor Phil Murphy issued an Order declaring a state-of-emergency in New Jersey as a result of COVID-19. (Am. Complaint ¶100) On March 16, 2020, Governor Murphy issued another Executive Order declaring it a necessity to limit unnecessary movement of individuals and person-to-person interactions. (Am. Complaint ¶101) On March 21, 2020, Governor Murphy issued a stay-at-home Order for all New Jersey residents. (Am. Complaint ¶102) Governor Murphy's Orders did not compel New Jersey hotels to close. (Am. Complaint, Exhibit 12)

On March 12, 2020, Delaware Governor John Carney signed an Executive Order declaring a disaster emergency in Delaware. (Am. Complaint ¶103) On March 16, 2020, Governor Carney issued another Executive Order recommending the suspension of gatherings of groups of people greater than 50. This was followed by a stay-at-home Order on March 22, 2020. (Am. Complaint ¶¶104-105) Governor Carney's Orders did not close hotels and, in fact, the Governor's Fifth Modification of the Declaration of a State of Emergency specifically

[3] See, Virginia.gov, *Virginia's Statewide Stay at Home Order – Frequently Asked Questions*, p. 9/21, attached hereto as Exhibit B.

references individuals who reside in hotels and motels. (Am. Complaint Exhibit 16, Doc. 10-1, p. 572 of 575)[4]

All of these Civil Authority Orders were implemented to prevent the spread of COVID-19. (Am. Complaint ¶111) Although the Orders of the various state Governors allegedly limited the Plaintiffs' business operations in each of the four states, consistent with the fact that hotel operations were exempt from closure as essential businesses, the Amended Complaint does not allege that the Plaintiffs closed their hotels. Instead, the Amended Complaint alleges that they were forced to "severely limit and restrict the activities" at their various properties. (Am. Complaint ¶116) Although the Amended Complaint alleges in some detail that COVID-19 damaged or potentially contaminated various properties, the Complaint does not allege closure, but instead, continuing operation at less than full capacity. (Am. Complaint ¶121)

The contents of the insurance Policy demonstrate why there is no coverage for the losses alleged. Those reasons include a plainly-worded and clear exclusion due to virus which states in pertinent part that coverage is excluded for loss or damage caused directly or indirectly by "any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness or disease." (See, Doc. 10-1, p. 102). The Amended Complaint also establishes that the government Orders in question did not meet the requirements necessary to trigger the Civil Authority coverage because, among other things, the Orders did not prohibit access to SSN's business premises. Finally, the Policy requires a showing of direct physical loss of or damage to either its own property or property within a one mile radius. (See, Doc. 10-1, pp. 92, 93)

[4] The Plaintiffs did not attach Governor Carney's Fourth Modification of the Declaration of a State of Emergency as an Exhibit to the Amended Complaint. The Fourth Modification expressly lists hotel workers and staff necessary to ensure the safe and proper management of hotel properties as workers in essential businesses. Exhibit C hereto, p. 13.

In summary, a pandemic-related business interruption claim has been presented to Harford in this litigation. Applying the policy terms and conditions to the claim, it is clear that there is no coverage under the Policy.

The Policy Provisions at Issue

The Business Income coverage provisions are contained in the Business Income (and Extra Expense) Coverage Form CP 00 30 10 12. (Doc. 10-1, p. 92) The insuring language for the coverages at issue are as follows: Business Income coverage (Doc. 10-1, p. 92); Extended Business Income (Doc. 10-1, p. 94); Extra Expense (Doc. 10-1, p. 92); and Civil Authority (Doc. 10-1, p. 93). The Exclusion of Loss Due to Virus or Bacteria can be found at (Doc. 10-1, p. 102) and the definitions for Period of Restoration and Covered Causes of Loss are at Doc. 10-1, pp. 100 and 107 respectively.

III. STATEMENT OF ISSUE PRESENTED

WHETHER THE HARFORD POLICY PROVIDES COVERAGE TO THE PLAINTIFFS FOR VIRUS-RELATED LOSS OF BUSINESS INCOME, EXTRA EXPENSE OR ORDER OF CIVIL AUTHORITY?

Suggested answer: No

IV. ARGUMENT

A. Legal Standard

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must contain sufficient factual matter, which, if accepted as true, "state[s] a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). A plaintiff "must plead more than labels and conclusions," and "[f]actual allegations must be enough to raise the right to relief above the speculative level . . . ." Twombly, 550 U.S. at 555. In the context of a 12(b)(6)

motion, conclusions of law contained in a complaint need not be accepted by the Court. McTernan, Fowler v. UPMC Shadyside, 578 F.3d 203, 210-211 (3d Cir.2009).

Under the two-pronged approach set outlined in Twombly and later formalized in Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), a district court must first identify all factual allegations that constitute nothing more than "legal conclusions" or "naked assertions." Twombly, 550 U.S. at 555, 557. Such allegations are "not entitled to the assumption of truth" and must be disregarded for purposes of resolving a 12(b)(6) motion to dismiss. Iqbal, 556 U.S. at 679. The district court must then identify "the 'nub' of the ... complaint — the well-pleaded, nonconclusory factual allegation[s]." Id. Taking these allegations as true, the district court must then determine whether the complaint states a plausible claim for relief. See, Id.; Kahn v. Pa. Nat'l Mut. Cas. Ins. Co., 2021 U.S. Dist. LEXIS 23090, at *9 (M.D. Pa. Feb. 8, 2021).

B. Choice of Law

There are twenty-three separate corporate Plaintiffs in this case, six located in Pennsylvania, ten are in New Jersey, six are from Delaware[5], and one is in Virginia. (Complaint ¶¶12-33) Although the Amended Complaint does not expressly say so, it appears the Plaintiffs contend Pennsylvania law ought to apply to this controversy. For example, in paragraph 129 of the Amended Complaint, they contend that a declaratory judgment will further the public policy of this jurisdiction. While the numerous locations of the Plaintiffs' hotel properties could in some circumstances present a potential dilemma in terms of choice of laws, in actuality, there is no material difference in the respective jurisdictions' rules for insurance policy interpretation and, therefore there is no conflict in this case.

[5] SSN Ruchi Newark, LLC is alleged to be a New Jersey corporation with a principal place of business in Delaware. This appears to be an inconsequential error in the Complaint as SSN Ruchi Newark, LLC, is a Delaware company.

A federal court exercising diversity jurisdiction must apply the choice of law rules employed by the state in which it sits. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, (1941). Pennsylvania choice of law rules dictate that the District Court must first determine whether a "true conflict" exists between the relevant laws of Pennsylvania and the other states with an arguable interest in the litigation. Hanreck v. Winnebago Indus., Inc., 2019 U.S. Dist. LEXIS 51388 (M.D. Pa. Mar. 27, 2019). If the jurisdictions' laws are the same, there is no conflict, and the court's choice of law inquiry ends. Holtec Int'l & Holtec Mfg. Div., Inc. v. ARC Machs., Inc., 2020 U.S. Dist. LEXIS 183916, at *9 (W.D. Pa. Oct. 5, 2020); Hammersmith v. TIG Ins. Co., 480 F.3d 220, 230 (3d Cir. 2007).

The central issue presented in this case is one of contract interpretation. Under Pennsylvania law, the interpretation of an insurance contract is a question of law. Am. Auto. Ins. Co. v. Murray, 658 F.3d 311, 320 (3d Cir. 2011). The District Court must interpret the plain language of the insurance contract read in its entirety, giving effect to all its provisions and construe the words of the policy "in their natural, plain, and ordinary sense" meaning. Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 108 (Pa. 1999).

When the policy language is "clear and unambiguous," the court must "give effect to that language." 401 Fourth Street v. Inv'rs Ins. Co., 879 A.2d 166, 170 (Pa. 2005). When policy language is ambiguous, the court should construe the provision against the insurer and in favor of the insured. Ramara, Inc. v. Westfield Ins. Co., 814 F.3d 660, 677 (3d Cir. 2016). A policy is ambiguous where it is reasonably susceptible to more than one construction and interpretation. Madison Constr. Co., 735 A.2d at 106. Policy language should not be stretched beyond its plain language to create an ambiguity and mere disagreement between the parties about policy

meaning does not make the policy ambiguous. Meyer v. CUNA Mut. Ins. Soc., 648 F.3d 154, 164 (3d Cir. 2011).

The guiding principle in interpreting an insurance contract is to effectuate the reasonable expectations of the insured. Reliance Ins. Co. v. Moessner, 121 F.3d 895, 903 (3d Cir. 1997) (citations omitted). Under Pennsylvania law, even if the terms of the insurance contract are clear and unambiguous, the insured's reasonable expectations may prevail over the express terms of the contract. Bensalem Twp. v. Int'l Surplus Lines Ins. Co., 38 F.3d 1303, 1309 (3d Cir. 1994). Even so, the insurance contract's language itself serves as the best evidence of the parties' reasonable expectations. Safe Auto Ins. Co. v. Berlin, 991 A.2d 327, 332 (Pa. Super. 2010) (citation omitted).

The insured has the initial burden of establishing coverage under the policy. State Farm Fire & Cas. Co. v. Estate of Mehlman, 589 F.3d 105, 111 (3d Cir. 2009). Where the insured meets that burden and the insurer relies on a policy exclusion as the basis for denying coverage, the insurer then has the burden of proving that the exclusion applies. Id.; TAQ Willow Grove, LLC v. Twin City Fire Ins., 2021 U.S. Dist. LEXIS 7276, *4-6 (E.D. Pa. January 14, 2021).

As to these policy interpretation protocols, the applicable legal principles in Delaware, New Jersey and Virginia are not materially different from Pennsylvania. See, e.g., Auto. v. Zurich Am. Ins. Co., 2021 U.S. Dist. LEXIS 25325 *7-10 (D.N.J. Feb. 10, 2021); Eye Care Ctr. Of N.J., PA v. Twin City Fire Ins Co., 2021 U.S. Dist. LEXIS 24344 *4-5 (D.N.J. Feb. 8, 2021); Axis Reinsurance Co. v. HLTH Corp., 993 A.2d 1057, 1062-64, (Del. 2010); Marshall v. State Farm, 2013 Del. Super. LEXIS 231 *6 (Super. Ct. June 13, 2013), aff'd, 2104 Del. LEXIS 50 (Feb. 6, 2014); Monsanto Co. v. Aetna Cas. & Sur. Co., 1994 Del. Super. LEXIS 191, at *11 (Del. Super. Ct. Apr. 15, 1994); Marks v. Scottsdale Ins. Co., 2014 U.S. Dist. LEXIS 104977, at

*17-18 (E.D. Va. July 30, 2014); Bohreer v. Erie Ins. Grp., 475 F. Supp. 2d 578, 585 (E.D. Va. 2007). Accordingly, there is no conflict and it is appropriate for the Court to apply Pennsylvania law. Scirex Corp. v. Fed. Ins. Co., 313 F.3d 841, 847, n.1 (3d Cir. 2002).

C. Prima Facie Coverage

As indicated above, the first step in the analysis of this case is whether the Plaintiffs can sustain their burden of establishing coverage under the Policy's affirmative coverage grant. The Policy provisions at issue here share certain essential elements. Business Income coverage is tied to "direct physical loss of or physical damage to" insured property, and Extra Expense coverage is triggered by costs that would not have been incurred if there had been no direct physical loss or physical damage to insured property. (Doc. 10-1, p. 92) Each coverage also depends on there being a Covered Cause of Loss. The Business Income and Extra Expense coverages apply when direct physical loss or damage is caused by a "Covered Cause of Loss." (Doc. 10-1, p. 92) Additionally, the Civil Authority Coverage applies when an action of civil authority prohibits access to the insured premises as a direct result of a Covered Cause of Loss to property in the immediate area of the insured property. (Doc. 10-1, p. 93)

1. Business Income and Extra Expense Coverage - The Physical Damage Requirement.

The presence of direct physical loss of or damage to property is a foundational element of property insurance policies. In the absence of direct physical loss of or damage to property, there is no coverage. Property insurance policies are structured in such a way that generally there must be a physical change to the property – generally something that can be fixed or replaced – in order to trigger the coverage. By structuring property policies in this way, insurance companies have undertaken to protect against identifiable risks which last for an ascertainable period of time, defined in the policy as the "period of restoration." Property insurance cannot be

generally applied to situations where the risk is not tied to something that can be repaired or replaced whether it be the insured premises or as in the case of Civil Authority coverage, for damage occurring within a mile of the insured premises.

In first party property policies, the requirement that the loss be "physical" given the ordinary definition of the term, is widely held to exclude losses that are intangible or incorporeal, and, thereby, to preclude any claim against a property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property. 10A Couch on Insurance §148.46 (3rd Ed. 1998). As numerous courts have held, the requirement of "physical" loss or damage connotes a structural change to the property. Indeed, the policy's business income coverage lasts for the "period of restoration," which ends when the damaged property "should be repaired, rebuilt or replaced." These terms "strongly suggest that the damage contemplated by the policy is physical in nature." Philadelphia Parking Authority v. Federal Insurance Co., 385 F. Supp. 2d 280, 287 (S.D.N.Y. 2005)(applying Pennsylvania law).

The Third Circuit has likewise declared that the ordinary and widely accepted definition of physical damage to property means "a distinct, demonstrable, and physical alteration of its structure." Port Authority of New York and New Jersey v. Affiliated FM Insurance Co., 311 F.3d 226, 235 (3d Cir. 2002). In Port Authority, the Court of Appeals affirmed the District Court's ruling that there was no coverage for the cost of remediating asbestos under a property policy, inasmuch as the presence of asbestos in the building was not in such form or quantity as to make the building unusable. Id. at 236. As the Court acknowledged, depending on policy language, direct physical loss can occur due to hazardous substances, but only where such

substances actually contaminate the property and render it "uninhabitable and unusable." Id. at 236; Motorist Mutual Insurance Co. v. Hardinger, 131 F. Appendix 823 (3d Cir. 2005).

As explained by this Court in Moody v. Hartford Fin. Grp., Inc., 2021 U.S. Dist. LEXIS 7264, at *11 (E.D. Pa. Jan. 14, 2021), under the test established by the Third Circuit in Port Authority, allegations of physical damage to a building from "sources unnoticeable to the naked eye must meet a higher threshold." quoting, Port Authority, 311 F.3d at 235. Indeed, Port Authority requires that the dangerous condition affecting insured premises be actually present in such large quantities that it makes the structure "uninhabitable and unusable" but if the building continues to function and remain usable, then the building owner has not suffered a loss. Port Authority, 311 F.3d at 236. The "mere presence of asbestos, or the general threat of future damage from that presence, lacks the distinct and demonstrable character necessary for first-party insurance coverage." Id. In consideration of the fact that no government Order required complete cessation of operations but, instead, limited the ways in which the property could be used, the insured property remained inhabitable and usable and, therefore, coverage was not triggered. SSN's situation is not materially distinguishable from the Plaintiffs in Moody and Handel v. Allstate Ins. Co., 2020 U.S. Dist. LEXIS 207892 (E.D. Pa. Nov. 6, 2020).

The specific question of whether or not an insured sustains physical loss or damage as a result of potential COVID-19 exposure or related government orders has been decided in the Eastern District multiple times. See, e.g., 4431, Inc. v. Cincinnati Ins. Cos., 2020 U.S. Dist. LEXIS 226984 (E.D. Pa. Dec. 3, 2020). In the 4431, Inc. case, the Court discussed Port Authority and Hardinger and the fact that to trigger coverage, these cases require actual contamination by a dangerous agent to the point that the property's function is nearly eliminated or destroyed or the structure is made useless or uninhabitable. 4431, Inc., at *27. Accordingly,

"for Plaintiffs to assert an economic loss resulting from their inability to operate their premises as intended within the coverage of the Policy's 'physical loss' provision, the loss and the bar to operation from which it results must bear a causal relationship to some *physical condition* of or on the premises. The cases also indicate the existence of an element correlating to extent of operational utility—*i.e.*, a premises must be uninhabitable and unusable, or nearly as such; the ability to operate in almost any capacity, even on a limited basis, precludes coverage." Id. at *28-29 (emphasis original). And it is of no moment that "loss" and "damage" are undefined terms; they are not ambiguous. 1 S.A.N.T., Inc. v. Berkshire Hathaway, Inc., 2021 U.S. Dist. LEXIS 8590, at *12-16 (W.D. Pa. Jan. 15, 2021)("the language can be construed only as extending to events that physically impact the covered property.")

Consistent with this line of authority, it is clear that in this case, SSN has not presented well-pleaded facts that the alleged losses "bear some causal connection to the physical condition of the premises" nor that those conditions "operate[d] to completely or near completely preclude operation of the premises as intended." Moody, 2020 U.S. Dist. LEXIS at *13-14. To the contrary, SSN's properties were not "uninhabitable" or subject to closure under the government Orders as hotel operators were exempt as essential businesses. Under such circumstances, SSN can hardly establish that a physical condition of the premises completely or nearly precluded operation of the premises as intended. In fact, the argument that a covered loss has been sustained here is illogical because the Plaintiffs retained the ability to occupy and use their properties for exactly their intended purpose of housing hotel guests.

To the extent it is argued that SSN suffered some form of loss of use of its hotel properties, such losses bear no causal connection to the physical condition of its premises. Were

the Court to accept this argument, it would run afoul of both common sense and the holding in Port Authority. As this Court explained in Moody:

> First, it would create discord between the business income and extra expense provisions on one hand and the Civil Authority coverage endorsement on the other. If mere inability to use a property or inability to use it for its intended purpose is a "direct physical loss," then a government order barring access to a property would itself trigger business income or extra expense coverage because that lack of access would mean that the business could not use the property and was therefore suffering direct physical loss or damage. In that case, there would be no need for a separate Civil Authority provision granting coverage when civil authority orders bar access to premises under more limited circumstances.
>
> Second, Moody Jones's reading does not make sense in relation to the "period of restoration" language. Business Income and Extra Expense coverage is only provided during the period of restoration, defined in part as the time that begins "with the date of direct physical loss or physical damage caused by or resulting from a Covered Cause of Loss" and ends on the date when "[t]he property . . . should be repaired, rebuilt, or replaced with reasonable speed and similar quality" or the "date when . . . business is resumed at a new permanent location." Built into coverage for business income, extra expense, or extended business income losses under the Policy, then, is the idea that there is something to repair, rebuild, or replace — none of which exists for mere loss of use untethered to a physical condition of the property. Accordingly, Moody Jones's theory that its loss of use or lost operations stemming from the government order is a covered loss under the Business Income and Extra Expense provisions fails.

at *15-16.[6] See, also, Clear Hearing Solutions, LLC v. Cont'l Cas. Co., 2021 U.S. Dist. LEXIS 7273 at *18-19 (E.D. Pa. Jan. 14, 2021)(rejecting the contention that "direct physical loss of" is equivalent to loss of use); 4431, Inc., 2020 U.S. Dist. LEXIS 226984, at *26 n.15. (same; and also rejecting the argument that disjunctive use of "or" when pairing "loss" or "damage" means coverage under physical loss does not require physical damage to covered property. (Am. Complaint ¶78)).

[6] In the Amended Complaint, SSN takes its loss of use argument to absurd heights by alleging that the *suspected* presence of COVID-19 is sufficient to constitute physical loss of or damage to covered property. (Am. Complaint ¶ 122) Such a concept is totally incompatible with the holding in Port Authority and has absolutely no support under Pennsylvania law.

To the extent SSN alleges actual contamination by the virus (Am. Complaint ¶117), such an allegation contradicts its argument that its losses were caused only by the government Orders (Am. Complaint ¶123) and, in any event, SSN fails to plausibly allege *direct* physical loss or damage. Neither the presence of the virus nor an imminent threat thereof has "nearly eliminated or destroyed" the property's functionality or rendered it "useless or uninhabitable." Hardinger, 131 F. App'x at 826-27; Moody at *17. As stated, rather than being compelled to close, SSN's properties were permitted to remain open during the pandemic. This reality belies allegations of loss of use or contamination of covered properties because if COVID-19 really had the effect of rendering hotel properties uninhabitable or useless, SSN's hotels would have closed by necessity. Instead, they remained open, but were subject to a reduction in the normal level of public mobility that fuels the hotel industry. Any reduction in business income was not *direct* or resulting from physical loss of or damage to property. Such losses were an indirect result of the fact that people were not travelling for business or pleasure. There is no viable argument that SSN sustained direct physical loss of or damage to covered property here.

2. Civil Authority Coverage

For the Policy's Civil Authority Coverage to apply, there must be a (1) specific prohibition of access to SSN's premises, (2) a Covered Cause of Loss to property within a mile of SSN's premises, and (3) the order specifically prohibiting access to SSN's premises must be a direct result of that Covered Cause of Loss. Moody at *21. SSN's claim under the Civil Authority provision fails for multiple reasons.

First, and most fundamentally, with respect to hotel properties, the governmental Orders did not prohibit access to SSN's premises. TAQ Willow Grove, LLC v. Twin City Fire Ins., 2021 U.S. Dist. LEXIS 7276, at *18 (E.D. Pa. Jan. 14, 2021)(Holding that a prohibition on

access to the insured property is a prerequisite to coverage.); Brian Handel D.M.D., P.C. v. Allstate Ins. Co., 2020 U.S. Dist. LEXIS 207892, at *9 (E.D. Pa. Nov. 6, 2020)("Absent facts of direct physical loss or prohibited access to the property, plaintiff cannot sustain a claim for coverage under the civil authority provision of this policy.").

Second, the Orders were issued to address the ongoing health crisis and to arrest the spread of the disease, not as a consequence of some "direct physical loss." Moody at * 23. In addition, neither the threat of COVID-19 nor contamination thereby constitutes a "risk of direct physical loss" because properties are not rendered uninhabitable or unusable due to a physical condition of the property. Id. The fact that hotels were deemed to be essential businesses under the Governors' Orders and were allowed to operate but with sensible restrictions that were applicable to society in general, demonstrates that the governmental Orders were not issued "as a result of" damage to other property or "dangerous conditions" resulting from that damage. If that were so, access to the insured premises would be absolutely prohibited without exception. This indisputable fact reveals the Orders for what they actually were - efforts to keep people apart to avoid further spread and not a response to physical property damage and/or dangerous conditions within a mile of the premises.

Third, the theoretical basis for SSN's position – that a government order itself can constitute a covered cause of loss – is not correct. TAQ Willow Grove, LLC v. Twin City Fire Ins., 2021 U.S. Dist. LEXIS 7276, at *21-22 (E.D. Pa. Jan. 14, 2021)("Even if the Civil Authority orders had caused TAQ's losses, as we have discussed, civil authority orders are not a covered cause of loss."); Newchops Rest. Comcast LLC v. Admiral Indem. Co., 2020 U.S. Dist. LEXIS 238254, at *12 (E.D. Pa. Dec. 17, 2020)("the shutdown orders cannot constitute a covered cause of loss under either the civil authority or business income provision."); Prime

Alliance Group Limited v. Hartford Insurance Co., 2007 U.S. Dist. LEXIS 113098 (S.D. Fl. October 19, 2007)(an order of Civil Authority cannot in any reasonable manner be construed as a peril under a property policy; without a peril like windstorm giving rise to the Civil Authority order, there would be no coverage).

The structure and wording of the policy make it clear that the action of Civil Authority and the peril or cause of loss insured against are not the same thing. The insuring language plainly requires a Covered Cause of Loss that causes damage to property other than at the described premises which is then followed by an order of civil authority that prohibits access to the insured premises – "When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises . . . ." (Doc. 10-1, p. 93) This language plainly requires two things: a covered peril; followed by a separate order of civil authority prohibiting access to the premises. SSN's preferred construction – that the Orders are the Covered Cause of Loss - renders the insuring language nonsensical.

In short, SSN's Complaint does not allege viable facts sufficient to meet the requirements of the Civil Authority coverage in the Harford policy.[7]

[7] The policy's definition of Covered Cause of Loss as it applies to both the Business Income and Civil Authority provisions is also subject to an exclusion for Ordinance or Law. (Doc. 10-1, p. 107) The "Causes of Loss — Special Form" specifically states: "We will not pay for loss or damage caused directly or indirectly by . . . [t]he enforcement of or compliance with any ordinance or law . . . [r]egulating the construction, *use* or repair of any property." (emphasis added) The shutdown orders were governmental orders regulating the use of property and having the force of law. Newchops Rest., 2020 U.S. Dist. LEXIS 238254, at *13-16. To the extent the various Orders at issue here actually did regulate the use of the Plaintiffs' hotel properties, the Ordinance or Law provision provides alternative grounds for exclusion.

D. The Virus Exclusion Bars Coverage

1. The Virus Exclusion Clearly Applies to Every Aspect of Potential Coverage.

"An exclusion in an insurance policy is a 'limitation of liability or carving out of certain types of loss to which the coverage or protection of the policy does not apply.'" Borough of Moosic v. Darwin Nat'l Assurance Co., 556 F. App'x 92, 97 (3d Cir. 2014), quoting, *Williston on Contracts* § 49:111 (4th ed.).

The virus exclusion is uncomplicated and precludes coverage for loss or damage caused by or resulting from "any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness or disease." To eliminate any concern or cause for confusion, the virus exclusion explicitly states that it applies to all coverage under all forms and endorsements including business income, extra expense or action of civil authority. (Doc. 1-4, Page 102); Whiskey Flats, Inc. v. Axis Ins. Co., 2021 U.S. Dist. LEXIS 27137 at *11 (E.D. Pa. Feb. 12, 2021)(applying exactly the same language). The specific application of the virus exclusion to business income coverage demonstrates that the parties had agreed that a suspension of an insured's operations caused by a virus is not covered. Newchops, 2020 U.S. Dist. LEXIS 238254 at *17.

The exclusion is clear and easy to understand and such exclusions have been enforced routinely in this exact same context numerous times by Pennsylvania District Courts in general and this Court in particular. See, e.g., Zagafen Bala, LLC v. Twin City Fire Ins. Co., 2021 U.S. Dist. LEXIS 7255, at *22 (E.D. Pa. Jan. 14, 2021)(holding that the virus exclusion is "conspicuously displayed, clear and unambiguous"); Ultimate Hearing Sols. II, LLC v. Twin City Fire Ins. Co., 2021 U.S. Dist. LEXIS 7266, at *29 (E.D. Pa. Jan. 14, 2021)("Even if the virus was not the direct cause of the Plaintiffs' losses, it was at least an indirect cause, which is

sufficient to bar coverage under the Virus Exclusion clause."); Moody, supra.; ATCM Optical, Inc. v. Twin City Fire Ins. Co., 2021 U.S. Dist. LEXIS 7251, at *17 (E.D. Pa. Jan. 14, 2021); TAQ Willow Grove, LLC, 2021 U.S. Dist. LEXIS 7276, at *21 (E.D. Pa. Jan. 14, 2021); Wilson v. Hartford Cas. Co., 2020 U.S. Dist. LEXIS 179896 (E.D. Pa. September 30, 2020); Brian Handel D.M.D., P.C. v. Allstate Ins. Co., 2020 WL 6545893 (E.D. Pa. Nov. 6, 2020); Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am., 2020 U.S. Dist. LEXIS 223356 (E.D. Pa. Nov. 30, 2020); Kessler Dental Assocs., P.C. v. Dentists Ins. Co., 2020 WL 7181057 (E.D. Pa. Dec. 7, 2020). In each of these cases, the Courts considered virus exclusion language and held that the provisions unambiguously precluded coverage.[8] There is no relevant factual distinction in any of these cases as all arose from claims that businesses had their regular operations interrupted by government orders during the COVID-19 pandemic.

2. SSN's Alleged Losses Were Caused by a Virus

To the extent there is a contention here that SSN's losses were not caused by the coronavirus but were, instead, caused by government Orders (Am. Complaint ¶123), such an argument has already been addressed and rejected numerous times by Courts in this District. See, e.g., Newchops, 2020 U.S. Dist. LEXIS 238254 at *12-13. ("The civil authority action cannot be both the cause of that damage and the response to it.").[9]

3. The ISO Circular and Regulatory Estoppel

In an effort to avoid the plain meaning and dispositive effect of the virus exclusion on all of SSN's claims, the Complaint asserts a series of contentions, the import of which is that the

[8] SSN's assertion that Harford did not inform it of the Policy's limitations on coverage is of no moment. (Am. Complaint ¶ 48) Nat'l Mut. Ins. Co. v. Blanchard, 1989 U.S. Dist. LEXIS 9564, at *13 (E.D. Pa. Aug. 9, 1989)("[T]he effect of a limitation or exclusion in a policy may not be avoided by proof that the insured did not read or understand it, or that it was not explained."), citing, Standard Venetian Blind Co., 469 A.2d 563, 566 (Pa. 1983).

[9] See, also, Section C.2. above which explains why a government Order cannot constitute a Covered Cause of Loss.

doctrine of regulatory estoppel bars the application of the virus exclusion. (Am. Complaint ¶149) Such an argument is absolutely meritless and has already been rejected by Pennsylvania District Courts in this Circuit many times.

In Pennsylvania, the doctrine of regulatory estoppel applies only where an insurer "switch[es] legal positions to suit [its] own ends" by taking one position in regulatory proceedings and then later "asserting the opposite position [in court] when claims are made by the insured policyholders." Sunbeam Corp.v. Liberty Mutual Insurance Company, 781 A.2d 1189, 1192-93 (Pa. 2001). Here, even if ISO's 2006 statement could somehow bind Harford (which it cannot), Harford has not "switch[ed] legal positions." Harford's position in this action is that the Policy does not provide coverage because Plaintiff cannot satisfy the essential requirements of the coverage grant for Civil Authority or Business Income coverage and, in addition, the virus exclusion bars coverage. Harford's position is thus entirely consistent with the alleged statements of ISO and AAIS. Hussey Copper, Ltd. v. Royal Ins. Co. of Am., 2009 U.S. Dist. LEXIS 81830 (W.D. Pa. Sept. 9, 2009) aff'd, 391 Fed. Appx. 207, 211 (3d Cir. 2010)(regulatory estoppel did not apply because, among other things, ISO's statements were not contrary to the insurer's position in litigation.); Moody, supra. at *32-33; TAQ Willow Grove, supra. at *23-25; Handel, 2020 U.S. Dist. LEXIS 207892 at *4-5; Kessler Dental Associates, P.C. v. Dentists Ins. Co., 2020 U.S. Dist. LEXIS 238254 at *3 (E.D. Pa. Dec. 7, 2020).

It is also noteworthy that the contents of the ISO and AAIS writings are not contradictory or misleading at all. These materials make it crystal clear that the virus exclusion *was* expressly intended not only to apply to cases based upon the presence of or exposure to virus, the exclusion was expressly intended to apply to risks related to pandemics. Fuel Recharge Yourself v. Amco Ins. Co., 2021 U.S. Dist. LEXIS 26173, at *9 (E.D. Pa. Feb. 11, 2021)("insurers explicitly

contemplated the 'specter of pandemic or hitherto unorthodox transmission of infectious material' when seeking regulatory approval of the Virus Exclusion.").

Relying upon the full text of the ISO circular, the District Court in Border Chicken AZ, LLC v. Nationwide Mut. Ins. Co., 2020 U.S. Dist. LEXIS 217649 (D. Ariz. Nov. 20, 2020) considered the contention that ISO somehow created a problem in 2006 when the virus exclusion was introduced. As pointed out by the District Court in Border Chicken, the language of the circular "illustrates the ISO's intent that a virus exclusion would apply to a disease such as COVID-19 by expressly stating that a virus exclusion is necessary so that the insurance company would not have to cover losses caused by, amongst other things, 'rotavirus, SARS, influenza (such as avian flu),' (ISO Circular at 1.) which are 'highly infectious diseases' that are similar to COVID-19." Id. at *14. The Court further explained why the ISO circular is definitive evidence of an intention to exclude pandemic-related losses:

> Further, in the "Current Concerns" section of the ISO Circular, it expressly states that a virus exclusion is necessary because "the specter of *pandemic*... raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent." (ISO Circular at 2 (emphasis added).) If Plaintiff had read the ISO Circular prior to entering the agreement, it would have had the reasonable expectation that losses due to a pandemic would not be covered.
>
> Id. (emphasis original).

With respect to the contention that the ISO circular constituted a fraud on Arizona insurance regulatory authorities, the District Court in Border Chicken completely dispelled that spurious argument: "Regardless, the ISO Circular is clear that the Virus Exclusion is meant to exclude losses caused by pandemics. *See supra* at II.B. *Assuming regulators did rely on the ISO document, they would have been aware of its effect on future coverage."* Id. at *17 (emphasis added).

Other courts are in accord with this conclusion. Boxed Foods Co., LLC v. Cal. Capital Ins. Co., 2020 U.S. Dist LEXIS 198859 (N.D. Cal. Oct. 26, 2020); Moody, supra.; Newchops, supra.; TAQ Willow Grove, supra.; Fuel Recharge, supra.; ATCM Optical, Inc. v. Twin City Fire Ins. Co., 2021 U.S. Dist. LEXIS 7251, at *19-22 (E.D. Pa. Jan. 14, 2021).

Accordingly, and for all of these reasons, Harford submits that there is no merit whatsoever to the contention that the ISO or AAIS writings impact the disposition of this case.

E. Claims for "Expenses" Are Expressly Excluded

SSN asserts that even if the virus exclusion applies, it does not apply to "expenses" because the virus exclusion in the Policy only applies to "loss or damage" and not expenses. (Am. Complaint ¶¶138-139) This argument is groundless and completely inconsistent with the Policy language in view of the fact that the virus exclusion at issue here expressly "applies to all coverage under all forms and endorsements that comprise this . . . Policy, including but not limited to . . . forms or endorsements that cover business income, *extra expense* or action of civil authority. (Doc. 10-1, p. 102)(emphasis supplied) Coverage also only applies in the event of a Covered Cause of Loss which, by definition, cannot occur if the loss is excluded ("Covered Cause of Loss means direct physical loss unless the loss is excluded or limited in this policy.") (Doc. 10-1, Page 107)

Finally, the Courts in this District have already considered and rejected this exact same argument as inconsistent with the policy language and structure. In Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am., 2020 U.S. Dist. LEXIS 223356, at *8 (E.D. Pa. Nov. 30, 2020), the Court explained it this way:

> In addition, the Policy's structure indicates that the parties intended the word "loss" to cover both lost income and continuing expenses. Under the Policy, "Business Income" includes both net income and continuing expenses, and the Policy provides coverage for any "loss of Business Income." Under the heading

> "Loss Determination," it describes the way that the parties anticipated determining the "amount of Business Income loss." And the Policy includes a provision that imposed on Toppers certain duties in the event of a "loss." These provisions, read as a whole, demonstrate that the parties intended the term "loss" to extend to all types of Business Income, including covered expenses. Toppers' argument to the contrary does not analyze the Policy's text; it does not point to a different definition of "loss;" and it does not account for the Policy's overall structure. As a result, it does not carry the day.

The referenced Policy provisions in this case are identical to those in Toppers Salon and the same result should follow. See, also, Kessler Dental Assocs., P.C. v. Dentists Ins. Co., 2020 U.S. Dist. LEXIS 228859, at *8 (E.D. Pa. Dec. 7, 2020).

F. The Reasonable Expectations Doctrine Does Not Apply

Without any specific factual basis, SSN suggests that it reasonably expected that the business interruption, extra expense and/or civil authority coverages contained in the Policy would protect against pandemic-related losses. (Am. Complaint ¶107)

As definitively stated by the Third Circuit, the doctrine of reasonable expectations is only "applied 'in very limited circumstances' to protect non-commercial insureds from policy terms not readily apparent and from insurer deception." Liberty Mut. Ins. Co. v. Treesdale, Inc., 418 F.3d 330, 344 (3d Cir. 2005). As Treesdale makes clear, "the reasonable expectations canon of insurance law does not assist [an insured's] attempt to argue an expectation that is contrary to the coverage clearly set forth in the insurance policy." Id. at 344-345;See, also, Madison, 735 A.2d at 109, n.8 (noting that Pennsylvania courts have only applied the reasonable expectations doctrine in two instances: (1) "to protect non-commercial insureds from policy terms not readily apparent" and (2) "to protect non-commercial insureds from deception"); Matcon Diamond v. Penn Nat'l Ins. Co., 815 A.2d 1109, 1114 (Pa. Super. Ct. 2003). See also U.S. Fid. & Guar. Co. v. Lehigh Valley Ice Arena, Inc., 121 Fed. Appx. 976 (3d Cir. 2005)("Lehigh Valley is a commercial insured – not the type of insured [the reasonable expectations] doctrine was

envisioned to protect."); Canal Ins. Co. v. Underwriters at Lloyd's London, 333 F.Supp. 2d 352, 357 (E.D. Pa. 2004)(indicating that the doctrine is limited to the two instances recognized in Madison and Matcon). Finally, our courts will not allow an insured to override the plain language of a policy limitation anytime he or she is dissatisfied with the limitation by simply invoking the reasonable expectations doctrine. Were the courts to permit such a tactic, the language of insurance policies would cease to have meaning and, as a consequence, insurers would be unable to project risk. Millers Capital Ins. Co. v. Gambone Bros. Dev. Co., 941 A.2d 706, 717-718 (Pa. Super. 2007).

In this case, the policy terms are clear and unambiguous. The virus exclusion states in plain English words that it applies to claims for loss or damage caused by or resulting from "any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness or disease." This exclusion expressly applies regardless of any other cause or event that contributes concurrently or in any sequence to the loss. As affirmed by numerous courts across the nation, including Pennsylvania Courts in this District, the exclusion is not ambiguous. See, e.g., Wilson, Handel, Kessler and Toppers Salon, supra.

The same reasonable expectations argument was made to and rejected by this Court in Moody, Fuel Recharge, and Zagafen Bala, LLC v. Twin City Fire Ins. Co., 2021 U.S. Dist. LEXIS 7255, at *16-17 (E.D. Pa. Jan. 14, 2021). In each of these matters, as is the case here, the Plaintiff failed to plead facts that the insurer or its agent "create[d] in the insured a reasonable expectation of coverage that is not supported by the terms of the policy." Moody, supra. at *19. There were no facts alleged in any of those cases that led the Court to believe the Plaintiff *reasonably* expected business losses not tied to any kind of actual damage to property would be covered by a property insurance policy. Id. at *20, citing, Tonkovic v. State Farm Mut. Auto.

Ins. Co., 521 A.2d 920, 923 (Pa. 1987)(finding it "patently unreasonable" for an insured to believe that the general liability coverage he purchased covered one's own property).

In addition to the absence of alleged facts to support the conclusion that the insurer or its agent created a reasonable expectation of coverage, the Complaints in Moody, Fuel Recharge and Zagafen Bala, further note the absence of any claim that the carrier made a *change* to the policy the insureds applied and paid for of which the insured was unaware and which would justify setting aside the plain language. See, Tonkovic, 521 A.2d at 925 (finding that when an individual "applies and prepays for specific insurance coverage, the insurer may not unilaterally" change it):

> Again, the policy that Moody Jones purchased is fundamentally a business owner's property insurance policy. While Moody Jones alleges that it *sought* coverage for business interruption losses, it points to no facts that it actually applied and paid for a wholly different kind of policy than what it received. Nor does it allege any affirmative representation by Twin City or its agents that business losses untethered to property loss or damage would be covered that could constitute a reason to set aside the unambiguous language of the property insurance policy here.

Moody, at *19-21; see, also, Fuel Recharge, at *11-12.

The unsupported allegations pertaining to the reasonable expectations doctrine in this case are of the same quality as those in Moody and Fuel Recharge and are clearly insufficient to invoke this rarely applicable principal of law.

V. CONCLUSION

For all of the reasons stated above, Harford respectfully requests that the Court dismiss the Amended Complaint in its entirety and with prejudice under Federal Rule of Civil Procedure 12(b)(6).

Respectfully submitted,

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CERTIFICATION

I certify that prior to filing the instant Motion, I conferred with Plaintiff's counsel, Michael Manara, Esquire, regarding the substance of the Motion and the issues to be addressed. The issues raised in the Motion cannot be resolved by agreement due to their dispositive nature and no further amended pleading is presently contemplated.

THOMAS, THOMAS & HAFER, LLP

By: /s/ Kevin C. McNamara

CERTIFICATE OF SERVICE

I, Kevin C. McNamara, Esquire, of the law firm of Thomas, Thomas & Hafer, LLP, hereby certify that I sent a true and correct copy of the foregoing document to the parties in the manner and on the date set forth below:

Via Electronic Court Filing System:

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/s/ Kevin C. McNamara Date: March 18, 2021

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