UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ITT, INC.,	:	
	:	Honorable Stefan R. Underhill
Plaintiff,	:	
	:	
v.	:	Civil Action No. 3:21-cv-00156-SRU
	:	
FACTORY MUTUAL INSURANCE COMPANY,	:	
	:	
Defendant.	:	n/ Dated: April 2, 2021

Bn/

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

OF COUNSEL:
Harvey Kurzweil
Kelly A. Librera
George E. Mastoris
Kerry C. Donovan
WINSTON & STRAWN LLP
200 Park Avenue
New York, New York 10166
(212) 294-6700

Daniel F. Sullivan
Dana M. Horton
ROBINSON & COLE LLP
One Financial Plaza, 14th Floor
Providence, RI 02903
(401) 709-3352

Attorneys for Defendant Factory Mutual Insurance Company

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES, RULES, AND OTHER AUTHORITIES

Defendant Factory Mutual Insurance Company ("FM Global") respectfully submits this memorandum of law in support of its motion to dismiss Plaintiff ITT Inc.'s ("ITT" or "Plaintiff") Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY STATEMENT

Plaintiff ITT, a large and multinational manufacturing corporation, brings this action against its insurance company, FM Global, contending that the terms of its property insurance policy (the "Policy") make FM Global liable for certain economic losses ITT allegedly suffered due to the COVID-19 pandemic. Although the alleged damages to ITT's business are unfortunate, the plain and unambiguous terms of the Policy make clear that they are simply not covered by its provisions. Indeed, only two Policy coverages (out of the ten identified by ITT) are even potentially applicable to ITT's claims, and both require conditions precedent which ITT has failed to allege. The Complaint should accordingly be dismissed with prejudice.

As an initial matter, Plaintiff cannot meet its burden of demonstrating the existence of "physical loss or damage," which is a prerequisite for eight of the ten provisions under which it claims coverage. Case after case has found as a matter of law that neither the presence of COVID-19 (or the novel coronavirus), nor government shutdown orders meant to slow the spread of the disease, can constitute "physical loss or damage." Nothing in Plaintiff's allegations compels a different result. Instead, Plaintiff attempts to plead around this dispositive precedent by arguing that the Policy language itself states that "communicable disease" *is* physical loss or damage. But the Policy says nothing of the sort. Indeed, unlike every other provision cited by Plaintiff, the Policy's two "Communicable Disease" provisions contain *no reference whatsoever* to "physical loss or damage." Moreover, those provisions contain a $1 million annual aggregate sublimit. If, as ITT alleges, their inclusion in the Policy somehow opened the door to coverage under numerous other provisions containing no such limitation, those sublimits would be

rendered nugatory. Such a reading is of course impermissible under basic principles of contract interpretation.

Second, even if Plaintiff could meet its burden of establishing "physical loss or damage" to each of its insured properties, ITT's claims are barred by the Policy's Contamination Exclusion, which excludes from coverage losses due to "contamination, *and* any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy" (emphasis added). The Policy defines "contamination" to include a number of "disease causing or illness causing agent[s]," including "virus," "bacteria," "pathogen," and "pathogenic organism." Plaintiff acknowledges that its losses resulted from the novel coronavirus (or SARS-CoV-2), and admits that the novel coronavirus is in fact a "virus," and thus a "contaminant" under the Policy. Accordingly, and as at least one other court in this District has already held when interpreting a similar exclusion, the Contamination Exclusion bars Plaintiff's claims with regard to eight of the ten Policy provisions pursuant to which Plaintiff seeks coverage. In addition, the Policy's exclusion for "loss of market or loss of use" (the "Loss of Use Exclusion") separately bars Plaintiff's recovery for those alleged damages tied to Plaintiff's inability to fully utilize its properties.

Third, Plaintiff has also failed to adequately plead that it is entitled to coverage under the final two provisions it identifies as applicable—the Policy's two Communicable Disease provisions. Unlike the other coverages claimed by Plaintiff, neither the Communicable Disease Response and Interruption by Communicable Disease (together, the "Communicable Disease Provisions") requires a showing of "physical loss or damage" and both constitute exceptions to the Contamination Exclusion. Accordingly, as FM Global has informed Plaintiff on numerous occasions, it will pay any valid claim submitted under those provisions up to the Policy sublimit

of $1 million, so long as ITT establishes their twin prerequisites: the "actual not suspected presence" of COVID-19 at one or more ITT properties, *and* a shutdown order or company directive limiting or eliminating access to or the use of those properties. However, despite the passage of almost nine months since ITT submitted its proof of loss to FM Global, it has yet to identify any evidence regarding the actual presence of COVID-19 at one of its locations, and that information appears nowhere in its Complaint, either. Accordingly, Plaintiff's claims under the Communicable Disease provisions should also be dismissed.

FACTUAL BACKGROUND

I. The Allegations in the Complaint

New York-based Plaintiff ITT is a "worldwide diversified manufacturing and technology company" which "manufactures products and components and provides services for the aerospace, transportation, energy, communications and industrial markets." Compl. ¶ 9.

Plaintiff alleges that, like many businesses nationwide, it has undertaken certain activities "at substantial cost" as a result of the COVID-19 pandemic and in order to comply with government orders or to otherwise slow the spread of the novel coronavirus (or SARS-CoV-2). *See* Compl. ¶¶ 28, 29. Specifically, ITT recites a series of steps it allegedly took "[a]s a consequence of the global pandemic," including the "remediation" of property that was exposed to the novel coronavirus, the administration of tests to its employees, the acquisition of "protective equipment," the reconfiguration of certain spaces to allow for social distancing, and the facilitation of remote work. *See id.* ¶ 29(a), (d), (e). Plaintiff also asserts that it was unable to fully utilize its properties as a result of either a COVID-19 breakout or the threat of COVID-19 in the community. *Id.* ¶ 29 (b), (c). Finally, Plaintiff alleges that it expended "logistics costs" to address the disruption of the supply chain due to the pandemic and for its insurance claim preparation. *Id.* ¶ 29(f), (g).

Tracking the language of the Policy almost word-for-word, Plaintiff alleges in conclusory fashion that, as a result of the actions enumerated above, it "incurred substantial losses, including but not limited to losses from or damage to property, time-element losses, Extra Expenses, Expediting Costs, Logistics Costs, and Claims Preparation Expenses," due to both the "presence of COVID-19" at or within five miles of its properties or "due to pandemic conditions and the threat posed by COVID-19." *Id.* ¶¶ 30, 32. Likewise, Plaintiff asserts that "numerous ITT facilities" incurred losses "from or damage to property, time-element losses due to government or private closures or suspensions of business, loss of ingress or egress, losses due to Communicable Disease, Extra Expense, Expediting Costs, and/or Logistics Costs." *Id.* ¶ 31. But Plaintiff does not allege the cause or nature of these alleged "losses," the description of which is essentially confined to one paragraph in its Complaint. *Id.* ¶ 29. For instance, Plaintiff never states what "remediation" efforts it undertook, nor does it identify any "personal property and real property" which was affected as a result. Although Plaintiff claims that "persons with COVID-19" were present on its properties, which experienced "disease outbreaks," it does not tell the reader anything about those "outbreaks," including when or where they occurred. Indeed, the Complaint lacks even basic information identifying the "government or private closures or suspensions of business" which allegedly impacted its facilities, the dates during which these closures or suspensions were in effect, and which if any of ITT's facilities were in fact subject to those orders or directives.

II. The Relevant Terms of ITT's Policy

As a general matter, ITT's Policy with FM Global insures "against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded," to certain insured properties. Policy at 1. Stated differently, if there is physical loss or damage to covered property or other loss that is covered by the Policy and all other Policy requirements have been met, such loss is

covered unless a specific exclusion applies to bar coverage. These exclusions, in turn, are subject to certain exceptions. *See* Policy at 13 ("exclusions apply unless otherwise stated").[1]

Plaintiff alleges that there is coverage for its "property damage" and business interruption losses under ten provisions in the Policy. Eight of the ten provisions under which ITT claims coverage also require a showing of "physical loss or damage of the type insured" as a prerequisite. *See* Compl. ¶¶ 42-96. These provisions are:

Time Element Coverage and Extra Expense[2]	This Policy insures TIME ELEMENT loss, as provided in the TIME ELEMENT COVERAGES, directly resulting from ***physical loss or damage of the type insured***[.]" Policy at 41 (emphasis added).
Civil or Military Authority	This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY if an order of civil or military authority limits, restricts or prohibits partial or total access to an insured location provided such order is the direct result of ***physical damage of the type insured*** at the insured location or within five statute miles/eight kilometres of it. Policy at 53 (emphasis added).
Ingress/Egress	This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY due to the necessary interruption of the Insured's business due to partial or total physical prevention of ingress to or egress from an insured location, whether or not the premises or property of the Insured is damaged, provided that such prevention is a ***direct result of physical damage of the type insured*** to property of the type insured. Policy 54 (emphasis added).
Contingent Time Element Loss Extended	This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY directly resulting from ***physical loss or damage of the type insured*** to property of the type insured at contingent time element locations located within the TERRITORY of this Policy. Policy at 53-54 (emphasis added).
Expediting Costs	This Policy covers the reasonable and necessary costs incurred: 1) for the temporary repair of ***insured physical damage*** to insured property;

[1] Citations to the Policy refer to the document found at Exhibit A to the Complaint, ECF No. 2-1. Page number references are to page numbers located on the bottom of each page of the Policy.

[2] Plaintiff identifies these as two different provisions, but Extra Expense is a type of "Time Element Coverage" subject to the "loss insured" requirements.

	2) for the temporary replacement of insured equipment suffering insured physical damage; and 3) to expedite the permanent repair or replacement of such damaged property. Policy at 28 (emphasis added).
Logistics Extra Cost	This Policy covers the extra cost incurred by the Insured during the PERIOD OF LIABILITY due to the disruption of the normal movement of goods or materials 1) directly between insured locations; or 2) directly between an insured location and a location of a direct customer, supplier, contract manufacturer or contract service provider to the Insured, provided that such disruption is a direct result of ***physical loss or damage of the type insured*** to property of the type insured located within the TERRITORY of this Policy. Policy at 55 (emphasis added).

Accordingly, unless ITT can demonstrate "physical loss or damage of the type insured" to its properties, coverage under these provisions is unavailable to ITT.[3]

Nevertheless, ITT alleges that "[u]nder the Policy's Time Element coverages, the Policy permits ITT to elect to make a claim based on either: (a) GROSS EARNINGS and EXTENDED PERIOD OF LIABILITY; or (b) GROSS PROFIT." Compl. ¶ 44. Notably, with respect to both GROSS EARNINGS and GROSS PROFIT, the PERIOD OF LIABILITY starts with "the time of ***physical loss or damage of the type insured***." Policy at 47-48 (emphasis added).

The Policy also contains a number of enumerated exclusions that apply "unless otherwise stated," two of which are particularly relevant here. First, the Policy's Contamination Exclusion states, in relevant part:

> 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.***

[3] The Policy's limited Claims Preparation coverage covers certain costs "for producing and certifying any particulars or details contained in the Insured's books or documents, or such other proofs, information or evidence required by the Company," Policy at 24-25. Although it does not itself require physical loss or damage, it is contingent on an insured loss for which the company has accepted liability. *See* Policy at 24-25.

Policy at 17 (emphasis added). "Contamination" is defined as:

> any condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, ***pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent***, fungus, mold or mildew.

Policy at 74 (emphasis added). Thus, by its plain terms, the definition of contamination encompasses "viruses" and other "disease causing or illness causing agents," like the novel coronavirus, and thus precludes recovery unless the contamination in question results from "other physical damage not excluded by this Policy," or falls within one of the Policy's exceptions.

Second, the Policy contains an exclusion for "loss of market or loss of use" (the "Loss of Use Exclusion"). Policy at 14. To the extent that ITT's alleged losses stem from an impairment of use due to government orders and/or COVID-19, as many appear to do, this exclusion further bars recovery subject to any applicable exclusions.

The Contamination and Loss of Use Exclusions thus act as separate bars to recovery under the eight non-Communicable Disease provisions to which ITT claims coverage.

However, the Communicable Disease Provisions are exceptions to these two exclusions. They also do not require ITT to show impending or actual "physical loss or damage." Rather, they provide coverage under the following conditions:

> 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[.]

Policy at 25-26, 60. Communicable Disease is defined, 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[.]" Policy at 74. Thus, under these Provisions, and as FM Global has

informed ITT (*see* Compl. Ex. C), if ITT is able to show that (1) it has the "actual not suspected presence" of COVID-19 on its covered property, and that (2) access to that property is "limited, restricted or prohibited by" a government order, it may be eligible to recover up to $1 million in costs for the "cleanup, removal and disposal of the actual not suspected presence" of COVID-19 and public relation services, as well as other expenses and losses. Policy at 9, 26, 60. Moreover, unlike the PERIOD OF LIABILITY for GROSS PROFIT and GROSS EARNINGS, the PERIOD OF LIABILITY for INTERRUPTION BY COMMUNICABLE DISEASE does not commence with physical loss or damage of the type insured (as physical loss or damage is not required for such coverage) but rather at "the time of the order of the authorized governmental agency or the Officer of the Insured." Policy at 61.

Despite numerous opportunities, Plaintiff has failed to proffer facts to support its conclusory allegation that COVID-19 was "present" on its properties. Absent any such showing, Plaintiff is not eligible for coverage under the Policy's Communicable Disease provisions.

III. Plaintiff's Insurance Claim and the Filing of this Lawsuit

On June 26, 2020, ITT submitted a letter to FM Global characterized as an "Initial Sworn Statement in Proof of Loss." *See* Compl. Ex. B. In this "Proof of Loss," ITT "identified 15 locations" which it asserted had "the actual presence of the COVID-19 virus," "broadly alleg[ed]" actions taken by ITT in response to that presence, and the financial impact on ITT. *See* Compl. Ex. C. In response, FM Global asked for information to substantiate ITT's claim for coverage under the Communicable Disease Provisions, including (1) documents to show the "actual not suspected presence" of COVID-19 on those premises (such as employees' positive test results or evidence of those individuals' presence at ITT's premises) and (2) documents to demonstrate costs incurred as a result of cleaning up, removing, or disposing of COVID-19 from its premises. As for ITT's other claims for coverage, FM Global explained that the presence of

the novel coronavirus did not constitute "physical loss or damage" under the Policy and that the Contamination Exclusion otherwise barred ITT's claims. *See id.*

To date, ITT has not provided any of the requested documentation. Nor did it respond to FM Global's letter. Instead, ITT remained silent until November 2020, when it moved for leave to file an *amicus* brief in a different COVID-19-related litigation involving FM Global (which motion was denied). This suit followed several months later. In addition to three breach of contract claims (Counts II, III, and IV), ITT also seeks declaratory relief (Count I), and breach of contract for property damage, time element, and time element coverage extension Policy provisions (Counts II, III, and IV). For the reasons set forth below, even if the Complaint contained factual allegations sufficient to support ITT's claims, ITT's claims for coverage cannot stand as a matter of law, warranting dismissal with prejudice.

APPLICABLE LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although the court must view the plaintiff's well-pleaded allegations as true, and view them in the light most favorable to plaintiff, "this tenet is 'inapplicable to legal conclusions.'" *Amaker v. New York State Dep't of Corr. Servs.*, 435 F. App'x 52, 54 (2d Cir. 2011) (quoting *Iqbal*, 556 U.S. at 678). Accordingly, the court is not "bound to accept conclusory allegations or legal conclusions masquerading as factual conclusions." *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011) (quoting *Rolon v. Henneman*, 517 F.3d 140, 149 (2d Cir. 2008)). If, in the end, a complaint's well-pleaded factual allegations are insufficient "to nudge plaintiff's claims across the line from conceivable to plausible," dismissal is warranted. *Tonina v. Ferraro*, 2020 WL 3489520, at *2 (D. Conn. June 26, 2020).

In adjudicating a Rule 12(b)(6) motion, a court may consider any documents attached to, incorporated by reference, or otherwise heavily relied upon in the complaint. *See Cockill v. Nationwide Prop. & Cas. Ins. Co.*, 2018 WL 6182422, at *1 (D. Conn. Nov. 27, 2018). "Further, if a document relied on in the complaint contradicts allegations in the complaint, the document, not the allegations, control, and the court need not accept the allegations in the complaint as true." *Curtis v. Aetna Life Ins. Co.*, 2021 WL 1056785, at *6 (D. Conn. Mar. 18, 2021) (internal alterations and quotation marks omitted).

ARGUMENT

Under both Connecticut and New York law, "[c]onstruction of a contract of insurance presents a question of law for the court."[4] *Metro. Dist. Comm'n v. QBE Americas, Inc.*, 416 F. Supp. 3d 66, 68 (D. Conn. 2019); *Morgan Stanley Grp. Inc. v. New England Ins. Co.*, 225 F.3d 270, 275 (2d Cir. 2000) (same under New York law). If the terms of an insurance policy "are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning." *England v. Amica Mut. Ins. Co.*, 2017 WL 3996394, at *4 (D. Conn. Sept. 11, 2017) (quoting *Connecticut Medical Ins. Co. v. Kulikowski*, 942 A.2d 334, 338 (Conn. 2008)); *see also Tappo of Buffalo, LLC v. Erie Ins. Co.*, 2020 WL 7867553, *3 (W.D.N.Y. Dec. 29, 2020) (same under New York law). "Courts should not torture words to import ambiguity when the ordinary meaning is not ambiguous, and any ambiguity must emanate from the language used in the contract rather than from one party's subjective perception of the terms." *LJ New Haven LLC v. AmGUARD Ins. Co.*, 2020 WL

[4] ITT is a company currently headquartered in New York, and the Policy insures properties located in numerous states and countries. As demonstrated in this Motion, however, dismissal is warranted regardless of which state's law applies and, therefore, the Court need not address this choice-of-law issue. *Lumbermens Mut. Cas. Co. v. Dillon Co.*, 9 F. App'x 81, 83 (2d Cir. 2001).

7495622, at *4 (D. Conn. Dec. 21, 2020) (internal quotation marks omitted); *see also Porco v. Lexington Ins. Co.*, 679 F. Supp. 2d 432, 436 (S.D.N.Y. 2009) (same under New York law).

Here, Plaintiff cannot establish a right to coverage under the circumstances alleged in the Complaint because the unambiguous terms of the Policy do not cover (and, in fact, explicitly exclude) the damages sought by Plaintiff. First, Plaintiff's argument regarding the existence of "physical loss or damage" relies on a fundamental misinterpretation of the Policy and should be rejected outright. Indeed, as numerous cases have held, the presence of COVID-19 on a property is insufficient to establish "physical loss or damage" as a matter of law. Second, the alleged physical loss or damage of which Plaintiff complains was caused by the novel coronavirus—a "contaminant" under the Policy—thus precluding coverage under the Contamination Exclusion. Third, Plaintiff's claims for damage stemming from its inability to fully use its property are barred by the Policy's Loss of Use Exclusion. Fourth, Plaintiff has failed to adequately allege the actual presence of COVID-19 on its properties, thus dooming its claims under the Communicable Disease Provisions.

I. Plaintiff Cannot Show Physical Loss or Damage to Its Insured Properties.

As discussed above, eight of the ten Policy provisions on which Plaintiff bases its claim for coverage require that the covered properties have sustained "physical loss or damage." *See supra* at 5-6 (chart describing eight coverages requiring a demonstration of physical loss or damage). ITT's allegations do not (and cannot) establish such "physical loss or damage." Faced with an overwhelming majority of cases holding that neither the coronavirus itself nor government shutdown orders stemming from the pandemic can cause physical loss or damage as a matter of law, Plaintiff takes a different tack and argues that COVID 19—the severe respiratory disease caused by the coronavirus—itself constitutes insured physical loss or damage under the Policy. Specifically, Plaintiff asks this Court to find that while the presence of the coronavirus

on a physical surface might be excluded per the Policy, and might not constitute physical loss or damage under the law, the presence of the very same virus in a human being is not excluded and in fact constitutes physical loss or damage sufficient to trigger each of the other eight coverages Plaintiff claims apply to its losses. As a result, Plaintiff claims, it is entitled not only to the Policy's $1 million sublimit under the Policy's two Communicable Disease Provisions, but up to the overall Policy limit of $750 million. Plaintiff's position finds no support in the Policy, settled law, or common sense.

A. "Communicable Disease" is Not "Physical Loss or Damage."

The keystone of Plaintiff's Complaint is that "the Policy equates the presence[] of a 'communicable disease' at property with physical loss or damage of the type insured under the Policy." Compl. ¶ 36. Specifically, Plaintiff alleges that, because the Communicable Disease Response Provision is an "Additional Coverage" found in the "Property Damage" section of the Policy, and the Policy states that it includes Additional Coverages for "insured physical loss or damage," the Communicable Disease Response, and indeed all Additional Coverages under the Policy, must stem from "physical loss or damage." Compl. ¶¶ 35-36. Even a cursory review of the Policy exposes the fatal defects in Plaintiff's position.

First, the plain language of both Communicable Disease Provisions contains ***no*** requirement of physical loss or damage—unlike every other one of the coverages Plaintiff claims is applicable to its losses. *See supra* at 5-6. Rather, and as FM Global has informed Plaintiff (*see* Compl. Ex. C), the Communicable Disease Provisions involve only two prerequisites: (1) "the actual, not suspected presence of a communicable disease" and (2) the resulting limitation or preclusion of access to such property by a governmental order or an officer of the insured company. Policy at 25-26, 60. So long as those conditions are satisfied, there is no need for a further showing of physical loss or damage, which is why those words do not appear within

either of the Communicable Disease Provisions themselves.

The PERIOD OF LIABILITY applicable to the Interruption by Communicable Disease coverage further underscores the bankruptcy of Plaintiff's position in this regard. If Plaintiff were correct that the Communicable Disease Provisions treat communicable disease as "physical loss or damage," there would of course be no need for the Policy to specify a separate period of liability than that set forth in the GROSS PROFIT and GROSS EARNINGS provisions, which commences "from the time of physical loss or damage of the type insured." Policy at 47, 49. But the Policy does exactly that. *Compare* Policy at 61 (stating that the Period of Liability for Interruption by Communicable Disease begins with "the time of the order" of an authorized agency or Officer of the Insured) *with* Policy at 47, 49 (stating that the Period of Liability for GROSS PROFITS and GROSS EARNINGS both "start[] from the time of physical loss or damage of the type insured"). *See also, e.g.*, *Chief of Staff LLC v. Hiscox Ins. Co. Inc.*, 2021 WL 1208969, at *3 (N.D. Ill. Mar. 31, 2021) (looking to a business income provision's "period of restoration" to determine if coverage required physical loss or damage) (applying Connecticut law); *Santo's Italian Café LLC v. Acuity Ins. Co.*, 2020 WL 7490095, at *10 (N.D. Ohio Dec. 21, 2020) (finding that "period of restoration" definition illustrated the scope of "direct physical loss or damage loss or damage"); *Paul Glat Md, P.C. v. Nationwide Mut. Ins. Co., et al.*, 2021 WL 1210000, at *5 (E.D. Pa. Mar. 31, 2021) (same).

Simply put, when physical loss or damage is required for coverage, the Policy provision at issue makes that very clear. *See, e.g.*, Policy at 20 ("Data Restoration" coverage requires "*physical loss or damage* to electronic data, programs or software"), 21 ("Data Service Provider Property Damage" requires "*physical loss or damage*"); 22 ("Accidental Interruption of Services" requires "*physical damage*"), 23 ("Accounts Receivable" requires "*physical loss or*

damage"), 24 ("Automatic Coverage" requires "*physical loss or damage*") (emphasis added).

Second, the premise of Plaintiff's argument—that every coverage in the Policy requires a showing of "physical loss or damage"—is simply incorrect. A number of other provisions in the Policy also have no such requirement. For example, neither the "Service Interruption Time Element" nor "Data Services Provider Time Element" provisions—which cover business interruption losses resulting from an interruption of utility services (e.g., incoming electricity or steam) or data services caused by an "accidental event" at a service provider, respectively—require a showing of "physical loss or damage." Policy at 51, 57. [5]

In fact, Plaintiff's proffered interpretation would paradoxically provide insureds—including ITT—with *less* coverage than the Policy otherwise affords. If Plaintiff were correct that each provision of the Policy, including the two Communicable Disease provisions, require "physical loss or damage," then Plaintiff would have to demonstrate (as discussed below) that the presence of COVID-19 caused a physical, tangible alteration to its property, something it cannot do as a matter of law. On the other hand, under FM Global's interpretation (and as FM Global has already told Plaintiff, *see* Compl. Ex. C), Plaintiff can recover up to $1 million under the Communicable Disease Provisions provided it is able to show, *inter alia*, the presence of a person with COVID-19 at an insured location.

Third, Plaintiff's argument obviates the distinction between cause and effect that courts routinely observe when construing policies. Specifically, the Policy provides coverage for "all risks of physical loss or damage" to insured property, subject to its other terms and exclusions. The "risks" referenced in that phrase are fortuitous causes of loss, such as an earthquake or flood.

[5] Another example of such a provision is Crisis Management, which is triggered by, among other things, a crime, suicide, attempted suicide, or armed robbery at an insured location. Policy at 58.

When those risks materialize, the consequence is covered loss or damage to the covered property. *See, e.g.*, *Int'l Multifoods Corp. v. Com. Union Ins. Co.*, 309 F.3d 76, 83 (2d Cir. 2002). As this Court recently explained, courts distinguish "between loss or damage, on the one hand, and processes that could—but have yet to—cause loss or damage, on the other, ruling that the latter do not fall within the scope of coverage where the policies require physical loss or damage to trigger coverage." *England v. Amica Mut. Ins. Co.*, 2017 WL 3996394, at *7 (D. Conn. Sept. 11, 2017) ("a covered loss is treated separately from its cause for the purposes of coverage, and must be in the form of a perceptible harm for a policyholder to claim coverage"). In other words, it is not an earthquake itself which constitutes "physical loss or damage," but the resulting material alteration to property *caused* by the earthquake. Plaintiff's argument equating the presence of COVID-19 with physical loss or damage turns this relationship on its head, and does violence to the common understanding of the phrase "physical loss or damage." *Cf. Tappo of Buffalo*, 2020 WL 7867553, *4 (presence of virus does not constitute direct physical loss or damage).

Finally, where the Policy intends to adopt a definition of "physical loss or damage" which differs from the ordinary, legal definition, it says so explicitly. For example, the "Data Restoration" provision specifically defines "physical loss or damage to electronic data, programs or software" to mean "the destruction, distortion or corruption of electronic data programs, or software." Policy at 20, 78. If FM Global had meant to adopt a different definition of the term for purposes of the Communicable Disease Provisions, it would have done so explicitly. It did not. Plaintiff's attempt to use the Communicable Disease Provisions to redefine the term "physical loss or damage" in a way that does not accord with the Policy's plain meaning or applicable precedent accordingly falls short.

B. The Presence of COVID-19 Does Not Constitute Physical Loss or Damage as a Matter of Law.

Stripped of its Policy-based argument, Plaintiff is left to prove that the alleged presence of COVID-19 on its properties resulted in "physical loss or damage" to those properties. Plaintiff's Complaint asserts that, as a result of the presence of COVID-19 on its properties or the "threat posed by COVID-19 in general geographic proximity," it was forced to "remediate" certain unidentified "personal property and real property," suspend "business activities," and undertake activities such as testing of workers, reconfiguring work spaces for social distancing, and facilitating remote work. Compl. ¶ 29. As numerous courts have held, such allegations are insufficient to establish "physical loss or damage" as a matter of law.

As an initial matter, Plaintiff pleads the "presence" of COVID-19 in conclusory fashion, which is insufficient under *Twombly* and *Iqbal*. For example, Plaintiff cites studies showing how easily the virus can spread, reiterates that COVID-19 was "present" on its properties, and refers to "persons with COVID-19" (s*ee, e.g.*, Compl. ¶ 29), but fails to allege what, exactly this means, "*i.e.*, whether a person infected with COVID-19 had entered the Properties, which of the Properties were 'infected,' or whether COVID-19 was present on any particular surfaces of the Properties." *Island Hotel Properties, Inc. v. Fireman's Fund Ins. Co.*, 2021 WL 117898, at *4 (S.D. Fla. Jan. 11, 2021) (assertion that COVID-19 was "present" on properties insufficient); *see also Promotional Headwear Int'l v. Cincinnati Ins. Co.*, 2020 WL 7078735, at *8 (D. Kan. Dec. 3, 2020) (assertion that the "virus was present on the Plaintiff's surfaces" was conclusory and "fail[ed] to raise a 'right of relief above the speculative level'").

Moreover, even if Plaintiff were able to plead the "presence" of COVID-19, it cannot tie that presence to any tangible *physical* harm. At most, Plaintiff's Complaint contains a single allegation in which it claims that it suffered property damage, e.g., that it "remediated" property

that came in contact with "respiratory particles, phlegm, and other materials expelled by persons with COVID-19." Compl. ¶ 29(a). But again, labeling its actions as "remediation" cannot avoid the undisputable fact that disinfectants and routine cleaning eliminate the novel coronavirus from surfaces.[6] Plaintiff has not alleged a single fact that would allow this Court to make the plausible inference that the presence of COVID-19 on its property was somehow different.

In fact, courts nationwide have repeatedly held that the presence of COVID-19 or the novel coronavirus does not cause physical loss or damage as a matter of law because the coronavirus itself can be eliminated with routine cleaning. *See, e.g.*, *7th Inning Stretch LLC v. Arch Ins. Co.*, 2021 U.S. Dist. LEXIS 58477, at *4-5 (D.N.J. Mar. 26, 2021) ("[T]he presence of a virus that harms humans but does not physically alter structures does not constitute coverable property loss or damage.") (citing cases); *Am. Food Sys., Inc. v. Fireman's Fund Ins. Co.*, 2021 WL 1131640, at *4-5 (D. Mass. Mar. 24, 2021) (finding the presence of COVID-19 could not cause "direct physical loss of or damage to" property); *Out West Rest. Grp. Inc., et al. v. Affiliated FM Ins. Co.*, 2021 WL 1056627, at *5-6 (N.D. Cal. Mar. 19, 2021) (finding the presence of the novel coronavirus does not cause "physical loss or damage" under Affiliated FM Insurance Company policy); *Manhattan Partners, LLC, et al. v. Am. Guarantee & Liab. Ins. Co. et al.*, 2021 WL 1016113, at *2 (D.N.J. Mar. 17, 2021) ("Plaintiffs' general statements that the COVID-19 virus was on surfaces and in the air at their properties is insufficient to show property

[6] For example, the CDC and the EPA, working together, have made a list of disinfectants that "kill all strains of SARS-CoV-2, the virus that causes COVID-19." *See* https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Cleaning-and-Disinfection (last visited April 2, 2021); *see also* https://www.epa.gov/pesticide-registration/list-n-disinfectants-coronavirus-covid-19 (last visited April 2, 2021). The CDC also advises that "everyday cleaning practices" for most businesses and communities will be enough to reduce the potential spread of COVID-19, although certain "high-touch" areas "should be cleaned and disinfected before each use." https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Cleaning-and-Disinfection (go to "What is routine cleaning? How frequently should facilities be cleaned to reduce the potential spread of COVID-19?").

loss or damage."); *O'Brien Sales & Mktg., Inc. v. Transportation Ins. Co.*, 2021 WL 105772, at *4 (N.D. Cal. Jan. 12, 2021) (because "contaminated surfaces can be disinfected and cleaned," the presence of COVID-19 does not cause physical loss or damage); *Promotional Headwear*, 2020 WL 7078735, at *8 (presence of COVID-19 does "not constitute the direct, physical loss or damage required to trigger coverage because its presence can be eliminated"); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 2020 WL 6436948, at *5 (S.D.W. Va. Nov. 2, 2020) ("[E]ven actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property. Because routine cleaning, perhaps performed with greater frequency and care, eliminates the virus on surfaces, there would be nothing for an insurer to cover[.]").[7]

These cases are consistent with both New York and Connecticut law. Under New York law, "physical loss or damage" requires a showing of "a negative alteration in the tangible condition of property." *Sharde Harvey, DDS*, 2021 WL 1034259, at *7. For this reason, a number of courts applying New York law have found that the presence of COVID-19 cannot, as a matter of law, cause "physical loss or damage." *See, e.g.*, *Dressel v. Hartford Ins. Co. of the Midwest*, 2021 WL 1091711, at *4 (E.D.N.Y. Mar. 22, 2021) (finding that "[t]hough the virus has the potential to cause significant harm to people," the virus cannot cause "'physical damage' to property"); *Harvey v. Sentinel Ins. Co.*, 2021 WL 1034259, at *8-9 (S.D.N.Y. Mar. 18, 2021) (explaining how neither the COVID-19 pandemic nor the "presence of COVID-19" can cause physical damage to property under New York law); *Food For Thought Caterers Corp. v. Sentinel Ins. Co.*, 2021 WL 860345, at *5 (S.D.N.Y. Mar. 6, 2021) ("[C]ontamination of the

[7] *See also Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 2020 WL 5847570, at *1 (S.D. Cal. Oct. 1, 2020); *Sharde Harvey, DDS, PLLC v. Sentinel Ins. Co., Ltd.*, 2021 WL 1034259, at *9 (S.D.N.Y. Mar. 18, 2021); *Infinity Exhibits v. Certain Underwriters at Lloyd's London*, 2020 WL 5791583, at *3-5 (M.D. Fla. Sept. 28, 2020); *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 2020 WL 5630465, at *2-3 (N.D. Ill. Sept. 21, 2020); *Diesel Barbershop, LLC v. State Farm Lloyds*, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020).

premises by a virus does not constitute a 'direct physical loss' because the virus's presence can be eliminated by 'routine cleaning and disinfecting,' and 'an item or structure that merely needs to be cleaned has not suffered' a direct physical loss."); *Tappo of Buffalo*, 2020 WL 7867553, at *4 (same); *Visconti Bus Serv., LLC v. Utica Nat'l Ins. Grp.*, 2021 WL 609851, at *10 (N.Y. Sup. Ct. Feb. 12, 2021) ("[E]ven if Covid-19 were found at Visconti's premises, it would not constitute the direct, physical loss or damage required to trigger coverage because its presence can be eliminated by routine cleaning and disinfecting[.]"). As one court explained when rejecting the argument that COVID-19 causes property damage: "[COVID-19] damages lungs. It doesn't damage printing presses." *Social Life Magazine, Inc. v. Sentinel Ins. Co. Ltd.*, 2020 WL 2904834 (S.D.N.Y. May 14, 2020).

Likewise, Connecticut law requires a showing of a "physical, tangible alteration" to property to establish "physical loss or damage." *Mazzarella v. Amica Mut. Ins. Co.*, 2018 WL 780217, at *3-4 (D. Conn. Feb. 8, 2018) (quoting *England*, 2017 WL 3996394, at *7) (dismissing claim for insurance coverage where the plaintiff failed to allege "specific damage" to property, and further explaining that the mere oxidation of concrete "absent any physical manifestation in the Property marking a change to an unsatisfactory state," could not constitute physical loss or damage); *see also Chief of Staff*, 2021 WL 1208969, at *2 (agreeing that the term "direct physical loss" "unambiguously requires some physical manifestation of change to the property") (applying Connecticut law). In certain very limited situations, Connecticut law has found "physical loss or damage" where there is a physical contamination of property that renders it unusable or inhabitable (e.g., through the exposure of friable asbestos and non-intact lead-based paint). *See, e.g.*, *Yale Univ. v. Cigna Ins. Co.*, 224 F. Supp. 2d 402, 413-14 (D. Conn. 2002). However, similar to a chemical reaction without an accompanying physical change (*see*

England, 2017 WL 3996394, at *8), the mere presence of asbestos is insufficient to establish physical loss or damage. *See Yale Univ.*, 224 F. Supp. at 413. Accordingly, the presence of COVID-19 on a property—which can be eliminated by routine cleaning and disinfecting—is insufficient to establish physical loss or damage.[8] Indeed, as Plaintiff's own Complaint acknowledges, its insured locations remained "Operational Even with COVID-19 at the Business Location."[9] Compl. ¶ 29.

For these same reasons, Plaintiff's assertions relating to the limitations on its operations due to government orders (*see id.* ¶¶ 28, 29, 31) are insufficient to establish "physical loss or damage" under either New York or Connecticut law. Likewise, that Plaintiff had to take extra steps to remain operations (*see id.* ¶ 29(d), (e)) does not physically alter any of its Properties. Such examples of "detrimental economic impact, such as loss of use, unaccompanied by a distinct, physical alteration of property, is insufficient" to establish "physical loss or damage." *O'Brien Sales*, 2021 WL 105772, at *3 (internal quotation marks omitted); *see also Food For Thought Caterers Corp.*, 2021 WL 860345, at *4 ("[T]he great majority of courts that have addressed this issue of insurance coverage for business losses sustained as a result of COVID-19 restrictions have held that a complaint which only alleges loss of use of the insured property fails to satisfy the requirement for physical damage or loss.") (citing cases); *Chief of*

[8] It bears noting that "damage" caused by contamination of friable asbestos such as in *Yale University* is simply different in kind than the type of "damage" caused by a virus, not the least because friable asbestos contamination requires non-routine, extensive remediation.

[9] Plaintiff's assertion that "a common and necessary response" to a "disease outbreak" is to shut down a facility does not change this fact. Such closures are intended to prevent further spread of the virus, not prevent property damage. As one court recently explained in a similar context, "COVID-19 poses a serious risk to people gathered in proximity to one another, and the government orders closing certain businesses were designed to ameliorate that risk. Property … is not physically damaged or rendered unusable or uninhabitable. If people could safely congregate anywhere without risk of infection, the Plaintiff has alleged no facts to suggest any impediment to [a business's] operation. No repairs or remediation to the premises are necessary for its safe occupation in the event the virus is controlled and no longer poses a threat." *Uncork & Create*, 2020 WL 6436948, at *5 (internal citation omitted).

Staff, 2021 WL 1208969, at *2 (holding there was no coverage for businesses losses suffered "where, as here, a government closure order prohibits access to a business's premise for reasons unconnected to any change in the physical condition of those premises, or in the physical condition or location of property at those premises"); *Sharde Harvey, DDS*, 2021 WL 1034259, at *11 (holding that loss of use without actual physical damage to property does not constitute direct physical loss or damage, and that government shutdown orders did not "physically damage" property).

In sum, Plaintiff's argument that "communicable disease" constitutes "physical loss or damage" under the Policy is meritless. So too is Plaintiff's argument that the presence of COVID-19 causes physical loss or damage.

In the case of Civil and Military Authority Coverage, dismissal is necessary for two additional reasons. First, Plaintiff has failed to plausibly allege that its properties or any properties located within five miles of its properties actually suffered physical damage, as required (Policy at 53). *See* Compl. ¶ 51. Second, while Plaintiff states in conclusory terms that it suffered losses "due to Orders of Civil or Military Authority that were entered as a consequence of damage to property of ITT and/or to property belonging to third parties" (*id.* ¶ 52), Plaintiff concedes earlier in its complaint that such government orders were made "in response to the COVID-19 pandemic" generally. *See id.* ¶ 28. In fact, the sworn "Proof of Loss" expressly refers to government shutdown that were not issued in response to physical loss or damage at Plaintiff's properties but were rather issued prospectively to slow the spread of the virus for the purposes of protecting the public's health. *See* Compl. Ex. B; *see 10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd.*, 2020 WL 7360252, at *4 (S.D.N.Y. Dec. 15, 2020) (finding plaintiff had not alleged civil authority orders were the "direct result of a risk of direct physical

loss" where ordered closures were "the direct result of the risk of COVID-19"); *Zagafen Bala, LLC v. Twin City Fire Ins. Co.*, 2021 WL 131657, at *7 (E.D. Pa. Jan. 14, 2021) (holding that civil authority coverage did not apply because the "conditions that led to the limitations on the insured properties were not the direct result of a 'risk[ ] of direct physical loss' to property in the immediate area of the insured property because no other property was rendered uninhabitable or unusable due to a physical condition of that property"); *AFM Mattress Co., LLC v. Motorists Com. Mut. Ins.*, 2020 WL 6940984, at *4 (N.D. Ill. Nov. 25, 2020) (same). This too bars Plaintiff's claim under that provision.

This Court should thus dismiss Plaintiff's claims for coverage under the eight Policy provisions requiring "physical loss or damage."

II. The Policy's Contamination Exclusion Bars Coverage for Losses Caused by the Actual or Suspected Presence of the Virus.

Plaintiff cannot claim coverage under any of the non-Communicable Disease Provisions because there are clear, unambiguous exclusions that bar the very losses it seeks. The Policy expressly provides coverage "against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded." Policy at 1, 8. One such exclusion is the Contamination Exclusion, through which the Policy excludes from coverage "**contamination** and any cost due to **contamination** including the inability to use or occupy property or any cost of making property safer or suitable for use or occupancy." Policy at 17 (emphasis in original). "Contamination" is defined in relevant part to include "any condition of property due to the actual or suspected presence of any … pathogen or pathogenic organism, bacteria, virus, [or] disease causing or illness causing agent[.]" Policy at 74.

Thus, by the clear terms of the Policy, if the alleged physical loss or damage was caused by the "actual or suspected presence" of a virus (or pathogen, or pathogenic organism, or disease

causing or illness causing agent, all of which describe the novel coronavirus), then the Contamination Exclusion unambiguously excludes the alleged physical loss or damage from coverage. *See, e.g., Cockill*, 2018 WL 6182422, at *2 (where language is unambiguous, it "must be accorded its natural and ordinary meaning"). Here, the Complaint expressly attributes Plaintiff's losses to the emergence and spread of the novel coronavirus (SARS-CoV-2). Plaintiff specifically alleges that it expended certain costs "[a]s a consequence of the global pandemic," that it incurred "substantial losses . . . as a result of the presence of COVID-19" [10] [a virus] at or near its insured properties, and that it suffered losses "due to pandemic conditions and the threat posed by COVID-19." Compl. ¶¶ 29-32. By acknowledging that the novel coronavirus led to its alleged loss, the Complaint concedes the applicability of the Contamination Exclusion. *See, e.g.*, *Garmany of Red Bank, Inc. v. Harleysville Ins. Co., et al.*, 2021 WL 1040490, at *6 (D.N.J. Mar. 18, 2021) (holding that the plaintiff could not show that the novel coronavirus was not "the proximate cause of its losses").

The vast majority of courts to have considered similar exclusionary language—including the one to do so in this District—have drawn precisely the same conclusion.[11] In *LJ New Haven LLC*, plaintiff, the operator of a restaurant, sought business interruption coverage from its insurance provider for losses allegedly due to the novel coronavirus and government orders issued to "slow transmission of the virus." 2020 WL 7495622, at *1-2. After its insurer refused coverage, plaintiff filed suit. The insurer moved to dismiss, arguing, among other things, that

[10] The Complaint argues that COVID-19 has "spread across the globe," but it directly acknowledges that it is the novel coronavirus (or SARS-CoV-2) that causes people to become infected with the disease COVID-19. *See* Compl. ¶ 16.

[11] In fact, as of the date of this filing, there are well over 50 cases on which courts have dismissed claims due to the existence of a virus exclusion. A summary of all the rulings in COVID-19 coverage cases may be found at https://cclt.law.upenn.edu/judicial-rulings/.

coverage was foreclosed by the policy's exclusion of damages or losses caused by "any virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease." *Id.* at *6. The court found that this exclusion—which overlaps entirely with the Contamination Exclusion at issue here—barred plaintiff's claim for coverage. *Id.* at *5, 8 (explaining that the complaint and the relevant government order "makes clear that it was a short step from the emergence of the virus to the curtailment of Plaintiff's indoor dining operations"); *see also Michael J. Redenburg, Esq. PC v. Midvale Indem. Co.*, 2021 WL 276655, at *7 (S.D.N.Y. Jan. 27, 2021) (claimed loss caused by COVID-19 pandemic "falls squarely" within exclusion for losses due to "any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or diseases").

So too here. The only difference between the applicable exclusions in *LJ New Haven* and *Redenburg* and the Contamination Exclusion is that the latter is, if anything, broader. It applies not only to loss or damage caused by "virus" or "bacteria," but to any "disease causing or illness causing agent," including "pathogen[s]" or pathogenic organism[s]." By its terms, the Contamination Exclusion is thus aimed squarely at barring recovery for losses of the sort implicated by a pandemic. Accordingly, it applies to Plaintiff's alleged losses, all of which are a "consequence" of the novel coronavirus and the resulting pandemic. Compl. ¶ 29.

Plaintiff appears to recognize that the Contamination Exclusion is fatal to its claims. Its Complaint thus preemptively includes a grab-bag of arguments as to why the Contamination Exclusion should not apply to its losses. *See id.* ¶ 98. None of these is compelling.

First, Plaintiff argues that the Contamination Exclusion does not apply to the presence of the novel coronavirus brought on premises by people infected with COVID-19. *See id.* ¶ 98(a). Plaintiff's argument appears to be based on the fact that the Contamination Exclusion contains an

exception for contamination "directly resulting from *other* physical damage not excluded by the Policy." Specifically, Plaintiff asserts that (1) the COVID-19 disease itself (presumably carried onto ITT property by infected individuals) somehow constitutes "physical damage not excluded by the Policy" and (2) that the novel coronavirus "directly results from" COVID-19 and people infected with it.

This convoluted argument is at odds with the Policy's plain language. As an initial matter, and as Plaintiff admits, the argument rises and falls on Plaintiff's assertion that a "communicable disease" like COVID-19 *itself* constitutes "physical loss or damage" under the Policy. However, as described in Section I, *supra*, there is simply no basis in the Policy for such an interpretation. For one thing, it would completely eviscerate the Contamination Exclusion, given that *every* disease, by definition, is caused by a "bacteria," "virus," "pathogen," "pathogenic organism," or "disease causing or illness causing" agent. If the mere presence of a person with such a disease on premises were to render the Contamination Exclusion inapplicable, as Plaintiff argues, each of those terms would be read completely out of the Policy. In addition, the "Communicable Disease" provisions themselves are sub-limited to $1 million. If, as Plaintiff is arguing, the existence of those provisions renders the Contamination Exclusion inapplicable and thus unlocks the eight other coverages ITT has identified, that sublimit would also cease to have any meaning whatsoever as losses stemming from "communicable disease" would then be covered in excess of the $1 million sublimit.

Plaintiff's argument makes no sense as a logical matter, either. Simply carrying a "communicable disease" onto a property cannot constitute physical loss or damage to that

property, nor are infected people themselves manifestations of "physical loss or damage."[12] The fact of the matter is that the reference to "other physical damage not excluded" by the Policy is simply meant to cover situations in which the contamination at issue is caused by some other covered peril, such as flood or fire. For instance, if a fire in a storage room creates carcinogenic residue that then needs to be removed, the Contamination Exclusion would not bar coverage the Policy elsewhere provides elsewhere for that independent fire event, subject to applicable sublimits. That is very different than the current scenario, where the disease would not exist but for the contaminant itself.

Second, Plaintiff argues that the Contamination Exclusion is narrow in nature and only applies to traditional pollutants and not "disease outbreaks." This, of course, runs directly counter to the text of the Contamination Exclusion, which could not state more clearly that it applies specifically to contaminants which cause human disease or illness. Indeed, as discussed above, the Exclusion includes not only terms like "virus" or "bacteria," but also the catch-all terms "disease causing or illness causing agent," making the intent of the drafters crystal clear.[13] Unsurprisingly, those courts to have considered the question have all found that exclusions similar to FM Global's apply not only to pollutants, but also to the kinds of "contaminants" which cause pandemics, like the novel coronavirus. *See, e.g.*, *Boulevard Carroll Entm't Grp., Inc. v. Fireman's Fund Ins. Co.*, 2020 WL 7338081, at *1, 2 (D.N.J. Dec. 14, 2020) (exclusion for loss or damage stemming from "disease, sickness, any conditions of health, bacteria, or

[12] As *Iqbal* points out, a court is entitled to "draw on its judicial experience and common sense" when analyzing the plausibility of a claim. *See* 556 U.S. at 679.

[13] In fact, the Contamination Exclusion overlaps significantly with the Insurance Services Office Virus Exclusion to which Plaintiff approvingly cites (Compl. ¶ 98(c)), which applies to "any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness, disease."

virus" barred pandemic-related losses).[14] This is true even where the clauses in question contain references to "traditional pollution" which are even more explicit than those in the Contamination Exclusion. *See, e.g., Zwillo V, Corp. v. Lexington Ins. Co.*, 2020 WL 7137110, at *7-8 (W.D. Mo. Dec. 2, 2020) (coverage barred by contamination exclusion which defined "contaminant" to include "virus" along with other traditional pollutants and hazardous substances such as smoke, soot, chemicals, and waste).

Third, and relatedly, Plaintiff's argument that the Exclusion bars only "virus-related damage that could fairly be described as resulting from an act of 'contamination' or 'pollution'" reads into the Policy language a condition precedent that does not exist. Compl. ¶ 98(c). The language of the Contamination Exclusion plainly states that it applies to damage "*due to* the *actual or suspected presence* of … pathogenic organism, bacteria, virus, [or] disease causing or illness causing agent." Policy at 74. Nothing more is required. Although Plaintiff may wish the Contamination Exclusion applied more narrowly, it does not. Its attempt to gain through this Court coverage for which it neither negotiated nor paid is improper and should be rejected.

Fourth, Plaintiff seizes upon the fact that the Contamination Exclusion excludes not only "contamination," but "any *cost* resulting from contamination," to somehow argue that it does not apply to "consequent economic losses" resulting from contamination, but only to "costs incurred

[14] *See also, e.g., Causeway Auto., LLC v. Zurich Am. Ins. Co.*, 2021 WL 486917, at *5 (D.N.J. Feb. 10, 2021) (concluding a similar exclusion to not be "ambiguous in any way"); *BA LAX, LLC v. Hartford Fire Ins. Co.*, 2021 WL 144248, at *4 (C.D. Cal. Jan. 12, 2021) (exclusion which grouped together "fungus, wet rot, dry rot, bacteria or virus" unambiguously applied to bar coverage); *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, No. 20-cv-03461-MMC, 2020 WL 7495180, at *6 (N.D. Cal. Dec. 21, 2020) (internal quotations omitted) (holding that coverage was barred by exclusion which excluded viruses along with other pollutants such as fungus, spores, and toxins arising out of such fungus or spores); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp.*, 2020 WL 7342687 (N.D. Cal. Dec. 14, 2020) (pandemic-related losses barred by exclusion which grouped together "virus" with other pollutants such as fungi, wet rot, and dry rot); *Wilson v. Hartford Cas. Co.*, 2020 WL 5820800, at *7 (E.D. Pa. Sept. 30, 2020) (exclusion which grouped together fungi, wet rot, dry rot, bacteria, and virus applied to bar coverage).

to remove the contamination from covered property." Compl. ¶ 98(d) (emphasis added). In making this argument, Plaintiff asks the Court to completely ignore the *very next clause* in the Contamination Exclusion, which expressly defines "cost resulting from contamination" to include Plaintiff's "inability to use or occupy property"—in other words, precisely the "economic losses" Plaintiff claims are not subject to the Contamination Exclusion. If that were not enough, Plaintiff's argument also ignores the fact that the Policy's definition of "contamination" includes the "actual *or suspected* presence of any" virus. Policy at 74 (emphasis added). Given that there is no way to "remove" a virus whose presence is only "suspected," this too makes clear that the Contamination Exclusion reaches beyond cleanup costs to consequential losses which could result from the suspected presence of a virus, such as time-element losses or extra expenses. Finally, this argument fails to ascribe any meaning to the exclusion of "contamination" itself (as opposed to "costs due to contamination."). In essence, Plaintiff is reading the inclusion of an additional phrase set off by the word "and" to somehow *limit* the reach of the Contamination Exclusion. This, too, makes little sense.

In an effort to buttress this argument, ITT will likely make much of a recent decision in *Thor Equities, LLC v. Factory Mutual Insurance Company*, Civil Action No. 20-Civ-3380 (S.D.N.Y.), which denied the parties' dueling motions for judgment on the pleadings in connection with the same Contamination Exclusion at issue here. But that decision is no help to ITT because the *Thor* court *rejected* Plaintiff's argument that the Exclusion applies only to costs, finding instead that "the first two words of the [E]xclusion – '**contamination, and'** – must be given effect" and Plaintiff's proffered reading "could tend to render certain aspects of the Exclusion meaningless." *Thor Equities, LLC v. Factory Mut. Ins. Co.*, 2021 U.S. Dist. LEXIS 62967, at *10 (S.D.N.Y. Mar. 31, 2021)(emphasis added). Notwithstanding that conclusion,

however, the court went on to hold that the Exclusion was somehow "ambiguous" about whether it covered anything beyond "costs" due to contamination. *Id.* at *11. Even more inexplicably, it noted that the Exclusion encompassed the "inability to use or occupy property" but declined to apply it to Thor's inability to use its property as a result of the coronavirus. *Id*. at *9-11. In so doing, the Court effectively failed to ascribe any meaning to two separate provisions of the Contamination Exclusion, thus violating basic principles of contract interpretation.

Plaintiff's final argument—that the Contamination Exclusion is "directed solely at 'conditions of property' and thus does not address" time-element or other economic losses—is simply a minor variation on the same theme. Compl. ¶ 98(e). Once again, Plaintiff ignores the language in the Contamination Exclusion which applies that provision to "the inability to use or occupy property." Moreover, Plaintiff's argument rests on the assumption that the words "contamination" and "costs of contamination" in the Contamination Exclusion refer to precisely the same thing—non-economic losses (such as cleanup and remediation costs) due to a "condition of property" caused by a contaminant. But this would improperly render those two different clauses as entirely co-substantial and redundant—a reading at odds with basic principles of contract interpretation. *See, e.g.*, *Cipciao, LLC v. M Chow One, LLC*, 2021 WL 1141567, at *4 (S.D.N.Y. Mar. 24, 2021) (rejecting interpretation that would render contract provision superfluous). And, again, this ignores the prefatory language to the EXCLUSIONS and TIME ELEMENT sections of the Policy. The TIME ELEMENT section of the Policy expressly states that Time Element coverage (which provides for consequential economic losses) "is subject to the Policy provisions, ***including applicable exclusions and deductibles***." Policy at 41 (emphasis added). The EXCLUSIONS section likewise provides that "exclusions apply unless otherwise stated." *See* Policy at 13.

At bottom, Plaintiff cannot avoid the plain language of the Contamination Exclusion, which unambiguously excludes coverage for alleged physical loss or damage due to viruses. For this reason, Plaintiff's claims for coverage under the non-Communicable Disease Provisions should be dismissed with prejudice.

III. The Policy's Loss of Use Exclusion Bars Plaintiff's Claims for Damages Arising from Plaintiff's Inability to Fully Use its Properties.

Although Plaintiff is at pains to avoid saying so explicitly, much of its Complaint focuses on the damages it says it has suffered due to the alleged loss of use of its properties. *See, e.g.*, Compl. ¶ 10 ("ITT has properties that are insured locations on the Policy on four continents and its direct customers and suppliers have properties worldwide that have been impacted by the COVID-19 pandemic and civil authority orders that have prohibited or limited access to ITT's insured locations[.]"); ¶ 29 (describing costs and losses due to facility shutdowns and limited use of facilities), ¶ 31 (describing "losses due to government or private closures or suspensions of business"). The problem for Plaintiff, and the reason it strives to recast each of these claims, is because they are barred by the Policy's Loss of Use Exclusion, which expressly precludes recovery of damage due to "loss of use or loss of market." *See* Policy at 13-14.

Courts addressing claims for COVID-related losses have recognized that similar loss of use exclusions preclude coverage for pure loss of use claims, unaccompanied by physical loss or damage. For example, in *Salon XL Color & Design Grp., LLC v. W. Bend Mut. Ins. Co.*, the court found that a policy's exclusion for losses due to "delay, loss of use or loss of market" precluded plaintiff's claims to coverage based on its inability to use its property as intended due to the presence of COVID-19. 2021 WL 391418, at *4 (E.D. Mich. Feb. 4, 2021); *see also Selane Products, Inc. v. Continental Cas. Co.*, 2020 WL 7253378, at *6 (C.D. Cal. Nov. 24, 2020) (finding policy precluded coverage in part because of its exclusion for "loss of use or loss

or market"); *Whiskey River on Vintage, Inc. v. Illinois Cas. Co.*, 2020 WL 7258575, at *18 (S.D. Iowa Nov. 30, 2020) ("The Consequential Losses provision unambiguously states that Defendant will not pay for loss or damage resulting from a loss of use."); *Harvest Moon Distributors, LLC v. S.-Owners Ins. Co.*, 2020 WL 6018918, at *6 (M.D. Fla. Oct. 9, 2020) (policy exclusion for losses due to "delay, loss of use, or loss of market" applied to claims for "loss of use" of insured property due to the COVID-19 pandemic). The same result is warranted here.

IV. Plaintiff Has Not Adequately Alleged Coverage Under the Communicable Disease Provisions.

Although the Contamination Exclusion and Plaintiff's inability to meet its burden of establishing physical loss or damage independently preclude ITT from recovering under most of the provisions it identified in its Complaint, the same is not true for the Communicable Disease Provisions. These provisions, which allow Plaintiff to recover up to $1 million in the aggregate, are not triggered upon a showing of physical loss or damage—in fact, by their plain terms, they do not require physical loss or damage at all. Instead, the Communicable Disease Provisions provide coverage if two requirements are met: (1) the "actual not suspected" presence of a communicable disease, and (2) an "order of an authorized government agency 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" that has "limited, restricted or prohibited" access to the insured location.

FM Global has expressly told Plaintiff that coverage under these Provisions could be available to it should Plaintiff provide documentation establishing these preconditions. *See* Ex. C. ITT has not provided this requested documentation, and appears unable to do so. FM Global, however, has not yet denied this claim for coverage and would adjust the claim in good faith should Plaintiff provide this documentation to FM Global.

As alleged, Plaintiff's claim for coverage under these Provisions is similarly insufficient. As described *supra* at 16, ITT's allegations regarding the alleged presence of COVID-19 on its insured locations are threadbare and conclusory. Plaintiff fails to provide a single factual allegation to support its claim that there was the "actual not suspected" presence of COVID-19 on its properties; for example, it fails to allege which locations experienced the presence of COVID-19, when COVID-19 was present on these properties, or how COVID-19 was present on its properties (e.g., through an infected worker). Instead, ITT relies on conclusory allegations such as "[t]he actual presence of the COVID-19 communicable disease has been confirmed at certain ITT insured locations," which merely beg the question and are thus insufficient to state a claim. *See* Compl. ¶ 69. Such conclusory allegations are insufficient.

Accordingly, this Court should dismiss Plaintiff's claims for coverage under the Communicable Disease Provisions. Alternatively, Plaintiff's inability to plead any facts regarding the "actual not suspected presence" of COVID-19 at its properties warrants dismissal.

CONCLUSION

For the reasons set forth above, this Court should grant FM Global's Motion to Dismiss in its entirety and dismiss the Complaint with prejudice.

THE DEFENDANT,

FACTORY MUTUAL INSURANCE COMPANY
By its Attorneys,

Dated: April 2, 2021

/s/ Dana M. Horton

Dana M. Horton (Fed Bar # ct21557)
Daniel F. Sullivan (Fed Bar # ct02765)
Robinson & Cole LLP
One Financial Plaza, 14th Floor
Providence, RI 02903
Tel: (401) 709-3300
Fax: (401) 709-3399
dhorton@rc.com
dsullivan@rc.com

/s/ Harvey Kurzweil
Harvey Kurzweil (Bar No ct14396)
Admitted Pro Hac Vice
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166-4193
Tel: (212) 294-6700
Fax: (212) 294-4700
hkurzweil@winston.com

/s/ Kelly A. Librera
Kelly A. Librera (Bar No phv11123)
Admitted Pro Hac Vice
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166-4193
Tel: (212) 294-4622
Fax: (212) 294-4700
klibrera@winston.com

/s/ Kerry C. Donovan
Kerry C. Donovan (Bar No phv1 1122)
Admitted Pro Hac Vice
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166-4193
Tel: (212) 294-3511
Fax: (212) 294-4700
kcdonovan@winston.com

/s/ George E. Mastoris
George E. Mastoris
Pro Hac Vice Application Pending
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166-4193
Tel: (212) 294-4623
Fax: (212) 294-4700
gmastoris@winston.com

CERTIFICATION OF SERVICE

I hereby certify that on the 2nd day of April, ,2012, a copy of the foregoing document was filed with the Court via the ECF filing system. As such, this document will be electronically sent to the registered participants identified on the Notice of Electronic Filing (NEF) and paper copies will be sent by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing.

/s/ Dana M. Horton
Dana M. Horton

Dated: April 2, 2021