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

GREENWOOD RACING INC., GREENWOOD GAMING AND ENTERTAINMENT, INC., RACETRACK OP CO., CITY TURF CLUB OP CO., TURF CLUB OP CO., and ACRA TURF CLUB, LLC Plaintiffs, v. AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY and STEADFAST INSURANCE COMPANY, Defendants.	Case No.: 2:21-cv-01682

NOTICE OF MOTION TO DISMISS THE COMPLAINT

PLEASE TAKE NOTICE that the undersigned attorneys for Steadfast Insurance Company ("Steadfast") hereby move before the Honorable Gerald J. Pappert, U.S.D.J., for an Order dismissing the Complaint with prejudice pursuant to Rule 12(b)(6); and

PLEASE TAKE FURTHER NOTICE that in support of this motion, Steadfast shall rely upon the attached memorandum of law.

Respectfully submitted,

MOUND COTTON WOLLAN & GREENGRASS LLP
Attorneys for Defendant Steadfast Insurance Company

Dated: April 30, 2021

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CERTIFICATE OF SERVICE

I, William D. Wilson, Esq., hereby certify that on April 30, 2021, I caused a true and correct copy of Steadfast's Motion to Dismiss the Complaint, including the accompanying memorandum of law in support thereof and proposed order, to be served via the Court's electronic filing system on all counsel of record.

Dated: April 30, 2021

/s/ William D. Wilson
William D. Wilson

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

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PRELIMINARY STATEMENT

This lawsuit arises out of a contractual dispute between Steadfast Insurance Company ("Steadfast") and Greenwood Racing, Inc. and its various subsidiaries (collectively, "Greenwood") over the existence of insurance coverage under an environmental liability policy for economic losses allegedly related to the COVID-19 pandemic. The environmental liability insurance provided by Steadfast is a specialized type of insurance that is limited in the first-party insurance context to covering loss or damage caused by a "pollution event." As demonstrated by Greenwood's struggles in the Complaint to plausibly allege that its claims fit within the scope of coverage, it has not identified a pollution event at any covered location and its losses are not the types of losses that are covered by Steadfast.

Although Greenwood contends that the presence of the virus that causes COVID-19 at each covered location constitutes a separate "pollution event," it has failed to plausibly allege that the COVID-19 virus was actually present at any single location. Instead, Greenwood relies upon generalized statements and speculative assertions concerning the prevalence of COVID-19 in society to argue that the virus must have been present at its facilities. But inferences and conjecture are wholly insufficient to plausibly state a claim for relief. Even if such conclusory allegations were sufficient (which they are not), Greenwood has not demonstrated that it has sustained covered loss or damage due to the presence of the virus at a covered location.

Initially, Greenwood alleges that it is entitled to First Party Cleanup Costs coverage. Such coverage applies to two types of costs and expenses: (1) "cleanup costs," which are those costs and expenses incurred in the investigation, removal, remediation, neutralization, or immobilization of contaminated soil, surface water, groundwater, or other contamination from Greenwood's property; and (2) "emergency expenses," which are those costs and expenses

incurred to avoid or otherwise mitigate an actual imminent and substantial endangerment to the public health or the environment. However, Greenwood has not plausibly alleged its entitlement to coverage for either "cleanup costs" or "emergency expenses."

In the first instance, "cleanup costs" are covered only when they are required by a governmental authority. Greenwood, however, fails to plausibly allege the presence of the COVID-19 virus at any covered location. Nor does it identify a governmental authority—such as a statute, regulation, ordinance, voluntary cleanup program, or order—that required the cleanup of the virus that causes COVID-19. Instead, Greenwood references government stay-at-home orders issued by the Governors of New Jersey and Pennsylvania, which were intended to slow the spread of COVID-19. None of these orders required Greenwood to perform any type of cleanup as defined under the terms of coverage. In the absence of a governmental authority requiring a cleanup, Greenwood is not entitled to First Party Cleanup Costs coverage.

While there is no requirement that "emergency expenses" must be incurred as a result of a governmentally-mandated cleanup, Greenwood must show that they were incurred to avoid or otherwise mitigate an actual imminent and substantial endangerment to the public health or the environment. This is something it cannot do. Indeed, Greenwood does not even allege that the virus that causes COVID-19 actually was detected at any of its premises. It relies instead on the presumed or "virtually certain" presence of COVID-19. Rather than seeking coverage for costs incurred to mitigate an actual imminent and substantial endangerment to the public health, Greenwood merely is seeking coverage for costs related to the routine cleaning and disinfecting of its premises, which it undertook to attract more customers to its businesses.

Greenwood also alleges that it is entitled to Suspension of Operations coverage, which covers, in part, loss of business income when there is a suspension of operations due to a

pollution event. The availability of this coverage, however, is contingent upon the suspension of operations being caused by a government-mandated cleanup and Steadfast being responsible for those cleanup costs under the First Party Cleanup Costs coverage. Because Greenwood has failed to plausibly allege entitlement to coverage for "cleanup costs" or "emergency expenses" or, that its operations were suspended due to a government-mandated cleanup due to the pandemic, its claim for Suspension of Operations coverage necessarily fails.

Accordingly, Greenwood's claims against Steadfast should be dismissed with prejudice because Greenwood cannot state a viable claim for coverage, and leave to amend would be futile as there is no set of facts it could allege that would entitle it to coverage.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Parties and the Environmental Liability Policy

"Greenwood Racing Inc. is a gaming and entertainment company that through its subsidiaries owns and operates a casino, a racetrack, and other wagering facilities in Pennsylvania and New Jersey." (ECF No. 1-4 at p. 9, ¶ 1.) The subsidiaries, each of which is named as a plaintiff in this case, include Greenwood Gaming and Entertainment, Inc., Racetrack Op Co., City Turf Club Op Co., Turf Club Op Co., and ACRA Turf Club, LLC. (*Id.* at ¶ 2.)

Greenwood purchased a Z Choice Real Estate Environmental Liability Policy from Steadfast (the "Environmental Liability Policy"), which was in effect from April 1, 2017, through April 1, 2020. (*Id.* at p. 24, ¶ 91.) Each of Greenwood's subsidiaries, which are named insureds under the Environmental Liability Policy, operates a separate location insured by Steadfast, including Parx Casino, Parx Racing, South Philadelphia Race & Sportsbook, and Oaks Race & Sportsbook.[1] (*Id.* at p. 13-14, ¶¶ 23-26; p. 25, ¶ 95.)

The Environmental Liability Policy provides coverage for First Party Cleanup Costs, subject to the following terms:

> **I. INSURING AGREEMENTS**
>
> **B. New Pollution Event**
>
> 1. First Party Cleanup Costs
>
> We will pay "cleanup costs" to the extent resulting from a "new pollution event" that is on, at, under or that is migrating or has migrated beyond the boundaries from a "covered location", if that "new pollution event" is first "discovered" during the "policy period" and the "discovery" is reported to us in writing during the "policy period" or within sixty days following the end of the "policy period".

[1] Plaintiff ACRA Turf Club, LLC operates Favorites at Egg Harbor Township, which is not insured by Steadfast under the Environmental Liability Policy. (*Id.* at p. 25, ¶ 95.)

(*Id.* at p. 413.) The following definitions are relevant to coverage for First Party Cleanup Costs:

III. DEFINITIONS

F. "Cleanup costs" means:

1. Reasonable and necessary costs, charges and expenses, incurred in the investigation, removal, remediation (including associated monitoring), neutralization or immobilization of contaminated soil, surface water, groundwater, or other contamination:

   a. To the extent required by "governmental authority", plus reasonable additional costs, charges and expenses incurred, at the "insured's" election, for "green remediation" not to exceed the Green Remediation Limit set forth in Item 3. of the Declarations, where such "green remediation" is neither legally necessary nor required by "governmental authority"; or

   b. That have actually been incurred by the government or any political subdivision of the United States of America or any state thereof or of the District of Columbia or Canada or any province thereof, or by third parties;

* * *

3. "Emergency expenses".

* * *

L. "Emergency expenses" means costs, charges and expenses incurred to avoid or otherwise mitigate an actual imminent and substantial endangerment to the public health or the environment.

* * *

P. "Governmental authority" means federal, state, local or District of Columbia statutes, regulations, ordinances, "voluntary cleanup program(s)" or orders applicable to "pollution events" including those applicable to any licensed professional authorized pursuant to state law to oversee remediation that is on, at, under or that is migrating or has migrated beyond the boundaries from a "covered location". For the purpose of "microbial substances",

"governmental authority" includes a written determination by a "certified industrial hygienist" in accordance with all applicable professional standards.

* * *

FF. "Pollution event" means the discharge, dispersal, release, or escape of any solid, liquid, gaseous or thermal irritant, contaminant or pollutant, including smoke, vapor, soot, fumes, acids, alkalis, toxic or hazardous substances, electromagnetic fields, chemicals, waste (including medical, infectious and pathological waste), and low level radioactive waste and materials, into or upon land, or any structure on land, the atmosphere, or any watercourse or body of water including groundwater in concentrations or at levels in excess of those naturally present in the environment. "Pollution event" includes:

* * *

2. Any "microbial substances" that are present on, at or within any buildings or other structures at a "covered location" or "job site".

* * *

(*Id.* at pp. 455-56.)

The Environmental Liability Policy also includes coverage for other types of loss, including loss of business income, subject to the following terms:

I. INSURING AGREEMENTS

D. Suspension of Operations

* * *

2. <u>New Pollution Event</u>

We will pay "other loss" to the extent it results from a "new pollution event" on, at, or under a "covered location" for which coverage for "cleanup costs" is provided under this policy and if that "new pollution event" directly causes a "suspension of operations" at such "covered location" during the "policy period", provided the "suspension of operations" is reported to

> us in writing during the "policy period" or any applicable extended reporting period.
>
> 3. Contingent Business Interruption
>
> We will pay "other loss" resulting from a "pollution event" at a "covered location" that results in a "suspension of operations" required solely by a mandate issued by a governmental authority, provided the "suspension of operations" is reported to us in writing during the "policy period" or any applicable extended reporting period.

(*Id.* at p. 448.) With respect to Suspension of Operations coverage, the Environmental Liability Policy includes the following additional definitions:

> **II.** The following are added to DEFINITIONS (Section III) solely with respect to coverage provided by this endorsement:
>
> * * *
>
> "**Cleanup**" means those activities necessary to investigate, remove, remediate, neutralize or immobilize contaminated soil, surface water, groundwater, or other contamination to the extent required by "governmental authority".
>
> * * *
>
> "**Other loss**" means "loss of business income", "evacuation expense" and "reasonable and necessary expense", in excess of the Deductible, sustained by the "named insured" during the "period of indemnity".
>
> * * *
>
> "**Suspension of operations**" means the necessary partial or complete suspension of "operations" at the "covered location" as a direct result of a "cleanup" required by "governmental authority".

(*Id.* at pp. 448-50.)

B. The Insurance Claim and this Lawsuit

In March 2020, Governor Tom Wolf of the State of Pennsylvania issued a series of stay-at-home orders. (*Id.* at pp. 38-39, ¶¶ 150-56.) The Governor of New Jersey issued a series of

similar stay-at-home orders. (*Id.*) Generally, these orders were issued as part of each State's strategy to combat the spread of the virus that causes COVID-19. The orders, *inter alia*, limited the operations of non-essential businesses as well as required individuals to stay at home unless seeking essential services. (*Id.*) None of the orders required any business to investigate, remove, remediate, neutralize, or immobilize contaminated soil, surface water, groundwater, or other contamination as a result of the spread of the virus that causes COVID-19.

In response to these stay-at-home orders, Greenwood closed its casino, racetrack, and other wagering facilities. (*Id.* at p. 40, ¶¶ 161-64.) On March 18, 2020, Greenwood notified Steadfast that it had purportedly discovered a "pollution event" at each covered location resulting from the spread of the virus that causes COVID-19 and claimed coverage for its economic losses, including cleanup expenses, emergency expenses, and business income losses. (*Id.* at p. 56, ¶ 263.) Following an investigation, Steadfast denied the claim on June 22, 2020, because Greenwood had failed to identify either a covered pollution event at any covered location or any covered losses. (*Id.* at ¶ 267.)

On March 8, 2021, Greenwood filed this action in the Court of Common Pleas of Bucks County, which Steadfast subsequently removed to this Court. Steadfast now moves to dismiss the Complaint because Greenwood fails to state a claim upon which relief can be granted.

LEGAL ARGUMENT[2]

POINT I

DISMISSAL WITH PREJUDICE IS WARRANTED BECAUSE GREENWOOD FAILS TO PLAUSIBLY STATE A CLAIM FOR RELIEF AGAINST STEADFAST

The Federal Rules of Civil Procedure provide that a party may assert a defense of failure to state a claim upon which relief can be granted by motion. Fed. R. Civ. P. 12(b)(6). In deciding a motion to dismiss, the Court must take all allegations in the complaint as true and view them in the light most favorable to the plaintiff. *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). However, "[n]either 'bald assertions' nor 'vague and conclusory allegations' are accepted as true." *Davis v. Nationwide Mut. Ins. Co.*, 228 F. Supp. 3d 386, 388 (E.D. Pa. 2017). The Court must then determine the sufficiency of the complaint by engaging in a three-step inquiry, which includes: "(1) identifying the elements of the claim, (2) reviewing the complaint to strike conclusory allegations, and then (3) looking at the well-pleaded components of the complaint and evaluating whether all of the elements identified in part one of the inquiry are sufficiently alleged." *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011). "To survive dismissal, 'a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Tatis v. Allied Interstate, LLC*, 882 F.3d 422, 426 (3d Cir. 2018) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Under this standard, a claim is facially plausible if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A complaint must do more than allege a plaintiff's entitlement to relief, it must 'show' such an entitlement with its facts." *Penn-Dion Corp. v. Great Am. Ins. Co. of N.Y.*, No. 2:17-cv-04634, 2019 WL 400543, *10 (E.D.

[2] Although federal jurisdiction in this litigation is premised on diversity, Steadfast does not dispute, for purposes of this motion, that Pennsylvania substantive law governs Greenwood's claims.

Pa. Jan. 31, 2019) (citing *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009)). In actions involving insurance coverage disputes, "the court may grant a motion to dismiss where the insurance contract unambiguously reveals the insured is not entitled to coverage." *Frog, Switch & Mfg. Co., Inc. v. Travelers Ins. Co.*, 193 F.3d 742, 745 n.1 (3d Cir. 1999). As the party seeking insurance proceeds, Greenwood bears the burden of proving that the claim falls within the scope of coverage. *See Fry v. Phoenix Ins. Co.*, 54 F. Supp. 3d 354, 361 (E.D. Pa. 2014) (stating Pennsylvania law requires the insured to "prove facts that bring its claim within the policy's affirmative grant of coverage").

The interpretation of an insurance policy is a question of law for the court. *See Duncan v. Omni Ins. Co.*, 210 F. Supp. 3d 652, 654 (E.D. Pa. 2016), *aff'd*, 719 F. App'x 102 (3d Cir. 2017). "Under Pennsylvania law, the language of an insurance policy 'must be construed in its plain and ordinary sense' and to 'effectuate the intent of the parties as manifested by the language of the specific policy.'" *Dougherty v. Allstate Prop. & Cas. Ins. Co.*, 681 F. App'x 112, 116-17 (3d Cir. 2017) (quoting *Pa. Nat'l Mut. Cas. Ins. Co. v. St. John*, 106 A.3d 1, 14 (Pa. 2014)). "A court should not consider individual terms in isolation, but rather must consider the entire insurance provision to ascertain the parties' intent." *Tria WS LLC v. Am. Auto. Ins. Co.*, No. 2:20-cv-04159, 2021 WL 1193370, at *2 (E.D. Pa. Mar. 30, 2021). "In determining what the parties intended by their contract, the law must look to what they clearly expressed. Courts in interpreting a contract, do not assume that its language was chosen carelessly." *401 Fourth St. v. Invs. Ins. Grp.*, 879 A.2d 166, 171 (Pa. 2005). Consequently, "[t]he court must give effect to any language of the policy which is clear and unambiguous." *NorFab Corp. v. Travelers Indem. Co.*, 555 F. Supp. 2d 505, 509 (E.D. Pa. 2008).

On the other hand, an ambiguous provision in a policy will be construed in favor of the

insured. *4431, Inc. v. Cincinnati Ins. Co.*, No. 5:20-cv-04396, 2020 WL 7075318, *8 (E.D. Pa. Dec. 3, 2020). "A policy's language is ambiguous 'if it is reasonably susceptible of different constructions and capable of being understood in more than one sense.'" *Id.* (quoting *401 Fourth St.*, 879 A.2d at 171). However, an ambiguity does not exist merely because the parties disagree about the policy language. *Meyer v. CUNA Mut. Ins. Soc'y*, 648 F.3d 154, 164 (3d Cir. 2011). Nor does the lack of a definition in the policy render a term ambiguous as "[w]ords of common usage in an insurance policy are construed according to their natural, plain, and ordinary sense, and thus [courts] may consult the dictionary definition of a word to determine its ordinary usage." *Tria*, 2021 WL 1193370 at *4 (citation omitted).

Moreover, a court may not "resort to a strained contrivance or distort the meaning of the language in order to find an ambiguity." *Byoung Suk An v. Victoria Fire & Cas. Co.*, 113 A.3d 1283, 1288 (Pa. 2015). In other words, "courts should not 'under the guise of judicial interpretation,' expand coverage beyond that provided in the policy." *Id.* (quoting *Guardian Life Ins. Co. of Am. v. Zerance*, 479 A.2d 949, 953 (Pa. 1984)).

Even accepting the allegations in the Complaint as true, the terms of the Environmental Liability Policy are clear and unambiguous, and not capable of being understood in more than one sense. When those terms are given effect, it is clear that Greenwood is not entitled to coverage. Thus, the Court should dismiss the Complaint. Moreover, the Complaint should be dismissed with prejudice because amendment would be futile as there is no set of facts that Greenwood could plead that would entitle it to coverage. *See 4431*, 2020 WL 7075318 at *13 (denying leave to amend as futile because "[t]he terms of the Policies are not in dispute, and there is nothing else Plaintiffs could allege that would bring their claimed losses within the Policies' coverage").

POINT II

GREENWOOD IS NOT ENTITLED TO FIRST PARTY CLEANUP COSTS COVERAGE OR SUSPENSION OF OPERATIONS COVERAGE

Greenwood contends that it is entitled to First Party Cleanup Costs coverage and Suspension of Operations coverage due to the presumed presence of the virus that causes COVID-19 at its covered locations in Pennsylvania. Both coverages share essential elements and are contingent on the discovery of a "pollution event." But here, Greenwood has not and cannot allege the existence of a "pollution event." Indeed, it does not even allege that the virus that causes COVID-19 actually was detected at any of its premises and instead relies upon generalized statements and speculative assertions about its presence at its premises.

In addition, Greenwood has not plausibly alleged that it incurred any costs or expenses that would be covered even if it established the existence of a "pollution event." It has not performed a "cleanup" as required by a "governmental authority" entitling it to coverage for "cleanup costs." Nor has it identified an imminent and substantial endangerment to the public health or environment entitling it to coverage for "emergency expenses." Because it has not plausibly alleged entitlement to coverage for "cleanup costs" or "emergency expenses," it is therefore not entitled to coverage for its loss of business income. And, even if it had plausibly alleged entitlement to coverage for "cleanup costs" or "emergency expenses," its loss of business income would nonetheless not be covered because it has failed to show that its suspension of operations was a direct result of a "cleanup" required by a "governmental authority."

For these and other reasons discussed below, the Complaint should be dismissed with prejudice.

A. Greenwood Has Not Identified a "Pollution Event" at any Covered Location

Based on the allegations in the Complaint, Greenwood contends that "each time an

employee or patron infected with Coronavirus entered or enters one of Greenwood's properties, the virus would have contaminated that location until Greenwood's sanitation and other risk mitigation efforts removed the virus" and that "this cycle constitutes a 'new pollution event' because Coronavirus was likely (if not certain) to be present wherever people are located or congregate." (ECF No. 1-4 at p. 48, ¶¶ 209-10.) However, these allegations are insufficient to trigger coverage under the terms of the Environmental Liability Policy.

Here, Greenwood simply does not allege any facts establishing the existence or presence of the COVID-19 virus at any covered location. Rather, Greenwood's claim is based on mere generalities, speculation, and conjecture as it alleges only that "it is a virtual certainty that from time to time the Coronavirus was located on Greenwood's properties during the term of the Pollution Policy" because the virus is "likely (if not certain) to be present wherever people are located or congregate." While Greenwood contends that customers and employees infected with COVID-19 may have been on its premises, it does not provide specific allegations to support such generalized statements and speculative assertions.

Federal courts have consistently found that speculative allegations about the presence of the COVID-19 virus are wholly insufficient to plausibly state a claim for business-interruption losses under standard commercial property policies, which provide broader coverage than the specialized policy at issue here. *See, e.g., Paradigm Care & Enrichment Ctr., LLC v. W. Bend Mut. Ins. Co.*, No. 2:20-cv-00720, 2021 WL 1169565, *7 (E.D. Wis. Mar. 26, 2021) (finding allegation that if the plaintiff were "to conduct business as usual, the disease and the virus would show up and children would get sick" to be "both speculative and conclusory" and finding further that the plaintiff failed to establish that there was a COVID-19 outbreak at its premises by alleging one enrollee at its childcare center tested positive shortly after the center closed); *DZ*

Jewelry, LLC v. Certain Underwriters at Lloyds London, No. 4:20-cv-03606, 2021 WL 1232778, *5 (S.D. Tex. Mar. 12, 2021) (finding the plaintiffs' allegation that "COVID-19 was potentially present" in its store and that several employees tested positive for COVID-19 "would not plausibly allege that the store property was actually contaminated by COVID-19"); *Food for Thought Caterers Corp. v. Sentinel Ins. Co., Ltd.*, No. 1:20-cv-03418, 2021 WL 860345, *7 (S.D.N.Y. Mar. 6, 2021) (holding "generalized statements" and "speculative assertions" about property damage in the immediate area of the insured premises based on the existence of government stay-at-home orders "cannot serve as a substitute for a specific allegation that any property near the insured's premises was in fact damaged"); *Another Planet Ent., LLC v. Vigilant Ins. Co.*, No. 3:20-cv-07476, 2021 WL 774141, *1 (N.D. Cal. Feb. 25, 2021) (finding it "difficult to understand how [the plaintiff] can allege with a straight face that the virus was actually present on its facilities' surfaces at the time of the shutdown" and calling such information "unknowable"); *Island Hotel Props., Inc. v. Fireman's Fund Ins. Co.*, No. 4:20-cv-10056, 2021 WL 117898, *4 (S.D. Fla. Jan. 11, 2021) (rejecting as conclusory the plaintiff's allegation that COVID-19 was present on its premises without alleging "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"); .

This also includes allegations similar to those asserted by Greenwood concerning the likelihood that the virus was present due to its ubiquity in society. *See, e.g., 7th Inning Stretch, LLC v. Arch Ins. Co.*, No. 2:20-cv-08161, 2021 WL 1153147, *2 (D.N.J. Mar. 26, 2021) (finding "Plaintiff's general statements that it was 'statistically certain' that the COVID-19 virus was 'present' on its property 'for some period of time since their closures'" does not plausibly state a claim); *Café Plaza De Mesilla Inc. v. Cont'l Cas. Co.*, No. 2:20-cv-00354, 2021 WL 601880, *6

(D.N.M. Feb. 16, 2021) (rejecting "Plaintiff's conclusory argument that the widespread existence of the virus locally necessarily makes it 'reasonable' to infer that the virus was present on its premises"); *Roy H. Johnson, DDS v. Hartford Fin. Servs. Grp., Inc.*, No. 1:20-cv-02000, 2021 WL 37573, *5 (N.D. Ga. Jan. 4, 2021) (rejecting the plaintiff's conjecture and speculation that "due to the exceedingly high number of COVID-19 cases in Georgia and ease of person-to-person transmission during the relevant time period, COVID-19 ***must*** have somehow found its way into the offices"); *Uncork & Create LLC v. Cincinnati Ins. Co.*, No. 2:20-cv-00401, 2020 WL 6436948, *5 (S.D.W. Va. Nov. 2, 2020) (rejecting argument that virus likely was present on surfaces at the plaintiff's facility because "[t]here is a similar risk of exposure to the virus in any public setting, regardless of artful pleading as to the likelihood of the presence of the virus"); *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, No. 2:20-cv-02211, 2020 WL 707835, *8 (D. Kan. Dec. 3, 2020) (declining to accept the plaintiff's speculative assertion that "the virus likely contaminated its property" because "[t]o accept Plaintiff's conclusory assertion would be to accept the proposition that any business located in a community with COVID-19 infections was likely contaminated with the virus").

Despite its "artful" pleading, Greenwood has failed to allege sufficient facts to establish that there was a "pollution event" at any covered location, which is a prerequisite to coverage under the Environmental Liability Policy.

B. Greenwood Was Not Required to Perform "Cleanup" by a "Governmental Authority"

In the first instance, under the terms of the Environmental Liability Policy, coverage for First Party Cleanup Costs is limited to the "[r]easonable and necessary costs, charges and expenses, incurred in the investigation, removal, remediation (including associated monitoring), neutralization or immobilization of contaminated soil, surface water, groundwater, or other contamination … to the extent required by 'governmental authority.'" Greenwood, however, has

failed to show that it was required to perform any cleanup activities by a "governmental authority" or that it incurred any costs as a result.

In the Complaint, Greenwood does not specifically allege that it was ordered by a "governmental authority" to investigate, remove, remediate, neutralize, or immobilize the virus that causes COVID-19 and, in fact, all but concedes that it was not ordered to do so. In trying to prove otherwise, Greenwood alleges only that "governmental authorities ordered that Greenwood suspend its operations at its various 'covered locations' as a way of protecting the public health from this cycle of person to person and surface to person infection" and "[i]n doing so, those governmental authorities were seeking to remove, remediate, neutralize, and immobilize the Coronavirus from the covered locations and protect healthy, uninfected members of the public." (ECF No. 1-4 at p. 48, ¶¶ 210-11.) In other words, Greenwood contends that its covered locations had to be closed to avoid people congregating in groups and that this is tantamount to performing environmental pollution cleanup. This interpretation strains credulity.

Despite its arguments to the contrary, the Complaint does not allege that Greenwood incurred any actual costs, charges, or expenses to investigate, remove, remediate, neutralize, or immobilize contaminated soil, surface water, groundwater, or other contamination to comply with a "government authority." In fact, Greenwood did not incur any costs, charges, or expenses at all as a result of the government stay-at-home orders. The orders required it to do nothing more than temporarily limit operations at Parx Casino, Parx Racing, South Philadelphia Race & Sportsbook, and Oaks Race & Sportsbook to prevent people from gathering as the COVID-19 virus spreads through person-to-person contact. These orders applied to every non-essential business in Pennsylvania, irrespective of whether the COVID-19 virus was ever present on their premises. Indeed, Greenwood was required to restrict its businesses even if it had no reported

cases of customers or employees with COVID-19 on its premises. If Greenwood's interpretation of the Environmental Liability Policy was upheld, every non-essential business in the State of Pennsylvania could claim to have been required to perform cleanup activities as a result of a "pollution event." Such an interpretation would render the policy wording essentially meaningless.

Thus, even if the Court finds that Greenwood has identified a "pollution event" at a covered location, it nevertheless has failed to plausibly allege that it incurred any "cleanup costs" covered under the terms of the Environmental Liability Policy as required by a "governmental authority" due to the presence of the COVID-19 virus.

C. Greenwood Has Not Identified an "Actual Imminent and Substantial Endangerment to the Public Health or Environment"

Although coverage for First Party Cleanup Costs is also extended to cover "emergency expenses," Greenwood has failed to plausibly allege that it has incurred any "emergency expenses." Unlike coverage for "cleanup costs," coverage for "emergency expenses" does not require any government-mandated cleanup. Rather, coverage is predicated on the existence of "an actual imminent and substantial endangerment to the public health or the environment" resulting from a "pollution event." In the event of such an emergency, Steadfast will reimburse the costs incurred by Greenwood to avoid or mitigate an actual imminent and substantial endangerment to the public health or the environment.

In this case, Greenwood is not entitled to coverage for "emergency expenses" under the Environmental Liability Policy because it seeks coverage only for costs incurred to allow it to continue its operations and not to avoid an actual public health emergency resulting from a "pollution event." In fact, it does not even allege that the virus that causes COVID-19 actually was detected at any of its premises. Even if it did, however, that would not be sufficient to

trigger coverage.

The phrase "imminent and substantial endangerment to health or the environment" is common in environmental pollution laws, such as the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9604(a)(1), the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B), the Federal Water Pollution Control Act, 33 U.S.C. § 1321(b)(2)(A), and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.415. In interpreting the phrase "an imminent and substantial endangerment," courts have found that "an endangerment is substantial if there is a reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or a threatened release of a hazardous substance if remedial action is not taken, keeping in mind that protection of the public health, welfare and the environment is of primary importance." *U.S. v. Conservation Chem. Co.*, 619 F. Supp. 162, 194 (W.D. Mo. 1985). Courts have delineated a number of factors that may be considered in determining whether there was reasonable cause for concern, including "the quantities of hazardous substances involved, the nature and degree of their hazards, or the potential for human or environmental exposure." *Id.*

However, unlike those laws, the Environmental Liability Policy requires an "actual" imminent and substantial endangerment and not merely that the conditions at issue may present an imminent and substantial endangerment, which would include threatened or potential future risks to health or the environment. Thus, case law interpreting the requirement of an "imminent and substantial endangerment" under those laws is of limited utility. *Cf. Dague v. City of Burlington*, 934 F.2d 1343, 1356 (2d Cir. 1991) (concluding under the Resource Conservation and Recovery Act that "a finding that an activity may present an imminent and substantial endangerment does not require actual harm" and that the statute is not "limited to emergency-

type situations").

On the other hand, courts in this district and this circuit have almost uniformly found that the mere presence of the COVID-19 virus on property—which does not even exist here—does not present a substantial danger to the public health or the environment because it does not render premises uninhabitable and can be eliminated by routine cleaning and disinfecting. *See SSN Hotel Mgmt., LLC v. Hartford Mut. Ins. Co.*, No. 2:20-cv-06228, 2021 WL 1339993, *5 (E.D. Pa. Apr. 8, 2021) (finding "the presence or threatened presence of the coronavirus on the property can be largely remediated by mask wearing, social distancing, and disinfecting surfaces"); *J.B.'s Variety Inc. v. Axis Ins. Co.*, No. 2:20-cv-04571, 2021 WL 1174917 (E.D. Pa. Mar. 29, 2021) (same); *Clear Hearing Solutions, LLC v. Cont'l Cas. Co.*, No. 2:20-cv-03454, 2021 WL 131283, *9 n.8 (E.D. Pa. Jan. 14, 2021) (finding "surfaces could be disinfected and contamination would not render properties useless or uninhabitable"); *Indep. Rest. Grp. v. Certain Underwriters at Lloyd's London*, No. 2:20-cv-02365, 2021 WL 131339, *7 n.8 (E.D. Pa. Jan. 14, 2021) (same).

This position is also the majority position throughout the country, as the overwhelming majority of courts have found that the virus that causes COVID-19 does not render property uninhabitable or require any emergency procedures both because the presence of the COVID-19 virus is "short lived" insofar as the United States Centers for Disease Control and Prevention states it will "naturally die within hours to days," *Jeffrey M. Dressel, D.D.S., P.C. v. Hartford Insurance Co. of the Midwest, Inc.*, No. 1:20-cv-02777, 2021 WL 1091711, at *4 (E.D.N.Y. Mar. 22, 2021), and also "can be eliminated by routine cleaning and disinfecting." *Tappo of Buffalo, LLC v. Erie Ins. Co.*, No. 1:20-cv-00754, 2020 WL 7867553, *4 (W.D.N.Y. Dec. 29, 2020); *see also Am. Food Sys. Inc. v. Fireman's Fund Ins. Co.*, No. 1:20-cv-11497, 2021 WL 1131640, *4

(D. Mass. Mar. 24, 2021); *B St. Grill & Bar LLC v. Cincinnati Ins. Co.*, No. 2:20-cv-01326, 2021 WL 857361, *5 (D. Ariz. Mar. 5, 2021); *Town Kitchen LLC v. Certain Underwriters at Lloyd's, London*, No. 1:20-cv-22832, 2021 WL 768273, *7 (S.D. Fla. Feb. 26, 2021); *SAS Int'l, Ltd. v. Gen. Star Indem. Co.*, No. 1:20-cv-11864, 2021 WL 664043, *4 (D. Mass. Feb. 19, 2021); *Rococo Steak, LLC v. Aspen Specialty Ins. Co.*, No. 8:20-cv-02481, 2021 WL 268478, *4 (M.D. Fla. Jan. 27, 2021); *Karmel Davis & Assocs. v. Hartford Fin. Servs. Grp., Inc.*, No. 1:20-cv-02181, 2021 WL 420372, *4 (N.D. Ga. Jan. 26, 2021); *R.T.G. Furniture Corp. v. Hallmark Specialty Ins. Co.*, No. 8:20-cv-02323, 2021 WL 686864, *3 (M.D. Fla. Jan. 22, 2021); *O'Brien Sales & Mktg., Inc. v. Trans. Ins. Co.*, No. 3:20-cv-02951, 2021 WL 105772, *3 (N.D. Cal. Jan. 12, 2021); *Mena Catering, Inc. v. Scottsdale Ins. Co.*, No. 1:20-cv-23661, 2021 WL 86777, *7 (S.D. Fla. Jan. 11, 2021); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, No. 1:20-cv-00665, 2020 WL 7351246, *7 (Dec. 14, 2020); *Promotional Headwear Int'l*, 2020 WL 7078735 at *8; *Uncork & Create*, 2020 WL 6436948 at *5.

In short, these decisions recognize that the COVID-19 virus is transmitted primarily through person-to-person contact and that surface transmission is relatively rare. Accordingly, the presence of the COVID-19 virus, to the extent it even was present at Greenwood's facilities, does not pose an "actual imminent and substantial endangerment to the public health or the environment" as required to trigger coverage for "emergency expenses."

D. Greenwood Is Not Entitled to Coverage for Loss of Business Income

In the event Steadfast is obligated to provide First Party Cleanup Costs coverage, the Environmental Liability Policy provides that in certain instances Steadfast also may be liable for Greenwood's loss of business income under the Suspension of Operations coverage. In other words, Suspension of Operations coverage is dependent upon the availability of First Party Cleanup Costs coverage for a "pollution event" and is not available as standalone coverage.

Greenwood, however, is not entitled to First Party Cleanup Costs coverage because it has not plausibly alleged that it discovered a "pollution event" at a covered location. It also has not plausibly alleged that it was required by a "governmental authority" to perform a "cleanup" due to the presence of the COVID-19 virus at a covered location. Nor has it plausibly alleged that it incurred costs to avoid or mitigate an "actual imminent and substantial endangerment to the public health or the environment" resulting from the presence of the COVID-19 virus at a covered location.

Even if the Court finds that Greenwood plausibly alleges entitlement to First Party Cleanup Costs coverage, its claim for Suspension of Operations coverage would still fail for another reason: Coverage for loss of business income under the Suspension of Operations coverage is only available if the loss of business income is due to a suspension in Greenwood's operations as a direct result of a "cleanup" required by a "governmental authority."

Here, however, Greenwood alleges that its businesses were closed "as a result of the risks associated with Coronavirus pandemic … and in compliance with government guidance and orders." (ECF No. 1-4 at p. 40, ¶ 161.) To the extent its operations were suspended because of the risks associated with the pandemic, this would plainly be insufficient to trigger coverage. Furthermore, the only government orders identified by Greenwood in the Complaint are the stay-at-home orders issued by the Governors of New Jersey and Pennsylvania. These orders did not require Greenwood to perform any "cleanup." Instead, these orders only required Greenwood to limit its operations. Thus, Greenwood cannot plausibly allege its entitlement to Suspension of Operations coverage because the suspension of operations at each covered location was not a direct result of a "cleanup" required by a "governmental authority."

* * *

Accordingly, Greenwood has failed to adequately allege its entitlement to coverage under the Environmental Liability Policy because it has not identified a covered "pollution event" or covered losses under either the First Party Cleanup Costs or Suspension of Operations coverages.

CONCLUSION

For the foregoing reasons, the Court should grant Steadfast's motion to dismiss.

Respectfully submitted,

MOUND COTTON WOLLAN & GREENGRASS LLP

Dated: April 30, 2021

By: /s/ William D. Wilson

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

GREENWOOD RACING INC., GREENWOOD GAMING AND ENTERTAINMENT, INC., RACETRACK OP CO., CITY TURF CLUB OP CO., TURF CLUB OP CO., and ACRA TURF CLUB, LLC Plaintiffs, v. AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY and STEADFAST INSURANCE COMPANY, Defendants.	Case No.: 2:21-cv-01682

PROPOSED ORDER

AND NOW, this _____ day of _____, 2021, upon consideration of the Motion to Dismiss filed by defendant Steadfast Insurance Company, and any response thereto, it is hereby

ORDERED that said Motion is granted; and it is further

ORDERED that the Complaint is hereby dismissed with prejudice against Steadfast Insurance Company.

_____
HON. GERALD J. PAPPERT, U.S.D.J.