UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND
(NORTHERN DIVISION)

THE CORDISH COMPANIES, INC., Plaintiff, v. AFFILIATED FM INSURANCE COMPANY, Defendant.	**Civil Action No. 1:20-cv-02419-ELH** Judge Ellen L. Hollander

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

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Plaintiff, The Cordish Companies, Inc., by the undersigned counsel, files this Memorandum of Law in Opposition to Defendant's Motion to Dismiss, and states as follows:

PRELIMINARY STATEMENT

Defendant Affiliated FM Insurance Company ("FM") sold Plaintiff and its affiliates ("Cordish") a $1 Billion "all-risk" insurance policy with many broad extensions of coverage (the "Policy"). Those extensions include a promise to pay for Cordish's business interruption losses due to events occurring at and away from the approximately 100 properties insured under the Policy. Cordish paid nearly $2 Million in annual premiums for this valuable insurance.

The widespread damage caused by COVID-19 and the resulting stay-at-home and closure orders have crippled Cordish's businesses. Struggling with business interruption losses in excess of $500 Million, Cordish turned to FM for the business interruption protection promised under the Policy. Instead of honoring its promise, FM forced Cordish to sue.

In its Motion, FM misstates the facts and the law, including the terms of its own Policy:

- FM placed the Policy's exclusions into separate Groups – one broad and two narrow. In past litigation, FM emphasized the importance of the distinction, but now tries to treat the narrow Group III exclusion for "contamination" as if it were in Group I.

- The Policy includes a narrow exclusion for "contamination and any *cost* due to contamination," but FM now treats it as barring coverage for "contamination and all *losses* directly or indirectly caused by or resulting from contamination."

- FM's brazen pursuit of dismissal based on the "loss of use" exclusion undermines the core purpose of the Policy's business interruption coverage and extensions.

- FM's narrow assessment of what constitutes "physical loss or damage" is the exact opposite of what FM told another Federal District Court a year before COVID struck.

- FM creates the false impression that courts routinely dismiss COVID-related cases, but omits the many decisions favoring policyholders. Nearly all of FM's cases involve restrictive policy terms with very broad "virus exclusions" *that FM did not use in the Billion-dollar Policy sold to Cordish*. FM cannot escape its obligations to Cordish here based on more restrictive terms found only on policies sold to others.

It is through such misleading arguments that FM seeks to prevent Cordish from having its

day in Court on a $500 Million+ insurance claim. To obtain the extreme relief of dismissal, FM must prove that its interpretations of the Policy are the only reasonable interpretations, especially with respect to the exclusions FM invokes. Dismissal is not allowed if Cordish's allegations are merely "plausible" or if there are any disputed facts. FM cannot meet its heavy burden here.

FACTUAL BACKGROUND

A. Cordish's Businesses and the Insurance Policy Purchased to Protect Them

Affiliates of Cordish own and operate commercial real estate properties nationwide (the "Properties"), most of which depend on large numbers of customers gathering and interacting with one another. Compl. ¶¶1-3. These Properties include the Live! Casino & Hotel in Hanover, Maryland and several dining and entertainment complexes near professional sports stadiums. Compl. ¶¶10-14. To protect their Properties and business income interests, Cordish paid FM nearly $2 Million in annual premiums to purchase an "all-risk" insurance Policy with limits up to $1 Billion. Compl. ¶¶4-8. The accompanying cover letter boasted of "broad" and "comprehensive" coverage, giving Cordish "peace of mind" to focus on making its business thrive. *See* Policy (ECF 4-2) at cover page. The Policy insures against "all risks" unless specifically excluded. Compl. ¶59. It also includes business interruption coverage and several business interruption coverage extensions, which are triggered by circumstances and damage that occur away from the Properties. Policy pp. 20-31 of 44.

The Attraction Property coverage extension is triggered when there is physical loss or damage of the type insured to property that attracts business to Cordish's Properties. Policy p. 24 of 44. The Civil Authority coverage extension applies if an order of civil or military authority prohibits access to a location and the order is the direct result of physical damage of the type insured at a location or within five miles. Policy p. 24 of 44. The Supply Chain coverage extension is triggered if there is a loss (including Civil Authority) affecting "direct suppliers,

direct customers or direct contract service providers to the Insured." Policy p. 31 of 44.

The Policy contains exclusions that FM divided into three distinct groups, each with its own prefatory language. Policy pp. 2-5 of 44. The Group I exclusions relate to external causes of loss, such as "Nuclear reaction or nuclear radiation or radioactive contamination," "terrorism," and "earth movement." Policy pp. 2-3 of 44. Their prefatory language states that the Policy excludes "loss or damage *directly or indirectly caused by or resulting from*" these external forces "regardless of any other cause or event, whether or not insured under this Policy, contributing concurrently or in any other sequence to the loss or damage." Policy p. 2 of 44 (emphasis added). Group I does not mention viruses, communicable diseases, or contamination. *See id.* Groups II and III, on the other hand, exclude certain *conditions* at the Properties themselves, such as "wear and tear," "contamination," and "shrinkage." Policy pp. 3-5 of 44. In contrast to Group I, the language in Group III does *not* exclude losses "directly or indirectly caused by or resulting from" the specified conditions; it excludes only the conditions themselves. Policy pp. 4-5 of 44.

Insurance companies, including FM, have long known about risks of loss from pandemics and have developed broad exclusions to use when they want to exclude coverage for such losses. Compl. ¶79. Indeed, there is a standard endorsement drafted by an insurance industry trade association called the Insurance Services Office (the "ISO Virus Exclusion") that provides: "We will not pay for loss or damage caused directly or indirectly by…[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease" and expressly "applies to all coverage under all forms and endorsements . . . including but not limited to forms or endorsements that cover . . . business income, extra expense or action of civil authority." *See, e.g., Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, No. 20-cv-3198, 2020 WL 6545893, at *2 (E.D. Pa. Nov. 6, 2020). The only mention of "virus" in the Policy FM sold to

Cordish relates to the narrow Group III exclusion for "contamination" at the Properties and **not** the Group I exclusions that broadly exclude losses "directly or indirectly caused or resulting from" external causes of loss away from the Properties. Policy pp. 2-5 of 44. Moreover, in stark contrast to policies containing the ISO Virus Exclusion, the Policy FM sold to Cordish expressly provides coverage for losses due to "Communicable Disease." Policy p. 7 of 44; p. 25 of 44.

B. The Widespread Physical Loss and Damage from COVID-19

The devastation from COVID-19 is well-documented. Nationwide, the number of reported cases is 20 million and counting,[1] many of which are near the Properties. Compl. ¶¶32-33. In addition to transmission by interpersonal contact, SARS-CoV-2 physically rests and remains on surfaces of objects or materials, or "fomites," for up to twenty-eight days, and human contact with such fomites is known to transmit the disease-causing virus, making property impacted by SARS-CoV-2 dangerous and potentially fatal. Compl. ¶28. When the virus is shed by an infected person onto objects and surfaces such as tables, doorknobs and handrails, other people may become infected by touching these surfaces, then touching their eyes, noses or mouths.[2] Compl. ¶29. The *New England Journal of Medicine* reported a scientific study that analyzed the aerosol and surface stability of SARS-CoV-2, finding that SARS-CoV-2 persisted on plastic and stainless-steel surfaces for up to seventy-two hours in laboratory studies.[3] Compl. ¶30. Scientists also have studied the persistence of SARS-CoV-2 on surfaces in cruise ships with documented outbreaks of COVID-19. Compl. ¶31. One such study found that SARS-CoV-2 was "identified on a variety of surfaces in cabins of both symptomatic and asymptomatic infected

[1] The number of reported COVID-19 cases currently exceeds 18 million, with over 320,000 deaths. https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited Dec. 24, 2020).

[2] CDC – Frequently Asked Questions, How does the virus spread? https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Spread ("A person may get COVID-19 by touching the surface or object that has the virus on it and then touching their own mouth, nose, or eyes.").

[3] Neeltje van Doremalen, et al., *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, N. ENGL. J. MED. (March 17, 2020), *available at* https://www.nejm.org/doi/full/10.1056/NEJMc2004973.

passengers up to 17 days after cabins were vacated," but before disinfection procedures had been conducted.[4] *Id.* In other words, fomites, droplets, droplet nuclei, and aerosols containing the coronavirus are not theoretical, informational, or incorporeal, but rather are dangerous physical substances that have a material, tangible impact on property.

SARS-CoV-2 therefore has caused widespread physical loss and damage to the Properties, Attraction Properties, and other property within five miles and nationwide. Compl. ¶¶32-33. As a result, orders have been issued by government bodies that have prohibited access to properties (the "Orders"), including Cordish's Properties. Compl. ¶¶42, 54-56. These Orders required Cordish's businesses to close or restrict operations and required customers to stay home except for essential activities. Compl. ¶¶42-51. One such Order even specifically identified the Maryland Live! Casino & Hotel as an affected property required to close. Compl. ¶44.

C. Cordish's Devastating Business Interruption Losses

The damage caused by COVID-19, as well as the resulting Orders, has caused the Properties to suffer massive business interruption losses. Compl. ¶84. Even as the Orders eased to allow some of the Properties to operate subject to onerous restrictions, the Properties continued to be affected by the damage to Attraction Properties and the effect on the supply of customers they provide to the Properties. For example, many of the Covered Properties depend heavily on Major League Baseball ("MLB") stadiums and franchises to drive their business, illustrated by the fact that revenues at such Properties typically are 15-20 times greater on home game days than on non-home game days. Compl. ¶¶102-103. MLB fans were unable to attend games due to damage from SARS-CoV-2 and COVID-19, which caused devastating business interruption losses for Cordish's sports and entertainment businesses like Texas Live! and

[4] Leah F. Moriarty, et al., *Public Health Responses to COVID-19 Outbreaks on Cruise Ships–Worldwide, February-March 2020*, CDC Morbidity and Mortality Weekly Report (Mar. 27, 2020), *available at* https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.htm.

Ballpark Village. Compl. ¶¶99-103.[5] Collectively, the Properties have suffered and continue to suffer hundreds of millions of dollars in business interruption losses. Compl. ¶10.

D. FM's Effort to Avoid Its Obligations and the Procedural History of this Case

Considering its extensive losses, Cordish turned to FM to honor the promises FM made under the Policy. In response, FM sought to avoid its obligations. Compl. ¶¶112-114.

Cordish sued in Baltimore City Circuit Court for declaratory judgment and breach of contract. FM removed the case and filed an Answer on August 28, 2020. ECF 1-2, ECF 9. Thereafter, the Court entered a scheduling order that allowed for early dispositive motions to resolve threshold issues but did not order or contemplate a stay of discovery. ECF 23. Cordish served discovery requests on November 12, 2020, including requests that would shed light on the arguments FM has made in its Motion. For example, Cordish requested documents related to FM's internal communications about what constitutes "physical loss or damage" under FM's insurance policies. ECF 25-1. Rather than respond as required by the Rules, FM moved for a protective order, seeking to avoid its discovery obligations. ECF 25.

ARGUMENT

I. LEGAL STANDARDS FOR DISMISSAL AND POLICY CONSTRUCTION

FM's Motion under Rule 12(b)(6) should be denied because FM has already filed its Answer. *See* ECF 9. "A motion asserting [any Rule 12(b) defense] must be made before pleading if a responsive pleading is allowed." Fed. R. Civ. P. 12(b); *see also Wiseman v. First Mariner Bank*, No. ELH-12-2423, 2013 WL 5375248, at *4 (D. Md. Sept. 23, 2013) (Hollander, J.).

If the Court entertains FM's Motion as a Rule 12(c) motion, the standard is equally high. *Walker v. Kelly*, 589 F.3d 127, 139 (4th Cir. 2009) (Rule 12(c) motions are "assessed under the

[5] R.J. Anderson, *MLB Opening Day 2020: Five off-the-field questions facing the 60-game shortened season*, CBS SPORTS (July 21, 2020), https://www.cbssports.com/mlb/news/mlb-opening-day-2020-five-off-the-field-questions-facing-the-60-game-shortened-season/ (last visited Dec. 24, 2020).

same standard that applies to a Rule 12(b)(6) motion"). To survive a Rule 12(c) motion, a complaint need only contain facts sufficient to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To satisfy the "minimal requirements of Rule 8(a)(2)," Cordish's Complaint need only "set forth enough factual matter (taken as true) to suggest a cognizable cause of action, even if the actual proof of those facts is improbable and recovery is very remote and unlikely." *Kantseyov v. LumenR, LLC*, 301 F. Supp.3d 577, 591 (D. Md. 2018) (Hollander, J.) (citation and internal quotes omitted). A Rule 12(c) motion must be denied "unless the movant clearly establishes that no material issue of fact remains to be resolved." 5A Wright and Miller, *Fed. Prac. & Proc.* § 1368 (3d ed. 2020).

As with other contracts, Maryland courts interpret insurance policies against the drafter of the policy whenever the terms are unclear. *Catalina Enters., Inc. Pension Tr. v. Hartford Fire Ins. Co.*, 67 F.3d 63, 65 (4th Cir.1995) (*citing Collier v. MD–Individual Practice Ass'n*, 327 Md. 1, 607 A.2d 537, 539 (1992)); *W.C. & A.N. Miller Dev. Co. v. Cont'l Cas. Co.*, 814 F.3d 171, 176 (4th Cir. 2016). Clear and unambiguous provisions are afforded their plain meaning (*Catalina Enters.*, 67 F.3d at 65 (*citing Board of Trs. of State Colls. v. Sherman*, 280 Md. 373, 373 A.2d 626, 629 (1977)), which is based on the meaning that a reasonably prudent layperson would understand (*Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 330 Md. 758, 625 A.2d 1021, 1031 (1993)). Thus, the policyholder's reasonable expectations are critical to the interpretation of the policy. *Sheets v. Brethren Mut. Ins. Co.*, 342 Md. 634, 652–53, 679 A.2d 540, 549 (1996) (insurance policy should be interpreted to mean what a reasonable policyholder would expect).

When the words in an insurance policy can be afforded more than one reasonable meaning, those words are ambiguous. *W.C. & A.N. Miller*, 814 F.3d at 176; *Cole v. State Farm Mut. Ins. Co.*, 359 Md. 298, 305-06 (2000). "[U]nder general principles of contract construction,

if an insurance policy is ambiguous, it will be construed liberally in favor of the insured and against the insurer as drafter of the instrument." *Empire Fire & Marine Ins. Co. v. Liberty Mut. Ins. Co.*, 117 Md. App. 72, 97; *Truck Ins. Exch. v. Marks Rentals, Inc.*, 288 Md. 428, 435 (1980). This is especially true regarding the interpretation of exclusions:

> Since the language of the insurance policy is to be construed strongly against the insurer where an ambiguity is found, the insurer must use clear and unambiguous language to distinctly communicate the nature of any limitation of coverage to the insured. Similarly, the exclusion must be conspicuously, plainly and clearly set forth in the policy. An exclusion by implication is legally insufficient. . . .
>
> Where the exclusion or limitation is found to be ambiguous, the legal effect is to find that provision ineffective to remove coverage otherwise granted by the insuring agreements . . . .

Megonnell v. United Servs. Auto. Ass'n, 368 Md. 633, 656 (2002) (*quoting* Eric Mills Holmes & Mark S. Rhodes, HOLMES'S APPLEMAN ON INSURANCE 2D, 276-81 (Eric Mills Holmes ed., vol. 2 § 7.2, West 1996)). Moreover, FM has the burden of proving that an exclusion precludes coverage. *White Pine Ins. Co. v. Taylor*, 233 Md. App. 479, 497 (2017).

II. THE EXCLUSION FOR CONTAMINATION DOES NOT APPLY

FM's invocation of the exclusion for contamination is an improper attempt to re-write the terms of the exclusion in two ways: (1) moving the exclusion out of the narrow "Group III" and into the broad "Group I"; and (2) changing the exclusion for any "*cost* due to contamination" to one for any "*losses* due to contamination." FM's attempts to re-write the Policy must fail.

A. FM Cannot Cut and Paste the Exclusion for Contamination Out of Its Narrow Placement in Group III Into a Broad Use in Group I

FM drafted the Policy to include three different "Groups" of exclusions. Group I excludes losses "directly or indirectly caused by or resulting from" risks like nuclear disasters, acts of war, terrorism, earthquakes and flood "regardless of any other cause or event, whether or not insured under this Policy, contributing concurrently or in any other sequence to the loss or damage."

Policy p. 2 of 44. This is known as an "anti-concurrent causation" provision and is regularly used to broadly exclude certain *causes of loss*. 4 Andrew B. Downs, et al., *Law and Prac. of Ins. Coverage Litig.* § 52:9 (2020). If contamination (including by "virus") were listed in "Group I," then FM would have a reasonable argument to bar coverage for Cordish's losses. But it is not.

The lead-in language FM used for Groups II and III does not exclude loss or damage "caused by or resulting from" any particular cause of loss. Rather, most of the exclusions in Groups II and III are for *conditions* of property – *e.g.*, "contamination," "shrinkage, evaporation or loss of weight" or "changes in color, flavor, texture or finish" – as opposed to loss or damage "caused by or resulting from" causes of loss like earthquake or flood. *See* Policy pp. 3-5 of 44.[6] Thus, the exclusion for contamination is **not** an exclusion for loss or damage "*caused by or resulting from* contamination" – as it would be if FM had included it in Group I. Rather, Group III merely excludes losses based on the excluded condition itself. That is a distinction with an enormous difference. Indeed, FM itself stressed the "important" difference between different Groups of exclusions in briefs filed with multiple U.S. Circuit Courts of Appeals: "The Policy contains two groups of exclusions: the Group I exclusions (which are absolute) and the Group II exclusions, which are conditional or partial exclusions. The differentiation between the two groups of exclusions, which plaintiffs ignore, is an important factor." Opposition Brief on Behalf of Appellee in *Arctic Slope Regional Corp. v. Affiliated FM Ins. Co.*, No. 08-30050 ("FM's Arctic Slope Brief") copy attached to the Affidavit of Marshall Gilinsky in Opposition to Defendant's Motion to Dismiss (the "Gilinsky Aff.") as Ex. A, at p. 8, n.3; *see also* Appellee Factory Mutual Insurance Company's Opening Brief, filed in *Polo Towers Master Owners*

[6] When FM wanted to exclude losses "caused by or resulting from" risks excluded in Groups II or III, it said so. *See* Policy pp. 3-5 of 44 (excluding: "Loss or damage *caused by or resulting from*" changes of temperature and relative humidity; "Loss or damage or deterioration *arising from*" delay; "Loss *from*" enforcement of certain laws and ordinances; and "Loss or damage *resulting from*" the voluntary parting of property via false pretenses).

Ass'n, Inc. v. Factory Mut. Ins. Co., No. CV-S-03-1065 (9th Cir.) on October 29, 2004, copy attached to the Gilinsky Aff. as Ex. B, at p. 25 (arguing that "exclusion (D(1)) is an independent exclusion not conjoined with the wear and tear exclusion (C(3))").

Placed in Group III, the exclusion for contamination bars coverage for the contamination itself – 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 p. 42 of 44. Thus, if a "contaminant" spilled at one of the Properties, there would be no coverage for the "contamination, and any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy." Policy pp. 4-5 of 44. By contrast, the Group I exclusions bar coverage for the condition of the property itself *and* for all "loss or damage *directly or indirectly caused by or resulting from*" the excluded cause of loss. Policy p. 2 of 44 (emphasis added).

Because the Policy separates the exclusions into groups with different lead-in language, that different language must be given meaning. The distinctions between the "groups" cannot be "mere surplusage." *JMP Assocs., Inc. v. St. Paul Fire & Marine Ins. Co.*, 693 A.2d 832, 834-35, 345 Md. 630, 635-36 (Md. 1997).[7] Thus, the exclusion for contamination does **not** exclude loss or damage "directly or indirectly caused by or resulting from" a virus or communicable disease.

Although Cordish's Properties have been impacted and damaged by COVID-19, that is not the predominant cause of the company's business interruption losses. Cordish's losses are not from a spill resulting in contamination at its properties, or the "cost" due to such contamination.

[7] Tellingly, FM seeks to have this Court throw out Cordish's claim while simultaneously withholding documents showing that FM knows the difference between the broad exclusions in "Group I" and the narrow exclusions in "Group III" – refusing outright to answer discovery requests seeking documents regarding the relative breadth of the exclusions in the different "Groups." *See, e.g.*, ECF 25-4 at Request Nos. 11 and 12.

Rather, Cordish's losses are caused by the impact of the coronavirus away from the insured premises and the resulting orders of civil authority that have prohibited access to the Properties. *See, e.g.,* Compl. ¶¶82-111. For example, business fell off a cliff at the Maryland Live! Casino and the bars and restaurants at Power Plant Live! because of the widespread damage at property across the region and the resulting orders of civil authority, rather than any contamination of those particular Properties. *See, e.g.*, Compl. ¶¶82-111. Those losses are covered under the broad extensions of coverage in the Policy, including the Civil Authority Coverage, the Attraction Property Coverage and the Supply Chain Coverage, and the narrow Group III exclusion for contamination simply does not apply to such losses. *Id.*

FM's attempt to expand the lead-in language of the Group III exclusions violates Maryland's prohibition against extending the scope of exclusions in insurance policies by interpretation. *Megonnell*, 368 Md. at 656. If FM wanted to exclude loss and damage "directly and indirectly caused by or resulting from . . . contamination," then it needed to include that exclusion in Group I – not Group III. FM cannot simply "cut and paste" the exclusion from Group III into Group I now, after Cordish already has suffered such devastating losses from COVID-19. FM's post-loss interpretation is contrary to the "meaning a reasonably prudent layperson would attach" to the exclusions in the Policy. *Catalina Enters.*, 67 F.3d at 65. Thus, FM's expansive interpretation of the exclusion for contamination violates the terms of the Policy and Maryland law, and does not justify the dismissal of Cordish's claims.

B. FM Cannot Change the Exclusion from One for "Any *Cost* Due to Contamination" to One for "Any *Losses* Due to Contamination"

The Group III exclusion for contamination bars coverage for "**[c]ontamination**, and any *cost* due to **contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy." Policy p. 5 of 44 (bold in original, italics

added). But Cordish does not seek coverage for any "cost," let alone any "cost due to contamination." Compl. ¶¶116, 121. Rather, Cordish seeks coverage for its business interruption "loss" from COVID-19 damage and related Orders. Compl. ¶¶1, 10, 13-15, 17, 76, 81-84, 87-89, 96-97, 99, 104-107, 109-111. "Cost" is not defined in the Policy, so it is interpreted using the "customary, ordinary, and accepted meaning" of the word. *Sullins v. Allstate Ins. Co.*, 667 A.2d 617, 619, 340 Md. 503, 508 (Md.1995) (*quoting Cheney v. Bell Nat'l Life*, 315 Md. 761, 766-67, 556 A.2d 1135 (1989)). The Merriam-Webster Dictionary defines a "cost" as "the amount paid or charged for something" or an "outlay or expenditure." *See* https://www.merriam-webster.com/dictionary/cost. Cordish's claim here is not for sums "paid" to or "charged" by anyone or any "outlay or expenditure." Rather, Cordish is seeking coverage for the business interruption "loss" measured mainly by its revenue shortfalls. *See* Compl. ¶¶10, 13-14, 17, 76, 82-111. A business interruption "loss" is not a "cost" under any common understanding of those words. FM cannot treat them interchangeably to escape its contractual obligations to Cordish.

FM argues that Cordish's business interruption "*losses*" are swept away as a "*cost* due to contamination" because such "cost" *includes* "the inability to use or occupy property." But the "inability to use" phrase does not *expand* the exclusion beyond the contamination itself or any "*cost* due to contamination." Rather, FM's use of the word "including" means that the "inability to use or occupy property" is merely *illustrative* of a type of "cost" that is excluded – such as the cost of renting alternate space while the "contamination" is cleaned up. Policy, p. 5 of 44 (excluding coverage for "contamination, and any cost due to contamination *including* the inability to use or occupy property . . . .) (emphasis added). "It is hornbook law that the use of the word including indicates that the specified list . . . is illustrative, not exclusive." BRYAN GARNER'S DICTIONARY OF LEGAL USAGE at pp. 431-32 (2d ed. 1995) (*quoting Puerto Rico*

Maritime Shipping Auth. v. I.C.C., 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981)); *see also* Bryan A. Garner, BLACK'S LAW DICTIONARY (8th ed. 2004) ("include,vb. To contain as a part of something. The participle including typically indicates a partial list.").

As FM itself explained to the Fifth Circuit, when FM wants to list *additional* items that fall within an exclusion, it lists those items after a comma. *See* FM's Arctic Slope Brief, Gilinsky Aff. Ex. A, at p. 9 ("What follows the comma after '**flood**' are perils *that are also excluded in addition to '**flood**,' i.e.*, seepage or influx of water from natural underground sources . . .") (bold in original, italics added). In contrast, the phrase "including the inability to use or occupy property" in Cordish's Policy is merely illustrative of a possible type of "cost due to contamination," not in addition to the exclusion for any "cost due to contamination."

The reference to an "inability to use or occupy property" simply bars coverage for "*costs*" due to contamination such as the rental of alternate space. But business interruption "*losses*" due to the inability to use or occupy property are altogether different. If FM wanted to exclude "*loss* due to contamination," it could have said so but did not. FM cannot meet its burden of proving that its exclusion applies here. To the contrary, FM's interpretation defies the "meaning a reasonably prudent layperson would attach to the term" in violation of Maryland law. *Catalina Enters.*, 67 F.3d at 65.

C. Policies With Broad "Virus Exclusions" Sold to Others Do Not Change the Terms of Cordish's Policy, Which Has No Such Exclusion.

FM's Motion devotes four pages to a string cite designed to mislead this Court into concluding that COVID business interruption cases[8] uniformly are being dismissed based on exclusions like the contamination exclusion at issue here, stating that "[s]imilar contamination

[8] For the Court's convenience, a compendium of the published and unpublished COVID-19 coverage decisions cited in this brief is attached to the Gilinsky Aff. as Ex. C.

exclusions are uniformly upheld and enforced across the country." Motion p. 7. In reality, the cited cases involve broad exclusions like those in "Group I" for "losses directly or indirectly caused by or resulting from" virus or communicable disease. The broader "virus exclusions" in these cases commonly are added to most commercial property insurance policies,[9] but are different from the narrow exclusion used by FM under Group III of the Policy. For example, many of the cases involve the standard ISO Virus Exclusion that states: "We will not pay for loss or damage caused directly or indirectly by…[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."[10] Other cases involve an exclusion for "loss or damage caused directly or indirectly by . . . the . . . presence, growth, proliferation, spread or any activity of . . . virus."[11] The remaining cases involved other similarly

[9] The National Association of Insurance Commissioners report that 83% of commercial property insurance policies sold in the United States have such "virus exclusions." COVID-19 Property & Casualty Insurance Business Interruption Data Call Part 1 | Premiums and Policy Information, published by the National Association of Insurance Commissioners on June 2020, copy attached to the Gilinsky Aff. as Ex. D.

[10] *See, e.g., Long Affair Carpet and Rug, Inc. v. Liberty Mut. Ins. Co.*, No. SACV 20-01713-CJC(JDEx), 2020 WL 6865774, at *3 (C.D. Cal. Nov. 12, 2020); *Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, No. 20-cv-3198, 2020 WL 6545893, at *2 (E.D. Pa. Nov. 6, 2020); *AFM Mattress Co., LLC v. Motorists Commercial Mut. Ins. Co.*, No. 20 CV 3556, 2020 WL 6940984, at *2 (N.D. Ill. Nov. 25, 2020); *Border Chicken AZ LLC v. Nationwide Mut. Ins. Co.*, No. CV-20-00785, 2020 WL 6827742, at *1 (D. Ariz. Nov. 20, 2020); *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.*, No. 2:20-cv-00401, 2020 WL 5240218, at *2 (M.D. Fla. Sept. 2, 2020); *Natty Greene's Brewing Co., LLC v. Travelers Cas. Ins. Co. of Am.*, No. 1:20-cv-437, 2020 WL 7024882, at *3 (M.D.N.C. Nov. 30, 2020); *Vizza Wash, LP v. Nationwide Mut. Ins. Co.*, No. 5:20-cv-00680, 2020 WL 6578417, at *6 (W.D. Tex. Oct. 26, 2020); *West Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Co.*, No. 2:20-cv-05663, 2020 WL 6440037, at *5 (C.D. Cal. Oct. 27, 2020); *Whiskey River on Vintage, Inc. v. Ill. Cas. Co.*, No. 4:20-cv-00185-JAJ-HCA, (S.D. Iowa Nov. 30, 2020); *N&S Rest. LLC v. Cumberland Mut. Fire Ins. Co.*, No. 20-05289, 2020 WL 6501722, at*3 (D.N.J. Nov. 5, 2020); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, No. 2:20-cv-04423, 2020 WL 5938689, at *2 (C.D. Cal. Oct. 2, 2020); *DAB Dental PLLC v. Main Street Am. Prot. Ins. Co.*, No. 20-CA-5504, 2020 WL 7137138, at *6 (Fla. Cir. Ct. Highlands Cty. Nov. 10, 2020); *Seifert v. IMT Ins. Co.*, No. 20-1102, 2020 WL 6120002, at *2 (D. Minn. Oct. 16, 2020); *see also Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461, 2020 WL 4724305, at *3 (W.D. Tex. Aug. 13, 2020) ("We do not insure under any coverage for any loss which would not have occurred in the absence of . . . [v]irus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease."); *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *2 (E.D. Mich. Sept. 3, 2020) (same); *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, No. 2:20-cv-00087, 2020 WL 6503405, at *3 (S.D. Miss. Nov. 4, 2020) ("We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness, or disease."); *Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:20-cv-03342, 2020 WL 7024287, at*1 (E.D. Pa. Nov. 30, 2020) (same); *Travelers Cas. Ins. Co. of Am. v. Geragos and Geragos*, No. CV 20-3619, 2020 WL 6156584, at *2 (C.D. Cal. Oct. 19, 2020) (same).

[11] *See, e.g., Founder Inst. Inc. v. Hartford Fire Ins. Co.*, No. 20-cv-04466, 2020 WL 6268539, at *1 (N.D. Cal. Oct. 22, 2020); *Franklin EWC v. Hartford Fin. Servs. Grp., Inc.*, No. 20-cv-04434-JSC, 2020 WL 5642483, at *2 (N.D.

broad virus exclusions.[12]

The fact that many insurance companies use these broad virus exclusions in their policies does not mean that FM is entitled to a dismissal based on the much narrower exclusion it used in Group III of the Policy sold to Cordish. To the contrary, the cases cited by FM do the opposite by showing what a broad "virus exclusion" *actually* looks like.

FM hides from the Court all but one of the cases where motions to dismiss were *denied* despite the presence of broad virus exclusions in the policies at issue. Motion p. 11 (*citing Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., Ltd.*, No. 20-cv-01174, 2020 WL 5939172 (M.D. Fla. Sept. 24, 2020)); *but see also Optical Servs. USA/JC1 v. Franklin Mut. Ins. Co.*, No. BER-L-3681-20, slip op. (N.J. Super. Ct. Bergen Cty. Aug. 13, 2020), *appeal denied*, No. AM-000690-19T1 (N.J. Super. Ct. App. Div. Sept. 24, 2020); *Lombardi's, Inc. v. Indem. Ins. Co. of N. Am.*, No. DC-20-05751-A (Tex. Dist. Ct. Dallas Cty. Oct. 15, 2020); *Taps & Bourbon on Terrace v. Underwriters at Lloyd's London*, No. 00375 (Pa. Ct. Com. Pl. Phila. Cty. Oct. 26, 2020); *Indep. Barbershop, LLC v. Twin City Fire Ins. Co.*, No. 1:20-cv-00555-JRN, 2020 WL 6572428 (W.D. Tex. Nov. 4, 2020); *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2: 20-cv-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020).

Moreover, FM omits the numerous cases *without* broad virus exclusions where insurer motions to dismiss have been denied. *See Studio 417, Inc. v. The Cincinnati Ins. Co.*, No. 20-cv-03127, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020); *K.C. Hopps, Ltd. v. The Cincinnati Ins.*

Cal. Sept. 22, 2020); *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-cv-22833, 2020 WL 6392841, at *4 (S.D. Fla. Nov. 1, 2020); *Urogynecology Specialist of Fla., LLC v. Sentinel Ins. Co., Ltd.*, No. 6:20-cv-1174, 2020 WL 5939172, at *3 (M.D. Fla. Sept. 24, 2020); *Wilson v. Hartford Cas. Co.*, No. 20-cv-3384, 2020 WL 5820800, at *7 (E.D. Pa. Sept. 30, 2020).

[12] *See, e.g., Goodwill Indus. Of Central Okla., Inc. v. Phila. Indem. Ins. Co.*, No. CV-20-511, 2020 WL 6561315, at * 1 (W.D. Okla. Nov. 9, 2020); *Chattanooga Prof'l Baseball LLC v. Nat'l Cas. Co.*, No. CV-20-01312, 2020 WL 6699480, at *2 (D. Ariz. Nov. 13, 2020); *Boxed Foods Co., LLC v. Cal. Capital Ins.*, No. 20-cv-04571, 2020 WL 6271021, at *3 (N.D. Cal. Oct. 27, 2020).

*Co., No. 20-cv-*00437, 2020 WL 6483108 (W.D. Mo. Aug. 12, 2020); *Blue Springs Dental Care LLC v. Owners Ins. Co.*, No. 20-cv-00383, 2020 WL 5637963 at *4 (W.D. Mo. Sept. 21, 2020); *Francois Inc. v. Cincinnati Ins. Co.*, No. 20CV201416 (Ohio Ct. Com. Pl. Lorain Cty. Sept. 29, 2020); *Best Rest Motel Inc. v. Sequoia Ins. Co.*, No. 37-2020-00015679-CU-IC-CTL, 2020 WL 7229856 (Cal. Super. Ct. San Diego Cty. Sept. 20, 2020); *SSF II, Inc. v. Cincinnati Ins. Co.*, No. 20CV002644 (Ohio Ct. Com. Pl. Franklin Cty. Sept. 8, 2020); *780 Short North LLC v. Cincinnati Ins. Co.*, No. 20CV003836 (Ohio Ct. Com. Pl. Franklin Cty. Sept. 8, 2020); *Somco, LLC v. Lightning Rod Mut. Ins. Co.*, No. CV-20-931763, 2020 WL 1897326 (Ohio Ct. Com. Pl. Cuyahoga Cty. Aug. 12, 2020); *Chapparells Inc. v. Cincinnati Ins. Co.*, No. CV-2020-06-1704, 2020 WL 7258117 (Ohio Ct. Com. Pl. Summit Cty. Oct. 21, 2020); *Hill and Stout PLLC v. Mut. Of Enumclaw Ins. Co.*, No. 20-2-07925-1 SEA, 2020 WL 6784271 (Wash. Super. Ct. Nov. 13, 2020); *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, No. CV-20-932117, 2020 WL 7258114 (Ohio Ct. Com. Pl. Cuyahoga Cty. Nov. 17, 2020).

Tellingly, FM relegates to a footnote possibly the most on-point case. The policy at issue in *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, No. A-20-816628-B, 2020 WL 7258108 (Nev. Dist. Ct. Nov. 30, 2020) included a "Pollution and Contamination Clause" that is even broader than the exclusion for "contamination" in FM's Policy, and excluded "loss or damage caused by or resulting from . . . contamination" defined to include "virus." *Id.* at *3.[13] Like FM here, the insurance company in *JGB* argued that because "contaminants" includes

[13] Specifically, the exclusion in *JGB* provided: "This POLICY does not insure against loss or damage caused by or resulting from any of the following regardless of any cause or event contributing concurrently or in any other sequence to the loss: 1. contamination; 2. the actual or threatened release, discharge, dispersal, migration or seepage of POLLUTANTS at an INSURED LOCATION during the Term of this POLICY . . . ." *Id.* Similar to Cordish's Policy, the policy in *JGB* defined "POLLUTANT or CONTAMINANTS" to include: "any solid, liquid, gaseous or thermal irritant or CONTAMINANT including, but not limited to, smoke, vapor, soot, fumes, acids, alkalis, chemicals, virus, waste, (waste includes materials to be recycled, reconditioned or reclaimed) or hazardous substances as listed in the Federal WATER Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act, or as designated by the U.S. [EPA]." *Id.*

"virus," there is no coverage for COVID-related business interruption losses. *Id.* The court in *JGB* rejected that argument even under the broader exclusion in that case, holding that the insurance company failed to meet its burden of proving that its interpretation of the exclusion is the only reasonable interpretation "even though the Exclusion contains the word 'virus.'" *Id.; but see Zwillo V, Corp. v. Lexington Ins. Co.*, No. 4:20-00339, 2020 WL 7137110, at *6-8 (W.D. Mo. Dec. 2, 2020) (reaching the opposite conclusion and ruling that a very similar "Pollution and Contamination" exclusion bars coverage for COVID-related losses).

FM attempts to distinguish *JBG* by arguing, in a footnote, that the policy there did not contain a "*pure contamination exclusion* of the type at issue here but rather an exclusion covering both "POLLUTANTS and CONTAMINANTS." Motion p. 11, n. 2 (emphasis added). But FM misrepresents the exclusion at issue in *JGB*, which included two sub-paragraphs, the first of which excluded "loss or damage caused by or resulting from . . . contamination." The main difference between that exclusion and the one in Cordish's Policy is that the Group III exclusion here is much *narrower* – barring coverage for the contamination itself, but not "loss or damage caused by or resulting from" contamination. While it is true that there was a single definition of "Pollutants and Contaminants" in the JGB policy, that does not distinguish it from the definition of contamination here, which expressly includes pollutants and hazardous materials even *before* it mentions "virus." Policy p. 42 of 44. FM cannot distinguish *JGB* on the grounds that Cordish's Policy has a "pure contamination exclusion" and the exclusion in *JGB* is altogether something else. To the contrary, *JGB* is highly informative, and if the much broader exclusion for "loss or damage caused by or resulting from . . . contamination" did not bar coverage, then FM's narrow Group III exclusion for contamination does not bar coverage here.

The cases involving broad exclusions that FM *wishes* it had used in the Policy actually

undermine FM's argument here. At best, those cases highlight the limits imposed by broad "virus exclusions" that were widely used in most policies but were **not** used by FM in the Policy it sold to Cordish. The fact that not all COVID-19 claims are barred by broad "virus exclusions" is indicated by the fact that insurance companies are jacking up rates and stand to reap an enormous *windfall* from COVID if their "no-coverage" position were accepted by the courts. *See* Articles attached to the Gilinsky Aff. as Ex. E (including one quoting an executive at FM and reporting that "insurers expected to push through further rate increases to recover profitability."). That is par for the course for insurance companies, who have a decades-long history of coming out ahead following catastrophes, as reported by the Consumer Federation of America. J. Robert Hunter, THE INSURANCE INDUSTRY'S INCREDIBLE DISAPPEARING WEATHER CATASTROPHE RISK: HOW INSURERS HAVE SHIFTED RISK AND COSTS ASSOCIATED WITH WEATHER CATASTROPHES TO CONSUMERS AND TAXPAYERS (Consumer Federation of America, Feb. 11, 2011), Gilinsky Aff. Ex. F, at p. 1 ("industry data demonstrates that insurers have significantly and methodically decreased their financial responsibility for [catastrophic] events in recent years and shifted much of this risk to consumers and taxpayers. . . . most of these savings have been achieved by hollowing out the coverage in homeowners insurance policies and raising rates").

D. FM Cannot Re-Cast and Shoehorn Cordish's Claim Into a Sublimit That FM Mischaracterizes as a "Limited Grant-Back Exception"

As an aside to the main arguments in the Motion, FM tries to re-characterize Cordish's losses and policy provisions in an effort to limit Cordish to the narrow coverage extension for losses due to communicable disease at insured premises. Motion at pp. 11-14. FM misleads the Court when it says the exclusion for "contamination" is part of "combination exclusion in conjunction with a limited 'grant-back' exception." Motion p. 13. That is contrary to the terms of the Policy and the allegations in the Complaint, which must be accepted as true.

Far from capping Cordish's claim at the *lowest* possible applicable sub-limit, the "Sub-Limits" section of the Policy expressly states that where more than one coverage applies, Cordish is entitled to the *largest* applicable sub-limit: "If the same coverage(s) apply under separate endorsements below, the single largest sub-limit will be the maximum payable and will apply on a per occurrence basis." Policy Declarations p. 2 of 15. Thus, so long as other Extensions of Coverage are triggered (which they are), the larger sub-limits apply, including up to $1 Billion under the Attraction Property Coverage. Policy Declarations, p. 4 of 15.

Nothing in the Policy links the exclusion for contamination with the limited "communicable disease" coverage extension, let alone identifies them as a "combination exclusion in conjunction with a limited 'grant-back' exception." The case cited by FM and its own brief from another action confirm the *absence* of a "limited-grant-back exception" in the Policy sold to Cordish. *See* Motion p. 13 (citing *Indep. Barbershop, LLC*, 2020 WL 6572428 at *7). The policy at issue in *Independence Barbershop* contained a two-part "virus endorsement." The first part excluded "loss or damage caused directly or indirectly by [the] . . . [p]resence, growth, proliferation, spread or any activity of 'fungi', wet rot, dry rot, bacteria or virus," but expressly stated that the exclusion "does not apply . . . [t]o the extent that coverage is provided in the Additional Coverage – Limited Coverage for 'Fungi', Wet Rot, Dry Rot, Bacteria or Virus." *Indep. Barbershop, LLC*, 2020 WL 6572428 at *2, n.2. The second part of the "virus endorsement" then set forth "Limited Coverage for 'Fungi', Wet Rot, Dry Rot, Bacteria or Virus." *Id.* FM's Arctic Slope Brief shows that FM itself knows how to expressly cross-reference this type of a "grant-back" in its own policies. *See* FM Arctic Slope Brief pp. 8-10, n.5 (quoting an express exception to the flood exclusion "as provided in Section C, Additional Coverage, Item, 2. Flood," noting that "[a]dditional coverage is then provided by Section C.2 of the Policy,

which, as the flood exclusion clearly states, is the only exception to the exclusion"). The Policy that FM sold to Cordish, however, does not contain the prerequisite for a grant back – a broad exclusion of all loss or damage caused directly or indirectly by virus – and not surprisingly then, also does not cross-reference or connect any such exclusion to a "limited grant-back exception."

Far from constituting an express "grant-back" in connection with a particular coverage extension, the preamble to the "Exclusions" section in Cordish's Policy simply provides that the "exclusions apply *unless otherwise stated*." Policy p. 2 of 44 (emphasis added). For FM's argument to work, the Policy would need to say that the "exclusions apply *except to the extent otherwise stated in a coverage extension and then only up to the applicable sub-limits.*" Indeed, the Motion mischaracterizes the Policy's terms along those lines, stating that "the prefatory language to the exclusions section . . . provide[es] that the exclusions apply *to the extent*" not otherwise stated in the Policy. Motion p. 16 (emphasis added). But the Policy does not say "*to the extent* otherwise stated"; it says that the exclusions apply "unless otherwise stated." FM correctly points out that "it is improper for the court to rewrite the terms of the contract," and that includes a re-writing to effectuate terms that FM wishes it had included but did not.

E. <u>The Contamination Exclusion Is Ambiguous at Best</u>

The exclusion for contamination clearly is inapplicable, but even if it were unclear, the Court must adopt Cordish's interpretation. *Empire Fire*, 117 Md. App. at 97, 699 A.2d at 494; *Truck Ins. Exch.*, 288 Md. at 435, 418 A.2d at 1191. When an exclusion can be afforded more than one reasonable meaning, the provision is ambiguous. *W.C. & A.N. Miller*, 814 F.3d at 176; *Cole*, 359 Md. at 305-06. Because exclusions drafted by insurers can have the draconian effect of destroying coverage, a policyholder is entitled to notice by clear and unmistakable language of an exclusion's extent. *White Pine*, 233 Md. App. at 500 (*citing Megonnell*, 368 Md. at 656).

The terms of the Policy here are ambiguous at best. For example, the inclusion of

"communicable disease" as an insured peril conflicts with the inclusion of the word "virus" in the definition of "contamination." The Motion makes the bizarre assertion that these conflicting provisions "are easily reconciled and in fact are complimentary." Motion p. 16. Such Orwellian assertions that black is white and up is down cannot possibly justify dismissal. Another example of a term that is ambiguous at best is the exclusion for "any *cost* due to contamination" that goes on to "include" the inability to use or occupy property. Although the "inability to use or occupy property" could give rise to certain "costs," the "inability to use or occupy" *itself* is not a "cost" that is excluded. At a minimum, Cordish's construction is a reasonable one. Furthermore, the lead-in language to the Policy's "Exclusions" section (Policy p. 2 of 44) is also potentially ambiguous. As discussed above, FM attempts to re-write the phrase "unless otherwise stated" as though it said "to the extent otherwise stated." Motion p. 16. This reflects two contradictory readings, with Cordish's interpretation (which hews to the actual words) being a reasonable one.

When confronted with confusing policy provisions like these, and reasonable interpretations advanced by the policyholder, Maryland courts protect policyholders' rights to coverage. *See White Pine*, 233 Md. App. at 499-500 (such provisions must be "construed liberally in favor of the insured and against the insurer as drafter of the instrument") (*quoting Maryland Cas. Co. v. Blackstone Int'l Ltd.*, 114 A.3d 676, 682 (Md. 2015)). This is doubly true for exclusions, which cannot be extended by interpretation and must be construed narrowly and in favor of coverage. *Megonnell*, 368 Md. at 656.

The matters at issue here are of great importance to both parties, but especially to Cordish. Cordish has suffered its largest and most devastating business interruption loss imaginable, and FM sold Cordish a "broad" and "comprehensive" billion-dollar insurance Policy that covers such losses. The reasonable interpretation of the Policy alleged in the Complaint far

exceeds the requirement to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Contrary to the narrow Group III exclusion for "contamination" at Cordish's Properties, the Complaint alleges business interruption losses due to the impact of COVID-19 on property away from the Properties, including losses due to the Orders that were issued in the wake of such impacts. Compl. ¶¶1, 10, 13-15, 17, 76, 81-84, 87-89, 96-97, 99, 104-107, 109-111, 116, 121. The Complaint further alleges that Cordish is *not* seeking coverage for "contamination" or any "cost due to contamination" at the Properties. *See, e.g.*, Compl. ¶121. These allegations satisfy the "minimal requirements of Rule 8(a)(2)." *Kantseyov v. LumenR, LLC*, 301 F. Supp.3d at 591. Cordish is entitled to have its claims decided on their merits. FM has failed to meet it heavy burden for seeking dismissal here and its Motion should be denied.

III. THE "LOSS OF USE" EXCLUSION DOES NOT APPLY

With brazen disregard of its promise to provide $1 Billion worth of business interruption coverage – including sixteen *extensions* of such coverage – FM asks this Court to completely dismiss Cordish's claims here because they "stem from . . . loss of use." Motion p. 18. FM's one-page, throwaway (daresay, fraudulent) argument must be soundly rejected.

FM's application of the "loss of use" exclusion would render $1 billion of business interruption coverage illusory. For example, the Civil Authority Coverage expressly *extends* coverage for "loss incurred . . . if an order of civil authority prohibits access to a location . . . ." Policy p. 24 of 44. Yet FM seeks dismissal on the grounds that Cordish's "inability to use its properties due to governmental orders . . . directly implicates the 'loss of use' exclusion." Motion p. 18. Obviously, *any* civil authority claim will "stem from loss of use" to some extent, as will *any* claim for Business Interruption under ¶A (property destroyed in a fire), under ¶E.4 (failure of computers to operate), under ¶E.8 (ingress to or egress from an insured location is physically prevented as a result of damage away from the property) and under ¶E.9 (property is rendered

untenantable or unusable). FM cannot charge nearly $2 Million annually for "broad" and "comprehensive" coverage and then wipe away its promises with an assertion that such coverage never existed because it "stems from . . . loss of use."

In reality, the "loss of market or loss of use" exclusion is intended to exclude consequential damages *where no business interruption coverage exists*. As one treatise explains:

> This exclusion emphasizes the CP policy's intent to cover *direct* and not consequential losses. The listed items (delay, loss of use or market) are indirect losses that are the result of a covered loss, such as a restaurant losing revenue (or customers) while rebuilding after a fire. The insured may purchase business income and extra expense insurance to cover this exposure.

Hillman and McKraken, COMMERCIAL PROPERTY COVERAGE GUIDE at 55 (Nat'l Underwriter 1997) (italics in original, underscoring added) (excerpt attached to the Gilinsky Aff. as Ex. G).[14] For policies that *do* provide business interruption coverage, the "loss of use" exclusion does not apply to business interruption losses. The Motion offers a nod to this fact when it acknowledges that the Policy's exclusions only apply "unless otherwise stated" (Motion pp. 18-19), and it is "otherwise stated" that Cordish's losses are covered here. At minimum, the Complaint plainly alleges as much and those allegations must be accepted as true. *See, e.g.*, Compl. ¶¶82-111.[15]

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[14] *See also Nuco Investments, Inc. v. Hartford Fire Ins. Co., Inc.*, No. 1:02 CV 1622, 2005 WL 3307089 at *4 (N.D. Ga. Dec. 5, 2005) (rejecting insurance company's argument that losses stemming from mold were barred by an exclusion for "loss of market or loss of use or other consequential loss" – characterizing the exclusion as one against consequential damages and holding that "what is lost when physical damage occurs is both utility and value; therefore, the insurer's obligation to pay for the loss includes paying for the lost value"); *Duane Reade v. St. Paul Fire & Marine Ins. Co.*, 279 F. Supp. 2d 235 (S.D.N.Y. 2003) *aff'd* 411 F.3d 384, 398–99 (2d Cir. 2005) ("the loss of market exclusion relates to losses resulting from economic changes occasioned by, *e.g.*, competition, shifts in demand, or the like; it does not bar recovery for loss of ordinary business caused by a physical destruction or other covered peril"); *c.f. Witcher Const. Co. v. Saint Paul Fire and Marine Ins. Co.*, 550 N.W.2d 1, 4-6 (Minn. Ct. App. 1996) (noting that an exclusion for "loss caused by delay, loss of market, loss of use, or any indirect loss" represents an exclusion "for the consequences of an otherwise insured loss" and holding that it applied, *but only* "*in the absence of specific language covering business interruption, loss of use or lost profits*") (emphasis added).

[15] The cases cited by FM are not on point or controlling. *Travelers Property Cas. Co. v. Mixt Greens, Inc.*, 2014 WL 1246686 (N.D. Cal. 2014) involved a duty to defend claim under general liability insurance policy and offers no insight into the scope of a "loss of use" exclusion in a property insurance policy, let alone one with express coverage for business interruption losses plus broad coverage extensions. The analysis of the "Consequential Damages" exclusion at issue in *Whiskey River on Vintage, Inc. v. Illinois Cas. Co.*, No. 4:20-CV-185-JAJ, 2020 WL 7258575 (S.D. Iowa Nov. 30, 2020) is dicta, with the Court having decided the matter based on the applicability of a broad

IV. SARS-COV-2 AND COVID-19 CAUSE "PHYSICAL LOSS OR DAMAGE"

FM seeks dismissal on the grounds that Cordish supposedly has not suffered business interruption losses resulting from "physical loss or damage." Motion pp. 20-28. But FM knows that communicable diseases like COVID-19 cause damage – *indeed, there is an entire section of FM's Policy entitled "Communicable Disease – Property Damage*." Policy p. 7 of 44. FM is also aware of the cases holding that there need not be structural damage for there to be "physical loss or damage" *FM relied on those in its own brief filed in Federal court*. *See* FM's Federal Ins. Co. Brief, Gilinsky Aff. Ex. H, at pp. 3-4. Yet FM asks this Court to ignore such facts and law and dismiss Cordish's case. FM's disingenuous arguments must be rejected.

A. The Complaint Alleges "Physical Loss or Damage"

For proof that deadly communicable diseases cause "physical loss or damage," one need look no further than the Policy itself, which includes a specific provision entitled: "Communicable Disease – *Property Damage*". Policy p. 7 of 44 (emphasis added). Further, the deductible provision that applies to the coverage for "Communicable Disease" states that it applies based on the "business interruption value that would have been earned had no loss occurred at the location *where the physical damage happened* . . . ." Policy Declarations p. 7 of 15 (emphasis added).[16] As this Court has noted, where the insurance policy contemplates the exact type of "physical loss or damage" at issue, the insurance company is not entitled to judgment as a matter of law. *Nat'l Ink and Stitch, LLC, v. State Auto Prop. and Cas. Ins. Co.*,

virus exclusion not found in Cordish's Policy. *Id.* at *18. To the extent that the Court briefly discusses the "loss of use" exclusion in that case, it is not well-reasoned or binding on this Court. *Id.*

[16] The Policy also includes coverage for "Data, Programs or Software" that covers "physical loss or damage" to data, programs or software, "including physical loss or damage" caused by malicious introduction of code (*i.e.*, computer viruses). Policy at p. 7 of 44, All Risk Coverage ¶D.6. Further still, the Policy includes an additional coverage entitled "Off-Premises Data Services – Property Damage" that covers "physical loss or damage" to insured property where such "physical loss or damage" results from the interruption of off-premises data processing or transmission services (e.g., cloud storage). Policy at p. 13 of 44, All Risk Coverage ¶D.21. Given that FM's Policy clearly acknowledges that a computer virus can cause "physical loss or damage" via its impact on computer code, it is disingenuous for FM to take the position that an organic, physical virus or communicable disease that turns property into a deadly hazard does not cause "physical loss or damage" as well.

435 F. Supp.3d 679, 682 (D. Md. 2020) ("the plain language of the Policy contemplates that data and software are covered and can experience 'direct physical loss or damage'").

The facts about the coronavirus – well-known to all and alleged in the complaint – further confirm the point. Contrary to FM's assertion that "[n]owhere . . . does the complaint allege or articulate the presence of any actual, distinct, demonstrable, physical alteration of any property" (Motion p. 24), the Complaint includes extensive allegations about the ways that COVID-19 and the coronavirus physically impact property, remain there for weeks and render it potentially fatal (Compl. ¶¶26-41).[17] There have been hundreds of thousands of confirmed cases of COVID-19 in proximity to the Properties, and the physical loss and damage to property from SARS-CoV-2 and COVID-19 is ubiquitous and widespread across the United States. Compl. ¶¶32-33. FM ludicrously compares the presence of the coronavirus on property to "the inadvertent scattering of dust on a restaurant floor." Motion p. 24. But *property impacted by COVID-19 can kill you*, and no sane person would knowingly use property that has been impacted by the deadly virus. Contrary to the baseless assertions in the Motion, such impacts plainly involve the "actual, distinct, demonstrable, physical alteration of property."

Businesses buy property and business interruption insurance to protect the ability to generate profits, and when property is impacted in a way that makes it incapable of producing profits, it does not matter whether it is from a fire, flood, toxic fumes, or a virus–the "physical loss or damage" is the same. Compl. ¶34. When the SARS-CoV-2 impacts property, it renders the property dangerous and potentially fatal. Compl. ¶35. Property impacted by SARS-CoV-2

[17] The Complaint references two scientific studies as representative examples of scientific reports that confirm the impact of the coronavirus on property. Copies of these studies, and similar studies published after Cordish filed its Complaint, are attached to the Gilinsky Aff. as Exs. I-Q. The Court may take judicial notice of these materials, even if not cited in the Complaint, as they reflect information "that is not subject to reasonable dispute because it…can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed R. Evid. 201(b); *see also Prelich v. Med. Res., Inc.*, 813 F. Supp. 2d 654, 668 n.13 (D. Md. 2011) (Hollander, J.).

does not function for the purpose of generating business income; to the contrary, because contact with such property can kill a person, it undermines any productive business purpose. Compl. ¶¶35-36. Like the impact of a fire, flood or toxic fumes, the impact of a virus or communicable disease constitutes physical loss or damage to property, in that property impacted by any of them is rendered equally incapable of producing revenues or profits. Compl. ¶37.

B. Decades of Cases Confirm That Non-Structural Impacts to Property That Impair Its Functionality Constitute "Physical Loss or Damage"

This Court recently addressed the "physical loss or damage" requirement under a property insurance policy and held that "loss of use, loss or reliability, or impaired functionality demonstrate the required damage . . . consistent with the 'physical loss or damage to' language in the Policy." *Nat'l Ink*, 435 F. Supp.3d at 686. *National Ink* involved an insurance claim after a ransomware attack on an embroidery and screen printing business that "prevented Plaintiff from accessing all of the art files and other data contained on the server, and all of its software, except for the embroidery software." *Id.* at 680. "[A]lthough Plaintiff's computers still functioned, the installation of protective software slowed the system and resulted in a loss of efficiency." *Id.* The insurance company argued "that because Plaintiff only lost data, an intangible asset, and could still use its computer system to operate its business, it did not experience 'direct physical loss' as covered by the Policy." *Id.* at 682. But the Court agreed with the policyholder that it could show "physical loss or damage" "based on either (1) the loss of data and software in its computer system, or (2) the loss of functionality to the computer system itself." *Id.*

The Court aligned its decision with the sound reasoning from several similar cases:

- "'physical damage' is not restricted to the physical destruction or harm of computer circuitry but includes loss of access, loss of use, and loss of functionality. . . . The mere fact that the system retained some limited functions did not prevent the Court from finding that Ingram had suffered physical damage." *Id.* at 685 (*citing American Guarantee & Liab. Ins. Co. v. Ingram Micro, Inc.*, No. 99-185, 2000 WL 726789, at *2 (D. Ariz. April 18, 2000)).

- "'loss of access, loss of use, and loss of functionality' fall within the definition of direct 'physical damage.'" *Id.* at 685 (*citing Southeast Mental Health Ctr., Inc. v. Pacific Ins. Co., LTD*, 439 F. Supp. 2d 831, 838 (W.D. Tenn. 2006)).

- "'direct physical loss or damage' includes a loss of reliability. The Court specifically declined to adopt a definition of 'direct physical loss or damage' that requires proof of a permanent loss in the ability to function." *Id.* at 685 (citing *Ashland Hos. Corp. v. Affiliated FM Ins. Co.*, 2013 WL 4400516, at *4, 6 (E.D. Ky. Aug. 14, 2013)).

In an attempt to dodge the blow that *National Ink* delivers to FM's argument here, the Motion resorts to mischaracterizing this Court's decision, stating: "*Nat'l Ink* was covered because the ransomware virus damaged the insured's computers to the extent that they needed to be replaced." Motion p. 25. In reality, *National Ink* found coverage based on a "loss of reliability, or impaired functionality" and noted that the "[c]ase law cited by State Auto does not suggest that, for damage to be covered, a computer system must be completely and permanently inoperable." *Id.* at 684, 686. If "loss of use, loss or reliability, or impaired functionality" constitutes "physical loss or damage" when caused by a computer virus, the same is true if caused by a physical virus.

National Ink is not an outlier. Indeed, "[t]he majority of cases appear to support [the policyholder's] position that physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces." *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708 (N.D. Va. 2010), *aff'd* 504 F. App'x 251 (4th Cir. 2013); *see also Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 825 (3d Cir. 2005) (presence of E. coli in residential water well could constitute a direct physical loss where the "functionality" of the property is "nearly eliminated or destroyed," or when it renders the property "useless or uninhabitable"); *Port Auth. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) ("sources unnoticeable to the naked eye," such as asbestos in the air, can be direct physical loss if it makes the building "uninhabitable and unusable"); *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (unpleasant odor that was "permeating and pervasive," resulting in

the loss of use of a building, could constitute a "physical injury" to property); *Gregory Packaging, Inc. v. Travelers Prop. Case. Co. of Am.*, No. 12 Civ. 04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) (discharge of ammonia "inflicted 'direct physical loss of or damage to' facility because it "physically transformed the air within Gregory Packaging's facility so that it contained an unsafe amount of ammonia or that the heightened ammonia levels rendered the facility unfit for occupancy"); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 15-01932, 2016 WL 3267247 (D. Or. June 7, 2016) (finding physical loss or damage to property when wildfire smoke infiltrated a theater and rendered it unusable for its intended purpose), *vacated by parties' joint stipulation*, 2017 WL 1034203 (D. Or. 2017); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. 98 Civ. 434, 1999 WL 619100 (D. Or. Aug. 4, 1999) (elevated fungal concentrations on garments could cause "distinct and demonstrable" damage at the "microscopic level"); *Mellin v. N. Sec. Ins. Co., Inc.*, 167 N.H. 544, 548 (2015) (cat urine odor from a downstairs condominium unit could constitute "physical loss" to the unit upstairs); *Sullivan v. Standard Fire Ins. Co.*, 956 A.2d 643 (Del. 2008) (mold contamination constitutes physical loss under a property insurance policy); *Murray v. State Farm Fire and Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) ("Losses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structure damage to the insured property."); *Western Fire Ins. Co. v. The First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) ("the accumulation of gasoline around and under the church building the premises became so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous . . . which we hold equates to a direct physical loss"); *Pepsico, Inc. v. Winterthur Intl. Am. Ins. Co.*, 806 N.Y.S.2d 709, 711 (N.Y App. Div. 2005) (soda that was "off-tasting" suffered "physical damage" because "the product's function and value have been seriously impaired, such

that the product cannot be sold"); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296 (Minn. Ct. App. 1997) ("Although asbestos contamination does not result in tangible injury to the physical structure of a building, a building's function may be seriously impaired or destroyed and the property rendered useless by the presence of" released asbestos fibers); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993) (a pervasive, persistent odor produced by methamphetamine cooking constitutes "direct physical loss"); *Matzner v. Seaco Ins. Co.*, 9 Mass. L. Rptr. 41, 1998 WL 566658 (Mass. Super. Aug. 12, 1998) (carbon monoxide contamination constitutes direct physical loss even though it did not produce tangible damage to the structure); *Cook v. Allstate*, No. 48D02-0611-PL-01156, slip op. (Ind. Super. 2007) (spiders living, breeding, and hunting on and within surfaces render a home unsuitable for its intended use and constitute a "direct physical loss").

FM is familiar with these cases from a dispute it had with Federal Insurance Company over coverage for mold damage. Just over a year before COVID-19 struck, FM cited many of these same cases to the U.S. District Court for the District of New Mexico, stating:

> Numerous courts have concluded that loss of functionality or reliability under similar circumstances constitutes physical loss or damage. *See, e.g., Western Fire Insurance Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (church building sustained physical loss or damage when it was rendered uninhabitable and dangerous due to gasoline under the building); *Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America*, Civ. No. 2:12-cv-04418 2014 U.S. Dist. LEXIS 165232, 2014 WL 6675934 (D.N.J. 2014) (unsafe levels of ammonia in the air inflicted "direct physical loss of or damage to" the juice packing facility "because the ammonia physically rendered the facility unusable for a period of time."); *Port Authority of N.Y. and N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (asbestos fibers); *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (unpleasant odor in home); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 709 (E.D. Va. 2010), *aff'd*, 504 F. App'x. 251 (4th Cir. 2013) ("toxic gases" released by defective drywall).

FM's Federal Ins. Co. Brief, Gilinsky Aff. Ex. H, at pp. 3-4. FM's position was correct then and proves the plausibility of Cordish's allegations here beyond any doubt.

C. FM's Motion Relies on COVID Cases That Lacked *Allegations* of "Physical Loss of Damage" and Ignores Cases to the Contrary

The Motion cites a list of cases where courts dismissed COVID-19 coverage actions in an attempt to mislead this Court into concluding that most courts have held that COVID-19 does not cause "physical loss or damage." Motion at pp. 20-22. Usually, however, those decisions were based on the absence of *allegations* that the virus causes such loss or damage, as opposed to a conclusion that no such loss or damage exists. Thus, FM's cases are distinguishable.

Cordish's Complaint here alleges that COVID-19 has been present at and near its locations and nearby attraction properties, causing damage to the property it impacts and leading to the issuance of the Orders. *See* Compl. ¶¶11, 13-14, 32-33, 53-54, 56, 83-86, 89, 92, 95, 98-99, 105-06, 108, 110-11. By contrast, to avoid broad "virus exclusions"[18], the complaints in many of the cases cited by FM did *not* allege such things; instead, those plaintiffs alleged that *the Orders themselves* caused "physical loss or damage."[19] Others simply did not or could not allege that COVID-19 was present on their premises.[20] Accordingly, in most of the cases, the dismissals

[18] The broad "virus exclusions" in these policyholders' policies placed them and their counsel in the impossible position where they could "not dispute…that losses caused directly or indirectly by COVID-19 are excluded from Policy coverage." *Franklin EWC*, 2020 WL 5642483 at *2. To avoid this Catch-22, the plaintiffs argued that their losses stemmed from orders of civil authority that were "separate and independent from the virus." *Id.* No such gymnastics are required under Cordish's Policy.

[19] *See, e.g., 10E, LLC v. Travelers Indem. Co. of Conn.*, No. 2:20-cv-04418-SVW-AS, 2020 WL 5359653, at *2 (C.D. Cal. Sept. 2, 2020) ("Plaintiff alleges . . . [t]he restrictions caused 'physical damage' . . ."); *Diesel Barbershop, LLC*, 2020 WL 4724305, at *5 ("Plaintiffs also argue that it is not COVID-19 within Plaintiffs' Properties that caused the loss directly, but rather that it was the Orders that caused the direct physical loss and thus the Virus Exclusion should not apply.").

[20] *See, e.g., Turek Enters., Inc.*, 2020 WL 2558484 at *6 ("Plaintiff is adamant that COVID-19 never entered its premises"); *4431, Inc. v. Cincinnati Ins. Co.*, No. 5:20-cv-04396, 2020 WL 7075318, at *12 (E.D. Pa. Dec. 3, 2020) ("there are no allegations that any physical conditions of or on the covered premises have been altered in a way that has resulted in or affected Plaintiffs' loss"); *Malaube LLC v. Greenwich Ins. Co.*, No. 20-22615-Civ, 2020 WL 5051581, at *7 (S.D. Fla. August 26, 2020) ("There is no allegation, for example, that COVID-19 was physically present on the premises."); *Mark's Engine Co. No. 28 Rest., LLC*, 2020 WL 5938689 at *3 (C.D. Cal. Oct. 2, 2020) ("Plaintiff does not allege that the virus 'infected' or 'stayed on surfaces of' its insured property."); *Promotional Headware Int'l v. Cincinnati Ins. Co.*, No. 20-cv-2211, 2020 WL 7078735, at *8 (D. Kan. Dec. 3, 2020) ("Plaintiff…does not claim property damage due to the presence of COVID-19 in its buildings."); *Rose's 1, LLC v. Erie Ins. Co.*, No. 2020 CA 002424 B, 2020 WL 4589206, at *2 (D.C. Super. Aug. 6, 2020) ("Plaintiffs offer no evidence that COVID-19 was actually present on their insured properties"); *Sandy Point Dental P.C. v. Cincinnati*

were based on the absence of *allegations* of "physical loss or damage" as opposed to a conclusion that the virus does not cause such loss or damage.[21]

Tellingly, the Motion omits numerous decisions rejecting the argument that COVID-19 cannot cause "physical loss or damage." In two of three cases that decided the issue on a motion for summary judgment, courts in North Carolina and Washington considered the dictionary definitions of "physical" and "loss" and held that COVID-related business interruption losses are "unambiguously a 'direct physical loss,' and the Policies afford coverage." *North State Deli, LLC v. The Cincinnati Ins. Co.*, No. 20-cv-02569, slip op. at p. 6 (N.C. Super. Oct. 9, 2020); *see also Perry Street Brewing Co., LLC v. Mut. of Enumclaw Ins. Co.*, No. 20-2-02212-32, slip op. at pp. 5-6 (Wash. Super. Ct. Spokane Cty. Nov. 23, 2020); *but see Rose's 1, LLC v. Erie Ins. Exch.* No. 2020 CA 002424 B, 2020 WL 4589206 (D.C. Super Ct. Aug. 6, 2020) (rejecting the argument that a "governmental edict, standing alone, constitutes a direct physical loss under an

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Ins. Co., No. 20 CV 2160, 2020 WL 5630465, at *2 (N.D. Ill. Sept. 21, 2020) (plaintiff did not allege "the presence of the virus on its physical surfaces"); *West Coast Hotel Mgmt., LLC*, 2020 WL 6440037 at *4 ("Plaintiffs' Complaint provides only generic statements regarding the physical nature of COVID-19 and the number of cases in California and Fresno County."); *Water Sports Kauai Inc. v. Fireman's Fund Ins. Co.*, No. 20-cv-03750, 2020 WL 6562332, at *4 (N.D. Cal. Nov. 9, 2020) (plaintiff alleged only the "mere threat of exposure" to the virus at its stores).

[21] *See, e.g.*, *Water Sports Kauai*, 2020 WL 6562332 at *8 (N.D. Cal. Nov. 9, 2020) (dismissing complaint due to the "absence of any allegation that any specific neighboring property . . . had actual coronavirus exposure" and granting leave to amend); *Hillcrest Optical Inc. v. Cont'l Cas. Co.*, No. 1:20-cv-00275, 2020 WL 6163142 (S.D. Ala. Oct. 21, 2020) (rejecting plaintiff's contention that its inability to use its property constituted a "direct physical loss" and dismissing the complaint with prejudice for failure to allege some tangible alteration to property); *Vandelay Hosp. Group v. The Cincinnati Ins. Co.*, No. 3:20-cv-01348, 2020 WL 5946863 (N.D. Tex. Oct. 7, 2020) (acknowledging absence of physical damage allegations and granting plaintiff leave to amend its pleadings); *Oral Surgeons PC v. Cincinnati Ins. Co.*, No. 4:20-cv-00222, 2020 WL 5820552 (S.D. Iowa Sept. 29, 2020) (dismissing complaint for failure to allege physical loss and rejecting plaintiff's position that "its loss was caused by the COVID-19 coronavirus and the government actions to suspend temporarily non-emergency dental procedures"); *Sandy Point Dental PC*, 2020 WL 5630465 at *3 (dismissing complaint for failure to sufficiently allege physical loss or damage); *Harvest Moon Distributors LLC v. S. Owners Ins. Co.*, No. 6:20-cv-01026, 2020 WL 6018918 (M.D. Fla. Oct. 9, 2020) (dismissing beer distributor's complaint without prejudice for failure to establish a causal link between the alleged "direct physical loss of or damage to Covered Property," the spoliation of its beer after a customer cancelled a standing order due to the pandemic, and a covered cause of loss); *see also Inns by the Sea v. Cal. Mut. Ins. Co.*, No. 20CV001274 (Cal. Super. Ct. Monterrey Cty. Aug. 6, 2020) (dismissing complaint without any explanation of the court's reasoning); *O'Brien Sales and Marketing, Inc. v. Transp. Ins. Co.*, No. 3:20-cv-02951 (N.D. Cal. Oct. 9, 2020) (dismissing complaint with leave to amend without specifying grounds); *but see Uncork and Create LLC v. Cincinnati Ins. Co.*, No. 2:20-cv-00401, 2020 WL 6436948 (S.D. W. Va. Nov. 2, 2020) (finding that "even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property").

insurance policy" and granting summary judgment in favor of the insurance company in part because there was no evidence that COVID-19 was present on property at issue).

There have been nearly two dozen cases in which courts have denied motions to dismiss COVID-19 coverage actions, in cases both with[22] and without[23] broad "virus exclusions." That FM fails to alert the Court to these cases is consistent with its other attempts to hide the facts.

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[22] *See, e.g., Optical Servs. USA/JC1 v. Franklin Mut. Ins. Co.*, No. BER-L-3681-20, slip op. (N.J. Super. Ct. Bergen Cty. Aug. 13, 2020), *appeal denied*, No. AM-000690-19T1 (N.J. Super. Ct. App. Div. Sept. 24, 2020) (finding "compelling" the *Wakefern* court's ruling that "since the term 'physical' can mean more than material alteration or damage, it is incumbent on the insurer to clearly and specifically rule out coverage in the circumstances where it was not to be provided") (*quoting Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 968 A.2d 724, 735 (N.J. Super. App. Div. 2009)); *Urogynecology Specialist of Fla. LLC*, 2020 WL 5939172 at *4 (M.D. Fla. Sept. 24, 2020) (holding that policyholder "has stated a plausible claim at this juncture . . . alleg[ing] the existence of the insurance contract, losses which may be covered under the insurance contract"); *Taps & Bourbon on Terrace v. Underwriters at Lloyd's London*, No. 00375 (Pa. Ct. Com. Pl. Phila. Cty. Oct. 26, 2020) (overruling insurance company's preliminary objections raised in its demurrer, stating "it would be premature for this court resolve [sic] the factual determinations put forth by defendants to dismiss plaintiff's claims"); *Indep. Barbershop, LLC v. Twin City Fire Ins. Co.*, No. 1:20-cv-00555, 2020 WL 6572428 (W.D. Tex. Nov. 4, 2020); *Elegant Massage, LLC*, 2020 WL 7249624 at *15 (E.D. Va. Dec. 9, 2020) ("Plaintiff has pled sufficient facts to state a claim to allow this Court to draw reasonable inferences that relief is plausible on its face for [declaratory judgment and breach of contract]."); *Lombardi's, Inc. v. Indem. Ins. Co. of N. Am.*, No. DC-20-05751-A (Tex. Dist. Ct. Dallas Cty. Oct. 15, 2020).

[23] *See Studio 417, Inc. v. The Cincinnati Ins. Co.*, No. 20-cv-03127 (W.D. Mo. Aug. 12, 2020) (policyholder adequately alleged a "direct physical loss" from the presence of coronavirus on surfaces "based on the plain and ordinary meaning of the phrase"); *K.C. Hopps, Ltd. v. The Cincinnati Ins. Co., No. 20-cv*-00437 (W.D. Mo. Aug. 12, 2020) (holding that Plaintiff's claims are "adequately stated" for "substantially the same reasons as those in the *Studio 417* Order"); *Blue Springs Dental Care LLC v. Owners Ins. Co.*, No. 20-cv-00383, 2020 WL 5637963 at *4 (W.D. Mo. Sept. 21, 2020) ("Plaintiffs plausibly allege that COVID-19 physically attached itself to their dental clinics, thereby depriving them of the possession and use of those insured properties."); *Francois Inc. v. Cincinnati Ins. Co.*, No. 20CV201416 (Ohio Ct. Com. Pl. Lorain Cty. Sept. 29, 2020) ("The complaint states claims which arguably fit the terms and conditions of the insurance policy and therefore the claims and defenses need to be developed with a record."); *Best Rest Motel Inc. v. Sequoia Ins. Co.*, No. 37-2020-00015679-CU-IC-CTL (Cal. Super. Ct. San Diego Cty. Sept. 30, 2020) (finding "sufficient facts alleged in the complaint to withstand a demurrer"); *SSF II, Inc. v. Cincinnati Ins. Co.*, No. 20CV002644 (Ohio Ct. Com. Pl. Franklin Cty. Sept. 8, 2020) (converting insurance company's motion to dismiss to a motion for summary judgment and permitting parties to conduct discovery as to liability); *780 Short North LLC v. Cincinnati Ins. Co.*, No. 20CV003836 (Ohio Ct. Com. Pl. Franklin Cty. Sept. 8, 2020) (same); *Somco, LLC v. Lightning Rod Mut. Ins. Co.*, No. CV-20-931763 (Ohio Ct. Com. Pl. Cuyahoga Cty. Aug. 12, 2020) (same); *Chapparells Inc. v. Cincinnati Ins. Co.*, No. CV-2020-06-1704 (Ohio Ct. Com. Pl. Summit Cty. Oct. 21, 2020) (finding that the complaint satisfies the pleading standard and survives defendant's motion to dismiss); *Hill and Stout PLLC v. Mut. Of Enumclaw Ins. Co.*, No. 20-2-07925-1 SEA (Wash. Super. Ct. Nov. 13, 2020) ("While there is no factual allegation of physical alteration of the property, [the insurance company's] narrow reading of the Policy is silent as to the Policy's language providing 'physical loss of' as an alternative basis for coverage. . . . If 'physical loss of' was interpreted to mean 'damage to' then one or the other would be surplusage."); *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, No. CV-20-932117 (Ohio Ct. Com. Pl. Cuyahoga Cty. Nov. 17, 2020) (finding that the complaint "sufficiently contends that Plaintiffs' premises sustained physical loss or damage directly from the presence of physical Covid-19 particles"); *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, No. A-20-816628-B, 2020 WL 7258108 (Nev. Dist. Ct. Nov. 30, 2020) (finding that the "Complaint sufficiently alleges losses stemming from the direct physical loss and/or damage to property from COVID-19 to trigger Starr's obligations under the property and TIME ELEMENT coverage provisions in the Policy").

D. The Complaint Alleges the "Direct" Connection Between the Orders, Cordish's Losses, and the "Physical Loss or Damage" from COVID-19

Finally, FM argues that Cordish failed to allege that its business interruption losses are a "direct result" of physical loss or damage. Motion pp. 26-28. This argument fails for two reasons. First, three of the coverage extensions here do not require Cordish's losses to be the "direct result" of "physical loss or damage." The Civil Authority Coverage only requires that the *Order* causing losses be the "direct result of physical damage." Policy p. 24 of 44. There is no requirement that Cordish's losses under the Civil Authority Coverage be a "direct result" of any "physical loss or damage" for the obvious reason that the Orders are an indirect link in that causal chain. And the Supply Chain coverage "is extended to include" Civil Authority Coverage (Policy p. 24 of 44) and thus is triggered by the same *indirect* nexus between Cordish's losses and the "physical loss or damage." For example, the Supply Chain Coverage insures against Cordish's losses where there is damage within five miles of its customers or contract service suppliers that results in an Order that prevents customers from patronizing Cordish's Properties (*e.g.*, a "stay at home" Order) or that prevents a contract service provider from providing services to the Properties (*e.g.*, the St. Louis Cardinals or Texas Rangers providing marketing, media, and advertising services per their contracts with Cordish). The Complaint alleges that the Orders were a "direct result" of damage at or near the Properties, Cordish's customers, and its contract service providers. *See* Compl. ¶¶97-106. Indeed, damage from COVID-19 is widespread and Orders were issued, at least in part, due to that damage. *See* Compl. ¶¶33, 42, 53-56.

Second, for coverage extensions that cover losses incurred "directly resulting from physical loss or damage" (*e.g.*, the Attraction Property, Rental Income and Ingress/Egress Coverages), Cordish's losses *were* incurred as a direct result of such damage. For example, Cordish suffered losses as a direct result of damage at "attraction properties" such as adjacent

stadiums where fans ordinarily come to see the St. Louis Cardinals, Texas Rangers, and Atlanta Braves. Compl. ¶¶82-87. The Complaint also alleges that losses covered under the Rental Income Coverage were a result of "direct physical loss or damage" at Properties rented to tenants. Compl. ¶¶107-111. Although damage at Cordish's Properties is not central to its claim, FM incorrectly asserts that "Cordish has not alleged that the virus that causes COVID-19 was even present at the Covered Properties or any other attraction property." *Compare* Motion p. 27 *with* Compl. ¶¶11, 13-14, 83-86, 108-110.

To the extent that FM argues that the Orders were not issued "as a direct result" of physical loss or damage because the Orders were not issued *solely* because of: (1) particular damage to a particular piece of property; or (2) damage to property as opposed to the health and welfare of people; the argument violates the terms of the Policy, which does not require that the Orders arise "exclusively" from particular damage. *See, e.g.*, Policy p. 24 of 44. Orders of civil authority that shut down businesses are almost always issued in part because of existing damage and in part to protect people from harm (*e.g.*, orders in connection with a toxic fire), and these are exactly the type of shutdowns that the Civil Authority Coverage is designed to cover. FM's argument also defies common sense, as it would result in a *reduction* in coverage for the most widespread and catastrophic loss scenarios. It makes no sense for the coverage to extend to situations where a fire down the block results in an order shutting down the street, but *not* for a situation where widespread hurricane damage results in an order shutting down several states.

Most importantly FM's argument gives rise to numerous disputed issues of fact. The Complaint alleges that the Orders were issued at least in part due to physical loss or damage and cites numerous Orders that expressly reference property damage. *See* Compl. ¶¶33, 42, 53-56. If FM contends otherwise (*see* Motion p. 27 ("any closure of Cordish's properties was solely

attributable to government orders designed to prevent the spread of the Coronavirus generally")), then such disputed issues of fact require that the Motion be denied.

E. FM Admits that "Physical Loss or Damage" Is At Least Ambiguous

At minimum, Cordish's interpretation of "physical loss or damage" is reasonable. FM admitted as much in its dispute with Federal Insurance Company: "'physical loss or damage,' which is undefined, is susceptible of more than one reasonable interpretation and is therefore ambiguous and must be construed against Federal." FM's Federal Ins. Co. Brief, Gilinsky Aff. Ex. H, p. 3, n.1. FM's position is correct, regardless of which foot wears the shoe.

V. PUNITIVE DAMAGES ARE NOT OUT OF THE QUESTION

While FM is correct that punitive damages cannot be awarded based on the existing causes of action, Cordish may yet add claims for bad faith. The foundation for such claims is evident, for example, from FM's two-faced arguments in the Motion, the potential collusion with other insurance industry players that would explain why FM is taking the opposite position here than it did just a year before COVID struck (*see* Compl. ¶¶125-126), and FM's improper attempts to thwart discovery and hide evidence. As seen from the FM briefs from other litigation cited in this Opposition, which Plaintiff found on its own despite FM's wholesale refusal to respond to the discovery requests timely served in this Action, FM is hiding important evidence germane to its arguments in the Motion. It appears quite possible that evidence obtained in discovery will warrant the addition of bad faith claims to this Action. Accordingly, although there is no need to strike two words form the *ad damnum* clause, should the Court be inclined to do so, it should be without prejudice.

CONCLUSION

Based on the foregoing, this Court should deny FM's Motion in its entirety.

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Respectfully submitted,

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