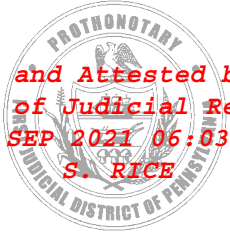


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THE TRUSTEES OF THE UNIVERSITY OF
PENNSYLVANIA,

Plaintiff,

vs.

FACTORY MUTUAL INSURANCE
COMPANY,

Defendant.

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY, PA

No.:

COMMERCE PROGRAM

JURY TRIAL DEMANDED

CIVIL ACTION COMPLAINT

Plaintiff, the Trustees of the University of Pennsylvania, files this Complaint against Defendant Factory Mutual Insurance Company and in support alleges as follows:

1. This is a breach of contract action. Plaintiff, along with others, acquired the insurance policy described herein, issued by Defendant Factory Mutual Insurance Company, covering one-hundred seventy and one insured locations owned and/or operated by Plaintiff, according to the schedule of locations, “Appendix A” of the Policy, pp. 80-128.

PARTIES

2. Plaintiff, the Trustees of the University of Pennsylvania (“Plaintiff”) is a private educational institution commonly referred to as the “University of Pennsylvania” located at 2929 Walnut Street, Suite 460, Philadelphia, Pennsylvania 19104-5099.

3. Defendant Factory Mutual Insurance Company (“Defendant”) is a Rhode Island corporation with its principal place of business in Johnston, Rhode Island. Defendant is licensed to transact, and is regularly transacting, business in the Commonwealth of Pennsylvania.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 42 Pa. C.S.A. § 931.

5. Pursuant to Pa. R.C. P. No. 2179 venue is proper because Philadelphia is the county where Plaintiff’s Covered Property is headquartered, because Defendant regularly conducts business in this county, including but not limited to selling policies, adjusting claims and accepting premiums, and because a substantial part of the transactions or occurrences giving rise to the claim occurred in this county.

FACTS

I. Plaintiff’s Policy

6. Plaintiff purchased commercial property insurance policy # 1056619 (the “Policy”), effective July 1, 2019, through July 1, 2020, covering 171 insured locations owned and/or operated by Plaintiff, as set forth in the schedule of locations, “Appendix A” of the Policy. A paginated copy of the Policy, prepared by Plaintiff’s Counsel for the convenience of the Court, is attached hereto as Exhibit A. The Policy is incorporated herein and made a part of this Complaint.

7. The Policy is an “all-risk” commercial property insurance policy that provides coverage for physical loss or damage to the insured property from *all risks* except those expressly excluded by Policy language. Ex. A at 8.

8. Unlike most other business interruption policies, the Policy expressly includes coverages for communicable disease response, interruption by communicable disease, as well as

claims preparation costs, decontamination costs, protection and preservation of property, civil authority, business income losses and extra expenses. *Id.* at 29, 31, 38, 45, 48, 55, 62. There is no exclusion or limitation in the Policy for communicable disease related losses or damages.

9. There is no exclusion in the Policy for lost business income and expenses caused by either emergency Orders limiting one's operations or the pandemic causing property damage and restricting Plaintiff's operational activities at its properties, or both.

10. The Policy sold by the Defendant to Plaintiff, like all insurance policies, must be read as a whole, in light of the reasonable expectations of the insured.¹

11. The Defendant has numerous duties under the insurance policy, including (but not limited to) answering insured questions regarding coverage, receiving loss notices, honestly investigating and assessing claims without a predetermined result, and issuing declination of coverage letters when appropriate, and promptly paying the claim when appropriate.

12. All conditions precedent to this action have been performed by Plaintiff or have been waived.

13. Despite agreeing to cover Plaintiff for all risks of physical loss or damage to property resulting from any cause not excluded, as well as the resulting time element and extra expense losses, Defendant has refused to honor its contractual obligations in the face of a claim for which coverage is expressly provided. Instead, Defendant attempts to wrongfully shoehorn Plaintiff's claim into a narrow and limited grant of coverage, while abstaining from granting or denying all other coverage under the Policy. Defendant must nevertheless cover the loss sustained by Plaintiff that Defendant contractually agreed to insure.

¹ See *Consolidated Rail Corporation v. ACE Property & Casualty Ins. Co.*, 182 A.3d 1011, 1026 (Pa. Super, 2018) *app. denied*, 648 Pa. 165, 191 A.3d 1288 (2018).

II. SARS-CoV-2

14. The World Health Organization (“WHO”) has declared a global pandemic as a result of SARS-CoV-2, the name given to the virus belonging to the *orthocoronavirinae* subfamily which, based on today’s knowledge and science, is transmitted through respiratory droplets, fomites or aerosols which remain suspended in the air for prolonged periods of times.

15. The uncontrolled spread of SARS-CoV-2 throughout Pennsylvania, the nation, and the world, like a wildfire, constitutes a natural disaster that insurance should cover.

16. On March 11, 2020, WHO declared the COVID-19 outbreak a pandemic and former President Trump declared a nationwide emergency due to the public health emergency caused by the COVID-19 outbreak in the United States.

17. A pandemic, by definition, is an “epidemic occurring worldwide”² This is different from a mere virus, and other insurers have specifically excluded pandemics which is not the case herein.

18. The global COVID-19 pandemic is exacerbated by the fact that the coronavirus is a physical substance that directly lives on and is active on surfaces of objects or materials in a building for extended periods. The COVID-19 virus is airborne, directly emitted and permeates the insured property and premises. The virus is spread, in part, because of its aerosol transport in and throughout buildings and their airways. At the beginning of the pandemic, the medical concern was focused on surface contacts, but recent science shows that the airborne exposures are very problematic in spreading disease.

19. The COVID-19 virus has repeatedly been found in various covered locations and is a cause of real physical loss or damage to property. According to a study published in THE

² See <https://www.who.int/bulletin/volumes/89/7/11-088815.pdf> (last viewed on September 1, 2021).

NEW ENGLAND JOURNAL OF MEDICINE, the virus adheres to its environment, remaining stable and transmittable in aerosols for at least three hours, up to four hours on copper, up to 24 hours on cardboard and up to two to three days on plastic and stainless steel. These are common objects found in Plaintiff's insured premises. Other studies suggest a longer lifespan.³

20. Scientific studies and guidance from WHO indicated that the COVID-19 virus spreads through (1) close contact with an infected person, (2) absorbing respiratory droplets when an infected person talks, sneezes, or coughs so as to taint the buildings air and threaten its surfaces or (3) touching one's eyes, nose, or mouth after touching a surface on which the virus is present.

21. The respiratory droplets that carry the COVID-19 virus are physical objects, carrying a physical substance, that attached to and caused harm to Plaintiff's insured property.

22. Educational institutions like Plaintiff are highly susceptible to being or becoming affected by the presence of the virus, as both respiratory droplets and fomites are likely to be retained on the Covered Property or in its air, remaining viable for an extended period of time.

23. Plaintiff's properties are also highly susceptible to being affected by the rapid transmission of the virus because of the nature of the property and its use as a highly social context in close proximity to the property, to one another, and to the existing load of the COVID-19 virus presence at surfaces or aerosol.

24. The material dimensions of a property can be altered and damaged through microscopic changes caused by the COVID-19 virus. Such damage may produce deadly results to human beings. If a person infected with the COVID-19 virus enters a building, as has happened at various of Plaintiff's locations, then (until disinfected) the building would be (1) physically altered

³ Scientific findings are dynamic and may continue to evolve prior to trial.

by the direct physical presence of the virus on surfaces or the air, and (2) thus physically damaged, and (3) may potentially be transformed into a superspreading viral incubator.

25. The numerous COVID-19 cases discovered at Plaintiff's properties; the high positivity rates; the fact that the coronavirus is transmitted by asymptomatic individuals; and, the inability to clean a location without depopulating it, support the factual allegation that a continuous presence of the COVID-19 virus existed within the insured premises. Moreover, Plaintiff's website compiles a dashboard since the beginning of the pandemic with data of the positivity rate and all cases of positive testing for COVID-19 on-campus.⁴

26. One of the best ways to mitigate the presence of COVID-19 in a building is to depopulate it by keeping COVID-19 virus carriers out or lowering the number of people allowed in at one time in combination with a vigorous cleaning routine and structural alterations, such as using plexiglass dividers. Plaintiff did this at enormous business income loss. The COVID-19 virus is virtually impossible to remove by ordinary cleaning so long as it is populated and used. Ceasing or limiting use are needed to remedy the loss and damage caused by the presence of the virus.

27. Many COVID-19 viral carriers (people) can infect others even though these carriers are asymptomatic. These carriers can transmit the virus directly or indirectly. Since the virus travels in aerosols or remains active on surfaces after being emitted by the carriers when they speak, shout, or sing, viral aerosols often end up on surfaces, or remain in the air and air circulation equipment of buildings continuously as carriers enter and reenter the location until the location is depopulated.

⁴ See <https://coronavirus.upenn.edu/content/dashboard-fall-2020> (last viewed on September 1, 2021).

28. When it became apparent that publicity alone concerning COVID-19 would not naturally facilitate voluntary actions that would mitigate the pandemic the world is facing, state and local authorities intervened through a series of emergency Orders.

29. For the most part (including those causing Plaintiff's loss), the emergency Orders were issued pursuant to an executive's emergency powers. They were not the result of the legislative or deliberative body's process typical of laws and regulations.

30. Plaintiff complied with all applicable Orders.

31. A nationwide debate has erupted as to the Orders' necessity, appropriateness, breadth and length with some high-profile federal and state officials in some circumstances questioning the motivation behind them or their continuation.

32. As a result of the COVID-19 pandemic, Pennsylvania's Governor Tom Wolf issued a Proclamation of Disaster Emergency. The proclamation allowed the State to direct state resources to affected communities and prohibited excessive price increases on goods and services. At the time of the proclamation the pandemic was pervasive and/or posing an imminent risk of harm to people and property.

33. On March 19, 2020, Governor Wolf issued an Order requiring all non-life sustaining businesses in the Commonwealth to cease operation and to close all physical locations.

34. On March 23, 2020, Governor Wolf issued a Stay-at-Home Order for citizens of various counties including Philadelphia County. On this same day, the Pennsylvania Department of Health issued a similar Order noting that the "operation of non-life sustaining businesses present the opportunity for unnecessary gathering, personal contact and interaction that will increase the risk of transmission and the risk of community spread of COVID-19."

35. On April 1, 2020, Governor Tom Wolf extended the March 23, 2020 Stay at Home Order to the entire Commonwealth of Pennsylvania. These emergency Orders confirmed that the presence or suspected presence of COVID-19 caused damage to property by rendering such businesses too dangerous to operate.

36. The goal of the emergency Orders was to mitigate actual or imminent harms caused by disease-causing agents, and to protect people and property.

37. As an institution of higher education operating in locations under emergency Orders, Plaintiff has been required to comply with the applicable Orders.

38. It is undeniable that Plaintiff sustained losses because of the pandemic. In an effort to avert further illness and injury to citizens and to slow or prevent the community spread of COVID-19 virions – which are tangible, physical things – the emergency Orders limited the Plaintiff's ability to physically use its properties. These Orders evidence that the presence of COVID-19 on or around Plaintiff's insured locations rendered the premises unsafe and unfit for their intended use. As a result, Plaintiff alleges it sustained significant losses.

39. These unprecedented emergency Orders were hardly a foregone conclusion or obvious consequence of the pandemic, as demonstrated by the great variance between states and localities as to the types and extent of restrictions placed on businesses.

40. The emergency Orders required almost complete closure of Plaintiff's academic operations. On the week of March 13, 2020, Plaintiff had to send home all staff, employees and students. Residential dormitories were restricted to only those students who were homeless or who were unable to return to a home due to exigent circumstances. Remote work and an online platform were implemented throughout Plaintiff's locations by April 1, 2020, right after Spring Break, and classes resumed online for the remainder of the term. Many of the insured locations have reopened

but are subject to emergency Orders limiting operational capacity and increasing costs of operation.

41. It is undeniable that Plaintiff sustained losses because of the pandemic. In an effort to avert further illness and injury to citizens and to slow or prevent the community spread of SARS-CoV-2 virions, which themselves are tangible, physical things that invade physical property, government Orders limited Plaintiff's ability to physically use its property because the physical use of the insured property and its air increased the damage. These Orders evidence what is apparent to all: the presence of SARS-CoV-2 on or around Plaintiff's insured locations rendered the premises unsafe and unfit for their intended use. As a result, Plaintiff alleges it sustained significant losses.

III. COVID-19 Meets the Definition of a Communicable Disease

42. On April 3, 2020, Plaintiff provided its first notice of loss to Defendant and showed it had incurred business income losses during the policy term.

43. Even though Defendant never issued an official denial letter, on August 3, 2020, Defendant issued a letter (Exhibit B, hereto) to Plaintiff informing that only Communicable Disease Response and Interruption by Communicable Disease coverages would be triggered by Plaintiff's claim.

44. On October 28, 2020, Defendant's adjuster acknowledged coverage for Communicable Disease Response and Interruption by Communicable Disease and paid the one million sublimit of coverage for property loss arising from communicable disease, however at the same time Defendant's adjuster indirectly summarily rejected all other coverages.

45. The Policy's "Communicable Disease Response" coverage applies when an insured location "has the actual not suspected presence of communicable disease and access to such

location is limited, restricted or prohibited by: (1) an order of an authorized governmental agency regulating the actual not suspected presence of communicable disease; or (2) a decision of an Officer of the Insured as a result of the actual not suspected presence of communicable disease....” Ex. A at 29. Under this coverage, Defendant agrees to cover “the reasonable and necessary costs incurred by the Insured...for the: (1) cleanup, removal and disposal of the actual not suspected presence of communicable diseases from insured property; and (2) actual costs of fees payable to public relations services or actual costs of using the Insured’s employees for reputation management resulting from the actual not suspected presences of communicable diseases on insured property.” *Id.*

46. The Policy also provides coverage for “Interruption by Communicable Disease” which applies when an insured location “has the actual not suspected presence of communicable disease and access to such location is limited, restricted or prohibited by: (1) an order of an authorized governmental agency regulating the actual not suspected presence of communicable disease; or (2) a decision of an Officer of the Insured as a result of the actual not suspected presence of communicable disease....” Ex. A at 62. Under this coverage, Defendant agrees to cover the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY at such location with the actual not suspected presence of communicable disease.” *Id.*

47. “Communicable Disease” is defined in the Policy’s relevant part, as “disease which is transmissible from human to human by direct or indirect contact with an affected individual or the individual’s discharges.” *Id.* at 75.

48. Inclusion of these coverages means that the Policy expressly acknowledges that communicable disease causes “physical loss or damage” to property and such physical loss requires “cleanup, removal and disposal.”

49. COVID-19 as a “Communicable Disease” is a covered cause of loss.

50. There is no exclusion in the Policy for Communicable Disease or a Pandemic.

51. There is no exclusion in the Policy for the statistically determined risk of contamination, and any preventative actions taken relative to the same.

52. There is no exclusion in the Policy for the suspected presence of a contaminant.

53. The Interruption by Communicable Disease and Communicable Disease Response Coverages do not expressly preclude coverage under other coverages.

IV. Plaintiff’s Losses – The Devastating Slowdown and/or Cessation of Plaintiff’s Business Activities

54. In 1779, Plaintiff was the first American institution of higher education to be named a university. The brainchild of Benjamin Franklin, Plaintiff today has a total of 18,000 employees, out of those 5,048 are faculty members. It has a total of 26,552 students, 9,960 are full-time undergraduate students and 11,825 are full-time graduate students. Plaintiff’s 299-acre West Philadelphia campus reflects its rich heritage—a heritage closely bound with the birth and core values of the United States—home to more than 180 buildings and many notable landmarks.

55. All of Plaintiff’s 171 locations spread throughout its campuses in Pennsylvania and worldwide, are insured properties under the Policy. Ex. A at 80-128.

56. Institutions of higher education, such as Plaintiff, have been hit particularly hard by the ongoing COVID-19 pandemic. Since the disease began to spread rapidly across the country in late February and early March 2020, almost every college and university, including Plaintiff, has taken action to protect its students, faculty, staff, and the general public from COVID-19. This was no easy task. Most institutions of higher education are more like small or medium sized cities than mere schools, and Plaintiff is no exception. In addition to educating the future of America, they provide housing for thousands of students; serve and sell food; operate stores; employ large

numbers of faculty, administrators, and other employees; sponsor sports teams; host public events; and perform many other services.

57. Apart from the nightmarish logistical challenge, and the serious disruption to its core mission of education, the measures Plaintiff has taken as a result of the COVID-19 pandemic have had the sort of adverse financial impact that is the reason for buying business interruption insurance. After reducing dorms and dining halls to very limited student population and skeleton operations, Plaintiff provided room-and-board reimbursements, totaling in the millions of dollars to those students who were forced to leave campus. Other substantial losses include, but are not limited to, lost revenue from on-campus events; lost revenue from dining refunds; lost revenue from rent forgiveness; lost revenue from business services provided by Plaintiff, e.g. hotels, parking and retail; lost revenue from research shutdown of many departments; lost revenue from ticket sales from Plaintiff's museums and several art related events; conference cancelations and many others. And these losses may continue or worsen if these precautions continue.

58. The profits derived from Plaintiff's operations had a drastic hit with the slow down and radical changes implemented to Plaintiff's operations, which in some cases included complete cessation of certain operations at virtually each and every covered location, except medical services. Plaintiff believed that the Policy bought from Defendant in full effect would insure against unforeseen perils such as the COVID-19 pandemic and ensuing emergency Orders.

59. During the Policy period, in response to the emergency Orders and to the pervasive presence of COVID-19 in the insured locations, and in order to protect the health of its students, faculty, and staff, Plaintiff discontinued the majority of in person operations on its campus, shifted classes to online platforms and offered reimbursement for parking, living and eating expenses to its students, among other things.

60. Public health authorities understood that the risk of harm to people and property was real, concrete and imminent as COVID-19 was exploding in the general population at an alarming rate.

61. Whether a building has been infected prior to the emergency Orders or was at imminent risk of being invaded by the COVID-19 virus can be demonstrated by circumstantial evidence.

62. Beginning in March 2020, Plaintiff was forced to severely restrict on-campus activities even canceling academic, sports and entertainment events it would normally provide at its properties and derive revenue from, all as a result of, and in connection with the COVID-19 pandemic and related governmental restrictions on non-essential business.

63. Since March 19, 2020, Plaintiff was not permitted to allow the majority of on-premises activities other than those required for life/safety, operating almost entirely through an online platform. With the passing of time, as the emergency Orders allowed, Plaintiff began to return certain in person operations with limited capacity on-campus. As a direct result of the emergency Orders described herein, Plaintiff has incurred a physical loss of (or alternatively, damage to) its properties for regular operations.

64. Specifically, Plaintiff lost the ability to provide certain services at its properties, was denied access to a number of insured properties, the majority of its students and staff were prevented from physically occupying the properties, causing the properties to be physically uninhabitable by students, staff and faculty members except in cases of emergency, causing their function to be nearly eliminated, and causing a suspension of Plaintiff's normal operations.

65. This loss of and/or damage to Plaintiff's insured properties caused Plaintiff a substantial loss of gross earnings and gross profit with substantial incurred extra expenses.

66. As a result of the emergency Orders and the pandemic Plaintiff suffered business income and extra expense losses.

67. Plaintiff alternatively states that it suffered direct physical loss of, or damage to its property causing business income and extra expense losses, as a result of:

(i) its reasonable actions—regardless of emergency Orders—to preserve property and persons from an imminent risk of harm; or

(ii) the risk of imminent harm, as said risk of imminent harm is itself a covered cause of loss; or

(iii) emergency Orders designating Plaintiff's business as uninhabitable and unusable on premises and in other forms without a prior governmental finding of on-site contamination; or

(iv) emergency Orders pursuant to inherent authorities to act in a disaster regardless of the actual presence of COVID-19 virus on-site;

(v) the actual presence of COVID-19 at the insured premises; or

(vi) the availability of other coverages under the Policy.

68. Plaintiff's losses and expenses at its insured properties have continued through the date of filing of this action, and various operations restrictions in the emergency Orders are likely to continue.

69. Plaintiff's actions were reasonable and necessary to comply with the various Orders or to mitigate the physical losses described herein to prevent greater harms, or both.

70. Plaintiff's causes of loss are not excluded by the Policy.

71. Plaintiff has suffered substantial losses of insured business income and has incurred insured expenses caused by insured causes of loss within the terms and conditions of the Policy, or the common law.

72. First, courts have treated the terms “physical loss” and “physical damage” from the 1950s to the inception of COVID-19 pandemic as including the infusion of property with disease-causing agents—radon gas, asbestos, ammonia, smoke, bacteria, carbon monoxide, oil fumes, etc. Policyholders and insurance companies knew this, as did the entities that draft standard-form insurance policy language. Indeed, the insurance industry made payouts for losses from the first novel coronavirus, SARS-CoV-1. This knowledge, spanning decades, and the ease with which the insurance industry could have drafted language to address loss from the occurrence of a pandemic should have been considered by Defendant in adjusting Plaintiff’s claims.

73. Second, the presence of SARS-CoV-2 can cause physical loss or damage to property, like other disease-causing agents; for instance, an average person breathes in hundreds of thousands of asbestos fibers per day, but in the absence of injury as a result, there is no insurance claim. In other words, physical property suffers foreseeable loss or damage when danger to people and business activities from concentrations of ammonia, asbestos, radon or SARS-CoV-2 are high enough to be a risk to health.

V. Plaintiff Purchased Insurance for Its Business, Not Just Its Buildings

74. In order to protect its property, business, and income from losses, Plaintiff obtained the Policy issued by the Defendant.

75. At all relevant times, the Policy was in full effect as Plaintiff paid premiums due which the Defendant accepted. Plaintiff has been insured with the Defendant since 2006, paying the required premiums annually.

76. Plaintiff has continuously relied on the Defendant’s promises to cover its insured business income losses and its additional extra expenses caused by such losses.

77. The premium Plaintiff paid included coverages for, *inter alia*, real property, personal property, time element including business income and extra expense. It also

encompassed, but is not limited to, additional coverages for claims preparation costs, communicable disease response, interruption by communicable disease, decontamination costs, protection and preservation of property, contingent time element extended, extended period of liability, civil authority, ingress/egress, emergency vacating expense and attraction property. The coverages are set forth in Exhibit A.

VI. Relevant Policy Provisions Provide Coverage for Plaintiff's Loss

78. The losses and expenses incurred by Plaintiff's business operations are covered under various Policy provisions.

79. The Policy must be read as a whole in light of its purpose and the reasonable expectation of the parties. Plaintiff's Policy is an all-risk commercial property insurance policy that covers insured property "against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded, while located as described in this Policy." Ex. A at 8.

80. Regarding the mandatory nature of the rules governing insurance policy interpretation, the application of the *contra proferentem* rule⁵ places on the drafter of the Policy the burden to narrowly draft exclusions clearly.

81. Plaintiff has to prove a risk of physical loss or damage. Here, Plaintiff alleges that actual physical presence of COVID-19 attached to its property causing physical loss or damage, a fact admitted by Defendant who made a partial payment on Plaintiff's loss, as well as compliance with operative emergency Orders.

⁵ The *contra proferentem* rule has been called the "first principle of insurance law." See Kenneth Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531 (1996).

82. Loss of use of property because of the actual or imminent and substantial endangerment to people and property from a disease-causing agent is recognized in Pennsylvania as physical loss or damage.

83. There are no exclusions in Plaintiff's Policy for the loss of business income caused by emergency Orders, the presence of COVID-19, or the pandemic; or alternatively, otherwise resulting in the physical loss of or damage to Plaintiff's properties.

A. Preservation of Property

84. The Policy under "Protection and Preservation of Property" covers "reasonable and necessary costs incurred for actions to temporarily protect or preserve immediately impending, insured physical loss or damage to such insured property." Ex. A at 38.

85. Closing or depopulating the University pursuant to emergency Orders was designed to preserve and protect property. There is no limit on this liability. Since a covered or insured physical loss or damage under the Policy is the actual presence of a communicable disease, then it constitutes a physical loss or damage of the type insured.

86. Plaintiff acted to protect and preserve its property, and the lives of its community, and continues to do so for the foreseeable future. It was certainly reasonable and necessary to comply with the Governor's emergency Orders which were designed to mitigate the harm to people and property in the face of a pandemic disaster. These harms were certainly imminent and substantial and had manifested throughout the state and locally.

B. Time Element Coverages

87. The Time Element Coverage and Extended Time Element Coverage covers Plaintiff's deprivation of the unlimited use of its property and associated business income losses, as well as providing coverage for the time after the removal of the last Executive Order to ramp

back up to pre-loss levels of profitability. Time Element Coverage covers losses resulting from physical loss or damage of the type insured. Ex. A at 44. It covers, without limitation, lost gross earnings and / or gross profits, *id.* at 45-46, up to the Policy's applicable limits and sublimits.

88. Plaintiff has suffered and continues to suffer substantial loss of business income during the Policy term which were caused by the loss of or damage to its insured property at the covered locations.

89. Plaintiff's loss of business income is covered under the Policy and has not been excluded from coverage, thus, Plaintiff is entitled to payment for these business income losses.

C. Extra Expense

90. The Time Element section also provides coverage for Extra Expense. Ex. A at 48. Extra Expenses are recoverable if reasonable and necessary extra costs are incurred during the period of liability, including "to temporarily continue as nearly normal as practicable the conduct of the Insured's business." *Id.* The expenses incurred by Plaintiff beyond those necessary in the normal operation of its operations solely as a result of the physical loss and damage caused by COVID-19 trigger coverage under the Policy's Extra Expense coverage.

D. Decontamination Costs

91. The Policy also provide coverage for "Decontamination Costs," which covers "the increased cost of decontamination and/or removal of...contaminated insured property" if "insured property is contaminated as a direct result of insured physical damage and there is in force at the time of the loss any law or ordinance regulating contamination due to the actual not suspected presence of contaminants." Ex. A at 31.

92. There is no limit on "Decontamination Costs." *Id.* If insured property is contaminated as a direct result of insured physical damage and there is in force at the time of the

loss any law or ordinance regulating “contamination” due to the actual not suspected presence of “contaminant(s),” then this Policy covers, as a direct result of enforcement of such law or an ordinance, the increased cost of decontamination and/or removal of such contaminated insured property in a manner to satisfy such law or ordinance” Here, the closing of all Plaintiff’s campuses was a means of decontamination.

93. The policy defines “contamination” as “any condition of property due to the actual or suspected presence of any . . . virus, disease causing or illness causing agent” *Id.* at 75. In other words, decontamination is appropriate if there is a suspected presence of virus.

E. Civil Authority

94. The Policy provides coverage from an interruption to business caused by an order from a “Civil or Military Authority.” *Id.* at 55. Specifically, the Policy covers “the Actual Loss Sustained and EXTRA EXPENSE incurred by the insured during the PERIOD OF LIABILITY if an order of civil or military authority limits, restricts or prohibits partial or total access to an insured location provided such order is the direct result of physical damage of the type insured at the insured location or within five statute miles/eight kilometres of it.” *Id.*

95. A communicable disease is a physical loss or damage of the type insured under the policy. The actual presence of communicable disease at Plaintiff’s properties, which is not in dispute, is a “physical damage not excluded.”

96. This coverage applies because access to Plaintiff’s property has been limited, restricted, and prohibited in part or in total due to the presence and threat of COVID-19 and related emergency Orders.

97. Under the Policy, at least, actual communicable disease contamination of covered property is an insured physical damage as are “Preservation of Property” and “Decontamination”.

As noted, such actual contamination was pervasive in Pennsylvania, including within 5 statute miles of Plaintiff. Plaintiff was very much at risk.

98. Although the Policy limits the amount of payment for two discrete harms, it does not limit Policy coverage for other communicable disease related harms.

99. Specifically, the following hospitals and locations are home to innumerable COVID-19 positive cases and within the five miles-radius requested by the Policy language:

- Hospital of the University of Pennsylvania, Cedar Avenue (1.9 miles)
- Hospital of the University of Pennsylvania, Civic Center Boulevard (0.4 miles)
- Children’s Hospital of Philadelphia (1.5 miles)
- Mercy Fitz Hospital (4.5 miles)
- Thomas Jefferson University Hospitals (2.1 miles)
- Delaware County Memorial Hospital (5.0 miles)
- Methodist Hospital (2.8 miles)
- Frankford Hospitals (2.0 miles)
- Girard Medical Center (3.6 miles)
- Lankenau Medical Center (4.7 miles)
- Kensington Hospital (5.0 miles)

F. Ingress/Egress

100. The Policy provides “Ingress/Egress” coverage, which requires the Defendant to pay for “the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured...due to the necessary interruption of the Insured’s business due to partial or total physical prevention of ingress to or egress from an insured location” provided that “such prevention is a direct result of physical damage of the type insured to property of the type insured.” Ex. A at 56.

101. Unlike other insurance policies that require total prohibition of access to trigger this coverage, Plaintiff's Policy, on its face, includes partial or total physical prevention of access. Ingress to and egress from Plaintiff's property has been partially or totally prevented due to COVID-19 presence at the covered locations. The Executive Orders limited ingress/egress by limiting the size of gatherings, even for essential services, and the stay-at-home Orders which prohibited travel by students, staff, faculty, and potential students, except for limited purposes.

G. Additional Coverages

102. The actual presence of COVID-19 at Penn's locations and surrounding property and the emergency Orders have triggered coverage under many of the Policy's provisions including additional coverages not listed hereto and not limited to the following: "Contingent Time Element Extended"; "Expediting Costs"; "Claims Preparation Costs"; "Emergency Vacating Expenses"; and "Attraction Property" coverages.

VII. The Policy's Contamination Exclusion Does Not Apply

103. The Policy contains an exclusion that purports to preclude coverage for "contamination." Ex. A at 21. Among other things, the Policy defines "contamination" as a "virus." *Id.* at 75.

104. The Policy's "contamination" exclusion does not exclude coverage for loss caused by "communicable disease" or related emergency Orders.

105. The Policy's "contamination" exclusion does not exclude coverage for Plaintiff's claim, which is based on the direct physical loss or damage caused by COVID-19 and the resulting emergency Orders.

106. Defendant's letter from August 3, 2020, at one hand affirmed that "COVID-19 meets the definition of a communicable disease under the Policy," but on the other hand, Defendant

qualifies COVID-19 as "a form of contamination as defined in the Policy, which is excluded." Exhibit B. Defendant cannot have it both ways.

107. To the extent Defendant contends that the Policy's "contamination" exclusion bars coverage for loss caused by "communicable disease" or some other aspect of Plaintiff's claim, the Policy is ambiguous because it is susceptible to more than one reasonable interpretation and, therefore, must be construed against the drafter and in favor of coverage.⁶ If communicable disease is a covered cause of loss, as it is under this Policy, the Contamination exclusion is inconsistent and should not be construed as to nullify another section of this contract, especially in light of exclusionary language, that should be narrowly construed, as opposed to coverage provisions, which should be construed broadly. The Policy does not state that "communicable disease" is a subset of or included within the definition of "contamination."

108. Like all exclusions, this exclusion must be narrowly construed. The reference to "virus" within "contamination" exclusion is clearly not intended to exclude coverage for a pandemic involving a "communicable disease." The Policy's interpretation must give effect to all of the policy's language to determine its plain and ordinary meaning. The reference to "virus" is limited to the pollution context like the other "contaminants." Thus, the exclusion clearly does not apply here to a case that does not involve pollution.

VIII. The Insurer's Duties, its Arbitrary Denial and Company Line

109. Plaintiff, like others, purchased its insurance policy for business income protection caused by unforeseen disaster.

110. During such times, individuals and businesses (including Penn) are vulnerable and dependent on the Defendant's promises of coverage, a fact of which insurance companies

⁶ See *Penn Psychiatric Center v. United States Liability Ins. Co.*, 2021 WL 2460789, at *4 (Pa. Super. 2021);

(including the Defendant) has knowledge. Insurance companies promise, warrant and sell “peace of mind” that in the unlikely event of a catastrophe or disaster the policyholder will be fully and promptly protected.

111. The contract of insurance carries with it a duty of utmost good faith on the part of the insurer because of the vulnerability of policyholders during and following an insured cause of loss. The Defendant’s duties include but are not limited to the Defendant’s obligation to fairly and quickly adjust Plaintiff’s claims to determine coverage and amount of loss, adjust its insurance claims, and providing prompt payment.

112. Here, Defendant made a blanket decision initially to deny all business income claims. Defendant failed to make a good faith investigation, determine coverage and adjust Plaintiff’s claims because Defendant reached a pre-determined conclusion to deny coverage.

113. The Defendant summarily and arbitrarily asserted that Plaintiff’s losses were not caused from direct physical loss of or damage to covered property, but provided no basis therefore.

114. The Defendant summarily and arbitrarily did not adjust potential losses under the Policy coverages, simply relying on Defendant’s pre-determined conclusions of no coverage.

115. Without reasonable investigation, the Defendant made summary coverage determinations as to the inapplicability of civil authority coverage or other coverages but provided no basis for its factual conclusions.

116. For example, the Defendant did not consider, nor did it have any procedures to consider that the applicable law has recognized the “physical loss or damage” to property language as ambiguous in cases where, as here, dangerous viruses entered a building, or were at imminent risk of entering a building.

117. Instead, the Defendant chose to blanket deny coverage, with the exception of the communicable disease coverages discussed above, in violation of its contractual duty for the purpose of saving its bottom line.

118. Upon information and belief, the Defendant used similar or same coverage decision language in different states, without regard for applicable state statutory and decisional case law affecting coverage.

119. The Defendant's one-size-fits-all approach to its contractual and common law duties to act reasonably and in good faith to investigate claims, decide policy coverage, and make claim adjustments has led to the improper denial of countless business interruption claims, including Plaintiff's.

120. Plaintiff has now been forced to file a lawsuit and will expend considerable efforts pursuing this action.

121. Plaintiff (like others who purchase business interruption insurance) has faithfully paid its premiums. Yet, when Plaintiff made a claim because of a catastrophic business interruption caused by state and local emergency Orders, the Defendant summarily and arbitrarily denied Plaintiff's claims. At all relevant times, Plaintiff (like many businesses) relied on its business interruption insurance to cover what it is supposed to cover – replacement of business income and payment of ongoing expenses in order to rebuild its businesses.

122. Accordingly, Plaintiff brings this suit in response to the Defendant's breach of its contractual obligation to pay Plaintiff's covered losses; and in response to Defendant's failure or refusal to adjust Plaintiff's claims under applicable coverages, and promptly pay Plaintiff's business income losses and claims.

123. The losses Plaintiff suffered are covered under the Policy, but the Defendant has denied coverage despite Plaintiff's timely notice of its claim.

COUNT I

BREACH OF CONTRACT

124. Plaintiff incorporates by reference the preceding paragraphs as though fully set forth herein.

125. Plaintiff has a commercial property insurance policy issued by the Defendant.

126. Plaintiff has performed all its obligations as specified by the Policy including the payment of all premiums due, cooperating in loss investigation, and seeking to prevent avoidable additional losses.

127. Plaintiff's Policy provides coverage for losses, expenses, damages and costs, including but not limited to costs and expenses incurred mending or repairing the premises, business income loss, extended business income loss, and/or extra expense coverages.

128. As described in detail above, Plaintiff suffered a direct physical "loss of" (or alternatively, "damage to") its property at the covered locations, which was caused by or resulted from the emergency Orders described herein.

129. In the alternative, Plaintiff suffered and continues to suffer physical loss of and/or damage to its insured properties at the covered locations, which was caused by or resulted from the ubiquitous presence of the COVID-19 virus, and the numerous civil authority Orders, and emergency Orders, or both, all of which qualify as types of loss that "all risk" property policies are designed to insure.

130. Plaintiff further alternatively states that it suffered and continues to suffer physical loss of, or damage to its insured properties at the covered locations, which was caused by or resulted from:

- (i) subject to circumstantial proof, actual on-site COVID-19 presence that caused a loss of, or damage to its property; or
- (ii) its reasonable actions—regardless of emergency Orders—to preserve property and persons from an imminent risk of harm; or
- (iii) the risk of imminent harm, which is itself a covered cause of loss; or
- (iv) emergency Orders designating Plaintiff’s business as uninhabitable and unusable on premises and in other forms; or
- (v) emergency Orders pursuant to inherent authorities to act, regardless of the actual presence of COVID-19 virus on-site; or
- (vi) the availability of other coverages under the Policy.

131. This direct physical ‘loss of’ (or alternatively, ‘damage to’) Plaintiff’s property caused the necessary slowdown or cessation of Plaintiff’s normal operations, resulting in an actual loss of business income.

132. The Policy also provides that the Defendant will pay for any necessary expenses that Plaintiff incurs that it would not have incurred had there been no physical loss or damage to its property.

133. The Defendant is also in breach of the Policy by refusing to adjust potential losses under other potentially applicable coverages.

134. As a result of the Defendant’s repudiation or breach of the insurance policies, Plaintiff has suffered actual damages.

WHEREFORE, Plaintiff seeks compensatory damages resulting from the Defendant’s breach of contract, and further seeks all relief deemed appropriate by this Court, including attorneys’ fees and costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against the Defendant as follows:

- (1) Awarding Plaintiff compensatory damages from the Defendant's breach of the insurance policy in an amount to be determined at trial or appraisal ordered by this Court, together with appropriate prejudgment interest at the maximum rate allowable by law;
- (2) Awarding Plaintiff costs and disbursements and reasonable allowances for the fees of Plaintiff's experts, and reimbursement of expenses;
- (3) Awarding Plaintiff attorneys' fees; and
- (4) Awarding such other and further relief the Court deems just, proper, and equitable.

DEMAND FOR A JURY TRIAL

Plaintiff requests a jury trial for any and all Counts for which a trial by jury is permitted by law.

Respectfully submitted this 2nd day of September, 2021.

KANNER & WHITELEY, LLC

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