IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Dakota Girls, LLC, et al.,	:	
	:	
Plaintiffs,	:	
	:	**Civil Action No. 2:20-cv-2035**
v.	:	
	:	**Judge Morrison**
Philadelphia Indemnity	:	
Insurance Company,	:	**Magistrate Judge Jolson**
	:	
Defendant.	:	

PLAINTIFFS'[1] MEMORANDUM OPPOSING DEFENDANT'S PHILADELPHIA INDEMNITY INSURANCE COMPANY'S MOTION TO DISMISS

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[1] The Plaintiffs are Dakota Girls, LLC, Elliott Care, LLC, Dublin Ashanik, LLC, Educare of Greene, Inc., Campbell Family Childcare, Inc., Lillypad Learning Center, LLC, Fuqua Norman, Inc., Eagle School of Hilliard Ohio, Inc., Powell Enterprises, Inc., Park Enterprises of Ohio, LLC, Park School of Dublin, LLC, Fixari School of Pickerington, LLC, Fixari School of Reynoldsburg, LLC, Burkhold Enterprises, LLC, Park School of Gahanna, LLC, DiMuzio-Speranza Enterprises, Inc., and Chambers Holdings, Inc.

COMBINED TABLE OF CONTENTS AND SUMMARY
PURSUANT TO S.D. OHIO CIV. R. 7.2(a)(3)

I. PRELIMINARY STATEMENT

Over the past five months, more than eight hundred lawsuits have been filed across the country by businesses of all sizes—from small, family owned business to Minor League Baseball and National Basketball Association teams—seeking insurance coverage related, in one way or another, to the COVID-19 pandemic. This is one of those cases.

Plaintiffs operate 17 private preschools across the State of Ohio and provide child-care services to children ages six weeks to six years. Each Plaintiff has suffered (and continues to suffer) significant business income losses caused by the COVID-19 pandemic. As a result, Plaintiffs turned to their insurance company seeking the coverage they had consistently paid for, in some cases for more than a decade. Philadelphia Indemnity Insurance Company refused to honor their insured's claims based on a tortured, self-serving interpretation of the terms of the policies.

PIIC has moved to dismiss Plaintiffs' Second Amended Complaint. PIIC's Motion essentially raises three issues:

1. To properly assert a coverage claim, are Plaintiffs required to prove (at this stage or even later) that their properties suffered "demonstrable, physical *alteration*," even though the insurance policies contain no such language?

2. To properly assert a claim under the Communicable Disease Endorsement, are Plaintiffs required (at this stage, or even later) to prove an "actual illness" existed at their premises?

3. Does the Virus Exclusion eliminate the claims of the 7 Plaintiffs whose PIIC policies contain the exclusion, even though their policies also contain a Communicable Disease Endorsement?

As set forth below, the answer to each of these questions is no.

II. FACTUAL BACKGROUND

Plaintiffs operate private preschools throughout Ohio. (Second Amended Complaint ("SAC"), Doc. #22, ¶1, PageID 5350). In return for the payment of premiums, Philadelphia Indemnity Insurance Company ("PIIC") issued policies of insurance to the Plaintiffs.[2] The Policy provides insurance coverage for "Covered Properties" (a term defined in the Policy) for the periods relevant to this action. (*Id*., ¶6, PageID 5351). Plaintiffs have performed all of their obligations, including the payment of premiums. (*Id*., ¶7).

A. Plaintiffs Purchased "All Risk" Policies Covering All Risks of Direct Physical Loss

The insurance policies Plaintiffs purchased from PIIC were all-risk policies,[3] (*id*., ¶8, PageID 5351), and the coverages set forth in each Policy are materially identical. As a result, Plaintiffs will review the relevant coverages together.

i. Building and Personal Property Coverage Form

The Building and Personal Property Coverage Form provides that PIIC "will pay for **direct physical loss of or damage** to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." (Mot., Doc. #24, PageID

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[2] PIIC attached most of Plaintiffs' insurance policies to its Motion to Dismiss (Doc. #24) as Exhibit 1, Parts 1-15. Plaintiffs will refer to the policies collectively as "the Policy." PIIC did not attach the policies for plaintiffs DiMuzio-Speranza Enterprises, Inc. and Chambers Holdings, Inc.

[3] Although the Policy does not use the term "all-risk," it nonetheless qualifies as an "all-risk" policy because it covers all losses that are not specifically excluded. *See Gulino v. Econ. Fire & Cas.* Co., 971 N.E.2d 522, 524 (Ill. App. Ct. 2012); *Huntington Chase Condo. Ass'n v. Mid-Century Ins. Co.*, 379 F. Supp. 3d 687, 696 (N.D. Ill. 2019). "All Risk" policies "cover[] all direct physical losses or damages to the Properties unless the losses or damages are specifically excluded or limited by the Policy. *Johnson v. Arch Specialty Ins. Co.*, W.D.Tenn. No. 2:19-cv-02217, 2020 U.S. Dist. LEXIS 64010, at *2 (Apr. 13, 2020).

9957; emphasis added). The Policy also contains a form titled "Causes of Loss – Special Form" through which PIIC agreed that: "When Special is shown in the Declarations, Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this Policy." (Doc. #24, PageID 9982-9991). PIIC made a conscious decision not to define "direct physical loss of or damage to" and the Policy does not explain the distinction between "physical loss" and "damage."

ii. Business Income (and Extra Expense) Coverage Form

The Policy also contains a Business Income (and Extra Expense) Coverage Form. (Doc. #24, PageID 9973-9981). In the Business Income Coverage Form, PIIC contractually agreed to pay for Plaintiffs' actual loss of Business Income sustained due to the necessary "'suspension' of [their] 'operations' during the 'period of restoration' caused by direct physical loss of or damage to" properties described in the Policy. Under the Business Income coverage form, a "slowdown or cessation" of business activities at the Covered Property is a "suspension" under the policy, for which PIIC agreed to pay for loss of Business Income during the "period of restoration" that occurs within 24 consecutive months after the date of direct physical loss or damage. (*Id*., PageID 9973). "Business Income" under the Policy means "**a.** Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and **b.** Continuing normal operating expenses incurred, including payroll." (*Id*.).

iii. Civil Authority Coverages

The Policy contains an additional coverage called Civil Authority coverage.[4] This coverage is found in both the Business Income (and Extra Expense) Coverage Form and the Elite

[4] While there are two separate and distinct coverages for Civil Authority in the Policy, "[i]n the event of a conflict between an endorsement and an insurance contract, the endorsement controls. *Burlington Ins. Co. v. Eden Cryogenics LLC*, 126 F. Supp. 3d 947, 955 (S.D.Ohio

Property Enhancement: Day Care Centers Endorsement. These coverages are in addition to, and do not replace, other applicable coverage under the Policy. (Doc. 22, PageID 5353). Through the additional Civil Authority coverage, PIIC contractually agreed that when a Covered Cause of Loss causes damage to property other than property at the described premises in the Policy, PIIC would "pay for the actual loss of Business Income [Plaintiffs] sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply: (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property." (*Id*.).

Unlike the Civil Authority coverage in the Business Income (and Extra Expense) Coverage Form, the Civil Authority coverage in the Elite Property Enhancement: Day Care Centers Endorsement does ***not*** contain a geographical restriction: "We will pay for the actual loss of "Business Income" you sustain and necessary "Extra Expense" caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss." (Doc. #24, PageID 9998).

2015), citing *Workman v. The Republic Mut. Ins. Co.*, 144 Ohio St. 37, 46, 56 N.E.2d 190, 194 (Ohio 1944) ("The endorsement must be regarded as a modification of the terms of the original contract of insurance if a clear inconsistency appears").

iv. Communicable Disease and Water-Borne Pathogen-Business Income and Extra Expense Endorsement

Coverage under the Communicable Disease Endorsement provides another avenue to recover Business Income and Extra Expense. Through this Endorsement, PIIC contractually agreed:

> We will pay for the actual loss of **"business income"** you sustain and necessary **"extra expense"** you incur during a **"period of restoration"** as a result of having your entire **"operations"** temporarily shut down or suspended. The shutdown or **"suspension"** must be ordered by a local, state or federal Board of Health having jurisdiction over your **"operations."** Such shutdown must be due directly to an outbreak of a **"communicable disease"** or a **"water-borne pathogen"** that causes an actual illness at the insured premises described in the Declarations. An actual business shutdown must occur.

(Doc. #24, PageID 10009) (Emphasis in original). Additionally, PIIC agreed to "pay any necessary "extra expense" for compliance costs arising from the shutdown or "suspension…" (*Id*.). Importantly, for this Endorsement:

> Covered Cause of Loss means an outbreak of a **"communicable disease,"** or a **"water-borne pathogen"** caused by infectious or bacterial organisms. The infectious or bacterial organisms must cause actual illness and result in an order from a local, state or federal Board of Health having jurisdiction over your **"operations"** to temporarily shut down or suspend your entire **"operations"** at the insured premises described in the Declarations.

(*Id*., PageID 10010). "Communicable disease" is defined in the Policy as:

> **"Communicable Disease"** means an illness, sickness, condition or an interruption or disorder of body functions, systems or organs that is transmissible by an infection or a contagion directly or indirectly through human contact or contact with human fluids, waste, or similar agent, such as, but not limited to, Meningitis, Measles, or Legionnaire's Disease.

Unlike other coverages in the Policy, the Communicable Disease endorsement does ***not*** require "direct physical loss of or damage to" Covered Property. Finally, PIIC chose not to define the term "actual illness."

v. Virus Exclusion

PIIC relies on and cites to one exclusion in the Policy. The Virus Exclusion provides, in pertinent part: "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."

B. COVID-19 Global Pandemic and the State of Ohio's Response.

In or about January 2020, the Center for Disease Control and Prevention ("CDC") began responding to an outbreak of a respiratory disease that was first detected in China, and which has now been detected in more than 100 locations internationally, including the United States. (Doc. 22, PageID 5356). The virus has been named "SARS-Cov-2," and the disease has been named coronavirus disease 2019 (abbreviated "COVID-19"). (*Id.*). On January 30, 2020, the World Health Organization ("WHO") declared the outbreak a "public health emergency of international concern." (*Id.*). On January 31, 2020, Health and Human Services Secretary Alex M. Azar II declared a public health emergency for the United States to aid the nation's healthcare community in responding to COVID-19. (*Id.*, PageID 5357).

On March 9, 2020, Ohio Governor Mike DeWine issued Executive Order 2020-01 D, "Declaring a State of Emergency," in response to the growing COVID-19 public health crisis. (*Id.*). On March 11, 2020, WHO publicly characterized COVID-19 as a global "pandemic" requiring urgent and aggressive action to control the spread of the virus. (*Id.*). On March 13, 2020, the Ohio Director of Health, Dr. Amy Acton, issued an Order limiting access to Ohio's nursing homes and similar facilities. In her Order, Dr. Acton stated that the virus "can easily spread" and "individuals can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose or eyes." (*Id.*).

On March 22, 2020, Governor DeWine announced the Ohio Department of Health Director's Stay at Home Order, effective March 23, 2020 at 11:59 p.m., that all Ohioans were to stay-at-home unless engaged in essential work or activity. (*Id*.). That Order also explained:

> Schools and other entities that provide food services under this exemption shall not permit the food to be eaten at the site where it is provided, or at any other gathering site ***due to the virus's propensity to physically impact surfaces and personal property."***

(*Id*., PageID 5355-56) (Emphasis added.). Also, on March 22, 2020, Governor DeWine announced that "all child care programs must close by 11:59 p.m. on Wednesday, March 25, 2020." (*Id.*, PageID 5357). On March 24, 2020, Dr. Acton signed a Director's Order to "Close Facilities Providing Child Care Services," which was effective at 11:59 p.m. on March 25, 2020. The Order stated that facilities providing child care services were being closed "to avoid an imminent threat with a high probability of widespread exposure to COVID-19 with a significant risk of substantial harm to a large number of people in the general population." (*Id.*). The March 22, 2020 orders and the March 24, 2020 order are among the Closure Orders that have adversely affected Plaintiffs' Covered Properties and business operations. (*Id.*, PageID 5258). Plaintiffs' childcare facilities were shut down as of March 25, 2020 at 11:59 p.m. (*Id.*).

The CDC has found that the COVID-19 virus can last on surfaces such as those in Plaintiffs' private preschools for up to seventeen (17) days, thereby "damaging" – those surfaces in the process. (*Id.*, PageID 5357). Among other things, the nature and extent of COVID-19, and/or one or more Closure Orders, have rendered Plaintiffs' facilities uninhabitable and unusable and/or have caused direct physical loss of or damage to Plaintiffs' Covered Properties and business operations. (*Id.*). COVID-19 and/or one or more Closure Orders have caused direct physical loss of or damage to Plaintiffs' Covered Properties and business operations, requiring suspension of operations at the Covered Properties. (*Id.*).

Further, each school had individuals on their premises with symptoms consistent with COVID-19, including, but not limited to, fever or chills, cough, shortness of breath, fatigue, muscle or body aches, sore throat, congestion or runny nose, or potentially had contact with someone diagnosed with COVID-19. (*Id*., PageID 5355).

As a result of the circumstances described above, Plaintiffs are entitled to coverage under the Policy. (*Id.*, PageID 5357).

III. LAW AND ARGUMENT

A. Motions to Dismiss under Fed. R. Civ. P. 12(b)(6) are subject to a high standard, which PIIC fails to meet.

A motion to dismiss under Rule 12(b)(6) tests "whether a cognizable claim has been pleaded in the complaint." *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988). Put another way, it "is a test of the plaintiff's cause of action as stated in the complaint, not a challenge to the plaintiff's factual allegations." *Sizemore v. Edgewood Bd. of Edn.*, S.D.Ohio No. 1:19-cv-555, 2020 U.S. Dist. LEXIS 67765, at *6-7 (Apr. 17, 2020), citing *Golden v. City of Columbus*, 404 F.3d 950, 958-59 (6th Cir. 2005). The Court is limited to evaluating whether the complaint sets forth allegations sufficient to make out the elements of a cause of action. *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983). All factual allegations are regarded as true and ambiguous allegations must be construed in the plaintiffs' favor. *Murphy v. Sofamor Danek Gp., Inc.*, 123 F.3d 394, 400 (6th Cir. 1997); *Feder v. SB2, Inc.*, S.D.Ohio No. 1:18-cv-00274, 2020 U.S. Dist. LEXIS 35288, at *8-9 (Mar. 2, 2020). Dismissal is inappropriate under Rule 12(b)(6) "'unless it appears beyond doubt that the [p]laintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 724 (6th Cir. 1996) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). Citing *Ashcroft v. Iqbal*, 556

U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 548, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the Sixth Circuit has held that the appropriate standard under 12(B)(6) is one of "plausibility," and not a "substantial" pleading burden. *Wesley v. Campbell*, 779 F.3d 421, 428 (6th Cir.2015).

B. <u>Ohio Rules of Insurance Policy Interpretation.</u>

Under Ohio law, an "insured bears the burden of proving coverage, while the insurer must prove that an exclusion to coverage is applicable." *Orchard, Hiltz & McCliment, Inc. v. Phoenix Ins. Co.*, 676 F.App'x 515, 520 (6th Cir. 2017). Court interpret exclusions "as applying only to that which is clearly intended to be excluded." *R.W. Beckett Corp. v. Allianz Global Corp. & Specialty SE*, N.D.Ohio No. 1:19-CV-428, 2020 U.S. Dist. LEXIS 72253, at *19-20 (Apr. 24, 2020).

Courts in Ohio "employ a two-step process in interpreting contracts, looking first to whether the language in the policy is clear and unambiguous." *R.W. Beckett, supra*. If the policy language is clear and unambiguous, Courts "give contract terms their plain and ordinary meaning." *Id*. However, if language is an insurance policy is ambiguous, the analysis continues:

> Under Ohio law, if an insurance policy is ambiguous, the policy is construed strictly against the insurer. *Andersen v. Highland House Co.*, 93 Ohio St. 3d 547, 2001- Ohio 1607, 757 N.E.2d 329, 332-33 (Ohio 2001). "[I]t will not suffice for [the insurer] to demonstrate that its interpretation is more reasonable than the policyholder's." *Id.* at 333 (quotation omitted). Instead, "in order to defeat coverage, the insurer must establish not merely that the policy is capable of the construction it favors, but rather that such an interpretation is *the only one* that can fairly be placed on the language in question." *Id.* at 332 (quotation omitted) (emphasis added). If the policy is ambiguous, and the insured's interpretation is reasonable, the insured prevails.

Perry v. Allstate Indemn. Co., 953 F.3d 417, 421 (6th Cir.2020) (emphasis in original); s*ee also Baldwin v. Allstate Fire & Cas. Ins. Co.*, N.D.Ohio No. 1:18 CV 1078, 2020 U.S. Dist. LEXIS

6147, at *12 (Jan. 14, 2020) ("Insurance policies are to be interpreted strictly against the drafter and in favor of the non-drafting party."); *R.W. Beckett Corp., supra* at *19-20, quoting *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, 519 N.E.2d 1380 (1988) ("If the language is ambiguous, however, the court must proceed to construe the contract 'strictly against the insurer and liberally in favor of the insured.'"); *M&M Bar Corp. v. Northfield Ins. Co.*, 260 F. Supp. 3d 895, 899-900 (N.D.Ohio 2017) ("In examining the language of the insurance policy, the Court will resolve any ambiguities in favor of the insured."). When examining undefined terms in an insurance contract, "[t]he Sixth Circuit and other federal courts, as well as the Ohio courts, look to dictionary definitions to determine the plain and ordinary meaning.…" *U.S. Specialty Ins. Co., supra,* citing *Westfield Ins. Co. v. Continental Ins. Co.,* 2015 U.S. Dist. LEXIS 45437, 2015 WL 1549277, *4 (N.D. Ohio 2015) (Nugent, J.); *Rite Aid of Ohio, Inc. v. Marc's Variety Store, Inc.*, 93 Ohio App.3d 407, 415, 638 N.E.2d 1056 (1994).

Courts around Ohio have repeatedly held that any reasonable construction which results in coverage for the insured must be adopted by the trial court. *See Trautman v. Union Ins. Co.*, 3d Dist. Hancock No. 5-09-34, 2010-Ohio-1504, ¶ 22; *Berg v. Erie Ins. Co.*, 4th Dist. Washington NO. 83 X 18, 1984 Ohio App. LEXIS 11768, at *1 (Dec. 10, 1984) ("When a policy contains a provision which is fairly susceptible of two reasonable constructions, the construction favoring the insured will be adopted, based upon the rationale that the insurer drew the contract and should be responsible for its contents."); *Parrish v. Bishop,* 5th Dist. Richland Case No. CA-1621, 1977 Ohio App. LEXIS 3498, at *7 (Jan. 1, 1977) ("Ohio courts have been in accord with the generally accepted rule that if an insurance contract is so drawn as to be equivocal, undertain [sic] or ambiguous as to require interpretation because susceptible to two or more different but sensible and reasonable constructions, the one will be adopted which, if consistent with the

objects of the insurance, is most favorable to the insured or his beneficiary."); *Royal Paper Stock Co. v. Robinson*, 10th Dist. Franklin No. 12AP-455, 2013-Ohio-1206, ¶ 29; *Hastings Mut. Ins. Co. v. Village Communities Real Estate, Inc.*, 10th Dist. Franklin No. 14AP-35, 2014-Ohio-2916, ¶ 14.

"Additionally, 'an exclusion in an insurance policy will be interpreted as applying only to that which is clearly intended to be excluded.'" *R.W. Beckett Corp., supra* at *21, citing *City of Sharonville*, 109 Ohio St.3d at 187, quoting *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.*, 64 Ohio St.3d 657, 665, 597 N.E.2d 1096 (1992). "The insurer, being the one who selects the language in the contract, must be specific in its use; an exclusion from liability must be clear and exact in order to be given effect." *S. Specialty Ins. Co., supra* at 784; *see also Acosta v. Potts*, S.D.Ohio No. 2:16-cv-612, 2017 U.S. Dist. LEXIS 165071, at *16 (Oct. 5, 2017), citing *Lane v. Grange Mut. Cos.*, 45 Ohio St. 3d 63, 65, 543 N.E.2d 488 (1989). "[W]here an insurer relies on an exclusion to deny coverage, the insurer has the burden of proving the applicability of the exclusion." *U.S. Specialty Ins. Co., supra*, citing *Will Repair, Inc. v. Grange Ins. Co.*, 2014-Ohio-2775, ¶ 21, 15 N.E.3d 386 (Ohio App. 2014).

Courts "must interpret the specific provisions of an insurance policy both as controlling and so as to avoid rendering any of its words or phrases surplusage or nugatory." *Joy Tabernacle-The New Testament Church v. State Farm Fire & Cas. Co.*, 616 F.App'x 802, 803 (6th Cir.2015); *see also William Powell Co. v. OneBeacon Ins. Co.*, 1st Dist. Hamilton Nos. C-190199, C-190212, 2020-Ohio-3270, ¶ 40, citing *Westgate Ford Truck Sales, Inc. v. Ford Motor Co.*, 2012-Ohio-1942, 971 N.E.2d 967, ¶ 14 (8th Dist.) ("Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.").

C. The SAC Satisfies Rule 8's Pleading Requirements and States Claims for Relief

PIIC contends the SAC contains only conclusions, but the detailed SAC consists of much more than the mere "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" that *Iqbal* warned against. 129 S. Ct. at 1949. The 18-page, 88 paragraph SAC identifies the specific policy provisions at issue, the events giving rise to the claims, the harm that triggered coverage under the Policy, and the fact that each Plaintiff has suffered losses. While PIIC may disagree with Plaintiffs' construction of certain words and phrases that are not defined in the Policy (because PIIC chose not to define them), the SAC clearly "give[s] the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)(quoting *Conley* v. *Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).

PIIC's motion rests largely on its disagreement about whether the SAC properly alleges Plaintiffs suffered a "direct physical loss of or damage to" their premises. PIIC complains that Plaintiffs should be required to "identify which properties suffered physical loss or damage, what the damage or loss was on any property, [and] how there was any *physical* impact on any property at all." Mot., Doc. #24, at PageID 5378-79 (emphasis in original). *Iqbal* and *Twombly*, however, do not run that far. When plaintiffs state "simply, concisely, and directly events that ... entitle[] them to damages," the rules require "no more to stave off threshold dismissal for want of an adequate statement[.]" *Johnson v. City of Shelby*, 574 U.S. 10, 12, 135 S.Ct. 346, 190 L.Ed.2d 309 (2014); *El-Hallani v. Huntington Nat. Bank*, 623 F. App'x 730, 739 (6th Cir. 2015) ("Although *Twombly* and *Iqbal* have raised the bar for pleading, it is still low."). *See also Insured Fin. Servs. v. State Farm Ins. Co.*, D.Neb. No. 8:18-CV-93, 2018 U.S. Dist. LEXIS 77369, at *10 (May 8, 2018) (insured's allegation that even though it satisfied all policy

conditions insurer failed to "pay for direct physical loss to the insured premises" sufficiently stated claim under Rule 8 and *Twombly*).

D. <u>Plaintiffs have alleged facts demonstrating "direct physical loss of or damage to" their properties, triggering coverage under the Policy.</u>

PIIC concedes that "direct physical loss" triggers coverage under the Policy. (Doc. #24, Mot. at PageID 5371-72 ("[T]he [closure] orders were not issued as a result of 'direct physical loss or damage to' any property at all, as **required to trigger coverage**[.]") (emphasis added); PageID 5379 ("[T]he SAC sets forth no facts establishing 'direct physical loss or damage' to the Covered Properties **necessary to trigger** Building, Business Income or Civil Authority Coverages.") (emphasis added). The SAC clearly alleges this "trigger" occurred:

> 54. Among other things, the nature and extent of COVID-19, and/or one or more Closure Orders, have rendered Plaintiffs' facilities uninhabitable and unusable and/or have caused ***direct physical loss of or damage to Plaintiffs' Covered Properties and business operations.***
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> * * *
>
> 56. COVID-19 and/or one or more Closure Orders have caused ***direct physical loss of or damage to Plaintiffs' Covered Properties and business operations***, requiring suspension of operations at the Covered Properties.
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> * * *
>
> 86. COVID-19 caused ***direct physical loss and damage to the insured premises***, as well as to other premises, such that the loss of business income and extra expense resulting from the suspension of Plaintiffs' business operations is covered under the Policies, and PIIC is obligated to indemnity Plaintiffs for their losses.

(SAC, Doc. # 22) (emphasis added).

Even though Plaintiffs have alleged, as a factual matter, the events that triggered coverage, PIIC contends the SAC contains no factual allegations that could plausibly lead to

entitlement to relief. To make this argument, PIIC conjures up its own definition of "direct physical loss or damage" – a definition nowhere found in the Policy: PIIC insists the phrase can only mean a "demonstrable physical alteration" to Covered Property. (Mot., Doc. #24, at PageID 5371, 5378, 5382, 5385). Using this narrow definition as a springboard, PIIC argues the SAC contains no allegations that suggest there's been any structural, physical alteration to any of the insured premises and therefore there can be no plausible claim for coverage (or breach of contract). PIIC's approach fails because its definition of "direct physical loss" is unduly restrictive, is not the only reasonable construction of the phrase, and is at odds with more than sixty years of case law.

Because "direct physical loss or damage" is not defined in the Policy, the words, individually and in combination, must be given their ordinary meaning, and if their ordinary meaning could reasonably result in coverage they must be construed that way. *See Perry*, *supra* at 421 ("'[I]n order to defeat coverage, the insurer must establish not merely that the policy is capable of the construction it favors, but rather that such an interpretation is *the only one* that can fairly be placed on the language in question." If the policy is ambiguous, and the insured's interpretation is reasonable, the insured prevails.") (quoting *Andersen v. Highland House Co.*, 93 Ohio St. 3d 547, 2001-Ohio-1607, 757 N.E.2d 329, 332 (2001)) (emphasis in original). There is, in fact, a different, reasonable construction of the term "physical loss" that results in coverage.

i. Plaintiffs' inability to use their properties constitutes "direct physical loss" of their premises

The SAC unquestionably alleges that the nature and extent of the pandemic, as well as orders that required Plaintiffs' facilities to close, rendered Plaintiffs' Covered Properties "uninhabitable" and "unusable." (SAC, Doc. #22, at PageID 5358). If "direct physical loss" can be commonly understood to encompass loss of use, and not just "physical alteration" or

structural damage as PIIC claims, the SAC has properly alleged a claim for breach of the insurance contract.

a. Black letter Ohio law dictates that "loss" means something other than "damage"

In insisting that "direct physical loss of or damage to" property means a physical alteration or structural change to the property, PIIC is arguing that in every instance there must be some type of physical damage. In short, PIIC contends "physical loss" means "physical damage." Such a construction, however, ignores the use of the disjunctive "or," common syntax construction, and Ohio law regarding insurance contract interpretation. As a result, PIIC's interpretation of "physical loss of or damage to" results in an extraordinary and unreasonable reading of that phrase.

The Sixth Circuit and other courts have consistently noted that the word "or" is a disjunctive that indicates there are alternatives that are to be treated separately. *See, e.g., Sec. Ins. Co. v. Kevin Tucker & Assocs.*, 64 F.3d 1001, 1007 (6th Cir.1995) (The word "or" in an insurance policy is to be read in the disjunctive); *Gencorp, Inc. v. Am. Internatl. Underwriters*, 178 F.3d 804, 821 (6th Cir.1999) ("'or' is generally considered a 'disjunctive' term which provides alternatives"); *Landrum v. Allstate Ins. Co.*, 11th Cir. No. 19-14539, 2020 U.S. App. LEXIS 14908, at *8 (May 11, 2020) ("Use of the disjunctive 'or' in the policy 'indicates alternatives and requires that those alternatives be treated separately'") (citation omitted). In short, the use of the disjunctive "or" in the phrase "direct physical loss or damage" means that either a loss ***or*** damage is required, and that a loss is distinct from damage.

Applying that rule to the very phrase at issue here, one court succinctly noted that "to interpret 'physical loss of' as requiring 'damage to' would render meaningless the 'or damage to' portion of the same clause, thereby violating a black-letter canon of contract interpretation—that

every word be given a meaning." *Total Intermodal Servs. v. Travelers Property Cas. Co. of Am.*, C.D.Cal. No. CV 17-04908 AB (KSx), 2018 U.S. Dist. LEXIS 216917, at *9 (July 11, 2018). Other courts have reached the same conclusion:

> As an initial matter, I reject ISOP's argument that a peril must physically damage property in order to cause a covered loss. As noted, the policy covered physical losses in addition to physical damage, and if a physical loss could not occur without physical damage, then the policy would contain surplus language. However, a contract must, where possible, be interpreted so as to give reasonable meaning to each provision without rendering any portion superfluous. Thus, 'direct physical loss' must mean something other than 'direct physical damage.' Indeed, if 'direct physical loss' required physical damage, the policy would not cover theft, since one can steal property without physically damaging it. And ISOP does not contend that the policy did not cover theft.

Manpower Inc. v. Ins. Co., E.D.Wis. No. 08C0085, 2009 U.S. Dist. LEXIS 108626, at *17-20 (Nov. 3, 2009); s*ee also Mangerchine v. Reaves*, 63 So.3d 1049, 1056 (La. Ct. App. 2011) ("Physical damage is only one cause of 'physical loss' of property; for example, a person can suffer the physical loss of property through theft, without any actual physical damage to the property.") (citing *Corban v. United Servs. Auto. Ass'n*, 20 So.3d 601, 612 n.17 (Miss. 2009)).

Similarly, PIIC's interpretation of the phrase "physical loss of or damage to" misapplies the common rules of syntax construction. PIIC construes the word "physical" as modifying both the "loss" and "damage," but it should be read to modify only the word "loss." Under the "nearest reasonable referent" canon of interpretation, "'[w]hen the syntax involves something other than [such] a parallel series of nouns or verbs,' the modifier 'normally applies only to the nearest reasonable referent[.]'" *Lockhart v. U.S.*, 136 S.Ct. 958,970, 194 L.Ed.2d 48 (2016) quoting A. Scalia & B. Gamer, *Reading Law: The Interpretation a/Legal Texts*, 152 (2012). *See, e.g., Swartz* v. *E.1. du Pont de Nemours* & *Co.,* S.D.Ohio No. 2:13-md-2433, 2019 U.S. Dist. LEXIS 101760, at *106-107 (June 17, 2019) (construing the words "permanent and substantial" to modify only the words "physical deformity" in statute that creates damages-cap exception for

"permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system").

Ultimately, PIIC's construction of the phrase "physical loss of or damage to" equates "loss" with "damage," thereby creating surplusage that Ohio courts disfavor when interpreting insurance contracts. *See DXE Corp. Liquidating Trust v. L3 Communs. Corp*., S.D.Ohio No. 3:12-cv-98, 2014 U.S. Dist. LEXIS 112080, at *37 (Aug. 12, 2014) ("A court must 'presume that words are used for a specific purpose' and strive to 'avoid interpretations that render portions meaningless or unnecessary.'") (quoting *Wohl v. Swinney*, 118 Ohio St. 3d 277, 2008 Ohio 2334, 888 N.E.2d 1062, 1066 (Ohio 2008). *See also Med. Assur. Co., Inc. v. Dillaplain*, 186 Ohio App.3d 635, 2010-Ohio-841, 929 N.E.2d 1084, ¶ 54 (2d Dist.) ("Parties to a contract cannot be assumed to have agreed to a term which is meaningless in relation to the rights and duties the contract creates."); *Esken v. Zurich Am. Ins. Co.*, 12th Dist. Preble No. CA2005-02-002, 2005-Ohio-7035, ¶ 13 (rejecting construction of insurance policy that would have rendered one of two terms superfluous and meaningless).

If "physical loss" is different than "physical damage" – as it must be when the disjunctive "or" is considered – PIIC's argument falls apart. PIIC has offered no explanation for what "physical loss" means if it means something other than "physical damage."[5]

b. The ordinary meaning of the word "loss" and the term "physical loss" includes loss of use.

Ohio courts regularly "resort to dictionaries as a source for determining the established, ordinary meaning of words." *Jones v. Chagrin Falls*, 116 Ohio App.3d 249, 252, 687 N.E.2d 515, 518 (8th Dist. 1997). The Merriam-Webster dictionary's definition of "loss" includes "the

[5] Of course, PIIC could have defined these terms in the Policy. However, despite decades of case law addressing the very phrase at issue here, PIIC chose not to define these terms.

act of losing possession" and "deprivation." *See Loss*, Merriam-Webster, https://www.merriam-webster.com/dictionary/loss (last visited July 30, 2020). *See also Loss*, Dictionary.com, https://www.dictionary.com/browse/loss?s=t (last visited July 30, 2020) (defining "loss" as "the state of being deprived of or being without something that one has had"). "Loss" is commonly understood to mean deprivation or the inability to continue using something, and a reasonable policyholder would understand "loss" that way when paying for coverage. If PIIC had wished to narrowly define the word "loss" in the Policy it could have done so. But it deliberately chose not to.

Adding the word "physical" before the word "loss" does not change the result. "The word 'physical' is defined as 'of or relating to material nature, or to the phenomenal universe perceived by the senses; pertaining to or connected with matter; material; opposed to *psychical, mental, spiritual*.'" *Patel v. Am. Econ. Ins. Co.*, 12-CV-04719-WHO, 2014 WL 1862211, at *5 (N.D. Cal. May 8, 2014) (quoting the Oxford English Dictionary 744 (2nd ed.2001) (emphasis in original). When the words are read together, "physical loss" simply means, in common, ordinary parlance, the deprivation or loss of use of a physical item; one suffers a "physical loss" upon being deprived of the use of something that can be perceived through the senses. *See Mellin v. N. Sec. Ins. Co.*, 167 N.H. 544, 548, 115 A.3d 799 (2015) ("We are not persuaded that the common understanding of the word 'physical' requires the restricted reading Northern proposes. Rather, we conclude that 'physical loss' need not be read to include only tangible changes to the property that can be seen or touched[.]"). Plaintiffs' dispossession and loss of use of their premises is a "physical loss."

Many courts have held that "physical loss" includes loss of use and does not require physical alteration or structural change:

- *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) ("we are persuaded both that odor can constitute physical injury to property under Massachusetts law, and also that allegations that an unwanted odor permeated the building and resulted in a loss of use of the building are reasonably susceptible to an interpretation that physical injury to property has been claimed.").

- *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) ("When the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct [physical] loss to its owner.").

- *Motorists Mut. Ins. Co. v. Hardinger*, 131 F.App'x 823, 825-827 (3d Cir.2005) (where policy provided coverage for "direct physical loss," evidence that insured property was made "useless or uninhabitable" due to bacterial infection created issue of fact that defeated insurer's motion for summary judgment).

- *Am. Guarantee & Liab. Ins. Co. v. Ingram Micro, Inc.*, No. 99-185 TUC ACM, 2000 U.S. Dist. LEXIS 7299, at *6 (D. Ariz. Apr. 18, 2000) ("'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*") (emphasis added).

- *Gregory Packaging, Inc. v. Travelers Property Cas. Co. of Am.*, D.N.J. No. 2:12-cv-04418 (WHW) (CLW), 2014 U.S. Dist. LEXIS 165232, at *15, 22 (Nov. 25, 2014) (finding, as a matter of law, that ammonia leak constituted "direct physical loss of or damage to" to premises where leak "temporarily incapacitated" the facility for approximately one week, because "property can be physically damaged, without undergoing structural alteration, when it loses its essential functionality").

- *Hughes v. Potomac Ins. Co. of D.C.*, 18 Cal. Rptr. 650, 655 (Ct. App. 1962) (finding coverage where house was perched at edge of cliff due to landslide but was structurally undamaged; insured suffered a direct, physical loss because condition rendered the premises "useless to its owners").

- *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (holding the loss of use of church, rendered uninhabitable by gasoline vapors, constituted a direct physical loss).

- *Matzner v. Seaco Ins. Co.*, Case No. 96-0498, 1998 Mass. Super. LEXIS 407, at *9-10 (Mass. Super. Aug. 26, 1998) ("Defendant claims that contamination of the Building by carbon monoxide does not constitute "direct physical loss or damage" within the meaning of the Policy. I find and rule that the phrase "direct physical loss or damage" is ambiguous in that it is susceptible of at least two different interpretations. One includes only tangible damage to the structure of insured property. The second includes a wider array of losses. Following the rule of construction that an ambiguous phrase be accorded the interpretation more favorable to the insured, I adopt the latter interpretation.").

- *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn.App.2001) (where commercial policy provided coverage for "direct physical loss or damage," inability to distribute product due to government regulation constituted "direct physical loss" because "direct physical loss can exist without actual destruction of property or structural damage to property; it is sufficient to show that insured property is injured in some way.").

- *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (finding "[d]irect physical loss also may exist in the absence of structural damage to the insured property" because "a building's *function* may be seriously impaired or destroyed and the property rendered useless by the presence of contaminants") (emphasis added).

- *Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co.*, 806 N.Y.S.2d 709, 711 (App. Div. 2005) (rejecting argument that "demonstrable alteration" was required, holding instead that coverage is triggered when the "function and value [of the property] have been seriously impaired").

- *Dundee Mut. Ins. Co. v. Marifjeren*, 587 N.W.2d 191, 194 (N.D. 1998) (finding "storage facilities were 'damaged' in the sense they no longer performed the function for which they were designed. In other words, the interruption of electrical power 'damaged' the storage facilities by impairing their value or usefulness.").

- *Travco Ins. Co. v. Ward*, No. 715 F. Supp. 2d 699, 708 (E.D. Va. 2010) (noting that the majority of cases nationwide find that physical damage to property is not necessary where, at least, the property has been rendered unusable by a covered cause of loss).

- *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 493, 509 S.E.2d 1 (1998) (policy provision providing coverage for "direct physical loss" to insured property required "only that the property be damaged, not destroyed. Losses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property.").

In these cases, which span sixty years, courts applied the common, ordinary understanding of the words "direct physical loss" and reasonably concluded that the phrase encompasses loss of use.

Plaintiffs lost all functionality of their premises when they were deprived of the ability to use their property. (SAC at ¶ 54, Doc. # 22, PageID 5358). Despite this, PIIC contends Plaintiffs did not suffer any "'direct physical loss or damage' at any 'Covered Property.'" PIIC's view is untenable and unreasonable. The Policy's key undefined terms – "loss of" and "direct physical loss" – are individually and collectively broad enough to capture Plaintiffs' complete deprivation

of the use of their property. And if there is any doubt as to the meaning of these undefined terms, then the terms are at least ambiguous as to Plaintiffs' losses and therefore must be construed in favor of coverage.

In contrast to the many cases in which courts have held that "physical loss" includes loss of use, PIIC relies principally on *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App.3d 23, 2008-Ohio-311, 884 N.E.2d 1130 (8th Dist.). But there the appellate court construed the term "physical injury" rather than "physical loss," which makes the case inapposite:

> The term 'physical injury' is undefined by the policy, so we give that term its usual meaning. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 1995 Ohio 214, 652 N.E.2d 684. Read in context with the other terms used in the definition of 'property damage,' we construe the term 'physical injury' to mean a harm to the property that adversely affects the structural integrity of the house.
>
> * * *
>
> Absent any specific alteration of the siding, the Mastellones failed to show that their house suffered any direct physical injury as required by the homeowners' policy.

Id. at p. 40-41. PIIC's brief makes it seem as if the *Mastellone* court was construing the phrase "physical *loss*," the relevant phrase before this Court. However, it is evident from a simple reading of *Mastellone*, that the Eight District's focus was on "physical injury" and ***not*** "physical loss."

Interestingly, *Mastellone* actually supports Plaintiffs' argument in one important respect: the Eighth District recognized that "[w]hen used in an insurance policy, the word 'loss' is given its ordinary meaning of 'injury; forfeiture; **deprivation**; damage; deficiency.'") (emphasis added) (citing *Polk v. Landings of Walden Condominium Assn.*, 11th Dist. Portage No. 2004-P-0075, 2005-Ohio-4042)). Although the court was considering the word "loss" as used in the phrase "date of loss," which is a different context, the acknowledgement that the ordinary

meaning of "loss" includes "deprivation" and not simply "structural alteration" aids Plaintiffs' argument.

The other cases PIIC relies on likewise miss the mark or, in some respect, actually support Plaintiffs' position. For example, in *Universal Image Prods. v. Fed. Ins. Co*., 475 F.App'x 569, 573 (6th Cir.2012) (and in the cases cited in that decision), there was no claim of loss of use or whether uninhabitability qualified for coverage under the applicable policies. The court in *Universal Image Products*, however, expressly recognized that "[s]everal courts have held that 'physical loss' occurs when real property becomes 'uninhabitable' or substantially 'unusable,'" but agreed with the district court that no genuine issue of material fact had been presented "regarding the uninhabitability or usability of the Evergreen building." *Id*. at 574 (citations omitted). In other words, although the Sixth Circuit appears to have favorably recognized the case law that *supports* the position Plaintiffs are taking here, the question of whether "physical loss" includes loss of use was not addressed (and certainly not rejected, as PIIC implies). The same is true for the cases cited in *Universal Image Products*, which PIIC refers to in footnote 17 of its brief: those cases addressed other issues (such as the meaning of the word "direct" in the phrase "direct physical loss") but the courts were not asked to address whether "physical loss" includes loss of use.

Other language in the Policy confirms that "physical loss or damage" does not require a structural alteration to Plaintiffs' premises for coverage to exist. *See Russcher v. Outdoor Underwriters, Inc.*, 6th Cir. No. 19-4021, 2020 U.S. App. LEXIS 23927, at *12 (July 27, 2020), citing *Foster Wheeler Enviresponse, Inc. v. Franklin Cnty. Convention Facilities Auth.*, 78 Ohio St. 3d 353, 1997-Ohio-202, 678 N.E.2d 519, 526 (Ohio 1997) ("Courts review insurance policy terms in the context of the whole policy so as to read the terms in harmony.") For example, the

Policy's "Nuclear Energy Liability Exclusion Endorsement" notes that "property damage includes all forms of radioactive *contamination* of property." (Doc. # 24-3, PageID 6074-6075) (emphasis added). Clearly, "contamination" does not necessarily result in a "structural alteration."

In addition, the existence of a Virus Exclusion in seven of the policies (addressed in detail below) works against PIIC's constrained definition of "physical loss or damage." The insurance industry develops standardized forms, like the virus exclusion,[6] that insurers like PIIC use. ISO developed a virus exclusion in 2006 precisely *because* insurers like PIIC know "direct physical loss or damage" includes contamination; why else would the exclusion exist? While the presence of such an exclusion does not necessarily preclude coverage, the failure to include such an industry-developed exclusion in a commercial policy undermines an insurer's attempt to re-write an existing policy post-loss to deny claims involving viruses. It is particularly telling when an insurer fails to use a virus exclusion when one considers that case law has long supported the proposition that contamination of a property, or the surrounding area, by a disease-causing or noxious agent causes physical loss or damage when it is present in/around the property and/or permeates the interior of insured property. *See, e.g., Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, 800 N.Y.S.2d 356 (N.Y. Sup. Ct. 2005) (noxious particles present in the insured property constituted property damage under the terms of the policy); *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So.2d 600 (Fla.App.1995) (physical loss and damage where unknown substance adhered to surfaces of insured property); *Am. All. Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th

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[6] *See* Insurance Services Office ("ISO") form CP 01 40 07 06 "Exclusion of Loss Due to Virus or Bacteria." The ISO is an insurance advisory organization that, among other things, provides pre-printed policy forms and endorsements widely used by insurers. *See Reliance Natl. Ins. Co. v. Hatfield*, 228 F.3d 909, 915 (8th Cir. 2000); *see also* https://www.verisk.com/insurance/brands/iso/ (last visited July 30, 2020).

Cir. 1957) (contamination of property with radioactive dust and radon gas were present in property thereby causing physical loss and damage).

For these reasons, the Virus Exclusion does not bar Plaintiffs claims.

E. Plaintiffs have stated a claim for coverage under the Policy's Civil Authority Coverages

The SAC also alleges PIIC has breached the Policy by failing to pay Plaintiffs' losses under the Policy's "civil authority" coverage. This coverage is separate from, and in addition to, the other coverages provided under the Policy.

The Policy's "Elite Property Enhancement: Day Care Centers" endorsement provides the following:

> 2. We will pay for the actual loss of "Business Income" you sustain and necessary "Extra Expense" **caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property**, **other than at the described premises, caused by or resulting from any Covered Cause of Loss**. The coverage for "Business Income" will begin 72 hours after the time of that action and will apply for a period of up to three consecutive weeks after coverage begins. The coverage for "Extra Expense" will begin immediately after the time of that action and will end: (1) 3 consecutive weeks after the time of that action; or (2) When your "Business Income" coverage ends; whichever comes first.

Doc. # 24-20, PageID 9998 (emphasis added). The "civil authority" coverage under this particular endorsement provides coverage when a civil authority (1) prohibits access to the insured's premises (2) due to direct "physical loss of or damage to" property[7] other than the insured's premises (regardless of where that "property" is located, because there is no proximity

[7] Like other coverage provisions in the Policy, this "civil authority" coverage provision includes the "physical loss or damage" phrase. As discussed above, the common and ordinary meaning of the words "physical loss" of property includes the dispossession of that property, and that conclusion applies equally to the "civil authority" coverage.

requirement) (3) caused by or resulting from any Covered Cause of Loss (which the Policy defines as "direct physical loss"[8]). In sum, Plaintiffs are entitled to coverage if a civil authority prohibits access to their premises because of loss of use or physical harm that has occurred at other properties.

Additional "civil authority" coverage is provided in the "Business Income (And Extra Expense) Coverage Form":

> When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:
>
> > **(1)** Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
> >
> > **(2)** The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Doc. # 24-18, PageID 9974. The SAC quotes this language. SAC at ¶ 21, Doc. # 22 at PageID 5353. Notably, this "civil authority" coverage under the Policy does not include the "direct physical loss of or damage to" requirement.

Plaintiffs allege the factual predicates that triggered "civil authority" coverage under the Policy:

> 34. One or more Closure Orders have prohibited access to and the operation of each Plaintiff's Covered Property, and the area immediately surrounding each Covered Property, in response to dangerous physical conditions caused by a Covered Cause of Loss.
>
> * * *

[8] *See* "Causes of Loss – Special Form," Doc. # 24-19 at PageID 9982.

> 55. In response to the COVID-19 pandemic, the Closure Orders described above **prohibited access to businesses within the relevant geographic area surrounding Plaintiffs' schools.** Specifically, the March 22, 2020 Closure Order provided '[a]ll business and operations in the State, except Essential Businesses and Operations as defined below, are required to cease all activities within the State except Minimum Basic Operations, as defined below.' Upon information and belief, business in the relevant geographic area surrounding Plaintiffs' schools suffered direct physical loss of or damage to their properties as a result of COVID-19.

(SAC at ¶¶ 34, 55, Doc. #22 at PageID 5356, 5358-5359; emphasis added). These allegations are clearly sufficient to state a claim for coverage under the "civil authority" provisions.

It is difficult to imagine a clearer example of events for which "civil authority" insurance coverage exists. The March 22, 2020 "Stay at Home" order issued by the Ohio Department of Health – a "civil authority" order – prohibited access to all non-essential businesses surrounding Plaintiffs' premises. The March 24, 2020 "civil authority" order then required the closure of Plaintiffs' day care facilities. That Order came after closing other properties failed to slow the harm. And, in her March 22, 2020 "Stay at Home" order and April 2, 2020 amended order[9] requiring all non-essential businesses to cease operations, the Ohio Director of Health specifically noted "the virus's propensity to ***physically impact surfaces*** and personal ***property***." (Emphasis added).

It is more than a stretch for PIIC to insist the Closure Order "was not issued in response to dangerous physical conditions resulting from property damage occurring to property other than the insured premises, as required under the Policies." COVID-19 is so contagious and pernicious that *state-wide* Closure Orders were issued. The orders required "[a]ll business and

[9] The Director's Amended "Stay at Home" order issued April 2, 2020 can be found at https://content.govdelivery.com/attachments/OHOOD/2020/04/02/file_attachments/1418062/Signed%20Amended%20Director%27s%20Stay%20At%20Home%20Order.pdf (last visited July 31, 2020).

operations in the State, except Essential Businesses and Operations as defined below . . . to cease all activities within the State except Minimum Basic Operations[.]" (SAC at ¶ 55, Doc. #22 at PageID 5358).

The March 24, 2020 Closure Order lists all closures that preceded the closure of Plaintiffs' day cares. (March 24, 2020 Closure Order, Doc. #24-24 at PageID 10014-10017). The Order notes that before March 24, when the day cares were ordered closed, a state-wide state of emergency had been declared; an order had been issued to limit access to Ohio nursing homes; an order had been issued limiting access to jail facilities; an order had been issued closing Ohio's restaurants and bars; an order had been issued closing hair salons, nail salons, barber shops, tattoo parlors, and massage therapy locations; and an order had been issued instructing all people in the State of Ohio to stay at home unless engaged in essential work or activity. *Id*. Ohio's day cares were among the last businesses to be ordered closed, and they were closed because "community spread" of the virus was so far-reaching that "isolation of known areas of infection is no longer enough to control spread." (*Id*. at PageID 10017). In sum, by the time Plaintiffs' day cares were closed, every non-essential business had already been closed.

"Determining whether a complaint states a plausible claim for relief is a context-specific task" that requires this Court to "draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). That exercise leads to the inescapable conclusion that access to Plaintiffs' properties was prohibited by civil authorities as a result of widespread contamination, and that the action was taken by authorities in response to dangerous physical conditions that existed at neighboring properties (in fact, all properties).

The cases PIIC relies on to support its argument are distinguishable. None involve an active, wide-spread contagion that required all businesses to be closed because infection could

occur "by touching a surface or object that has the virus on it and then touching [an individual's mouth, nose or eyes." (March 24, 2020 Closure Order, Doc. # 24-24 at PageID 10014). And none of PIIC's cases involved a contagion in which governments throughout the United States recognized that "the virus physically is causing property loss or damage due to its proclivity to stay airborne and to attach to surfaces for prolonged periods of time," or the virus had a "propensity to physically impact surfaces and personal property," or "the virus physically is causing property loss and damage." (SAC at ¶ 32, Doc. #22 at PageID 5355) (quoting government closure orders from throughout the United States).

Other cites by PIIC are even more questionable. For example, at footnote 20 of its brief PIIC cites *Milkboy Center City LLC*, No. 2:20-cv-02036-TJS, ECF No. 14 at 16-17 (filed July 9, 2020) as support for the proposition that "the presence of COVID-19 on property other than Plaintiffs' would not constitute 'direct physical damage' to that property because the virus can be removed by cleaning." (Motion, Doc. #24 at PageID 5387). Setting aside the fact that there is no requirement that another property suffer "direct physical damage" for Plaintiffs to have coverage under the "civil authority" provisions, the citation to the *Milkboy* case is a citation to a ***motion filed by an insurance company***, not a court's decision. *See Milkboy Center City, LLC v. The Cincinnati Casualty Company*, No. 2:20-cv-2036 (E.D. Pa), ECF No. 14. Perhaps this was a simple oversight by PIIC; however, a motion filed by an insurance company carries zero precedential value.

F. Plaintiffs Have Alleged Sufficient Facts to Establish Coverage Under the Communicable Disease Endorsement.

While Plaintiffs and PIIC disagree on a lot, the parties agree that the Communicable Disease Endorsement does ***not*** require direct physical loss of or damage to Covered Property to trigger coverage under this Endorsement. The parties also appear to agree that COVID-19 is a

"communicable disease" as that term is defined in the Policy: "an illness, sickness, condition or an interruption or disorder of body functions, systems or organs that is transmissible by an infection or a contagion directly or indirectly through human contact or contact with human fluids, waste, or similar agent, such as, but not limited to, Meningitis, Measles, or Legionnaire's Disease." (Doc. #24-21, PageID 10010).[10]

That, however, is where the agreement ends. Contrary to PIIC's claim, the Policy does ***not*** require a showing of "actual illness" related to an outbreak of a communicable disease. As set forth above, PIIC contractually agreed as follows:

> We will pay for the actual loss of **"business income"** you sustain and necessary **"extra expense"** you incur during a **"period of restoration"** as a result of having your entire **"operations"** temporarily shut down or suspended. The shutdown or **"suspension"** must be ordered by a local, state or federal Board of Health having jurisdiction over your **"operations."** Such shutdown must be due directly to an outbreak of a **"communicable disease"** or a **"water-borne pathogen"** that causes an actual illness at the insured premises described in the Declarations. An actual business shutdown must occur.

Under this Endorsement, Plaintiffs must plead and ultimately prove: (1) their "operations" were temporarily shut down or suspended; and (2) the shutdown or "suspension" was ordered by a local, state or federal Board of Health having jurisdiction over their "operations." The SAC clears that hurdle by specifically alleging that Plaintiffs' childcare facilities were shut down as result of an Order signed by Director of Health, Amy Acton, MD, MPH. (Doc. #22, Page 5358). Next, Plaintiffs must show that the shutdown was due to ***either***: (1) an outbreak of a "communicable disease;" ***or*** (2) a "water-borne pathogen" that causes actual illness at the

[10] The CDC recently found: "COVID-19 is a quarantinable communicable disease in the United States, meaning that CDC may quarantine and restrict the movement of individuals who are arriving into the United States and have been infected with or exposed to the disease." *See* https://www.cdc.gov/quarantine/pdf/Public-Health-Order_Generic_FINAL_02-13-2020-p.pdf.

insured premises.[11] Again, the SAC clears that hurdle as it alleges Plaintiffs were shut down because of the COVID-19 pandemic, i.e., an outbreak of a "communicable disease." (*Id*., PageID 5354). Plaintiffs' interpretation of the Policy is reasonable and consistent with PIIC's decision to amend the Covered Cause of Loss definition to remove the "direct physical loss of or damage to" requirement for the Communicable Disease Endorsement.

Next, even if a showing of "actual illness" is required in the context of a shutdown due to "communicable disease"—which, it isn't—the allegations in the SAC satisfy Plaintiffs' pleading burden. At the outset, like other material terms in the Policy PIIC chose not to define "actual illness." PIIC assumes, without explanation, that "actual illness" means "a positive COVID-19 test." That requirement, of course, is not in the Policy. Moreover, it ignores the reality that widespread testing was unavailable during the period at the beginning of the pandemic. (*Id*., PageID 5355). It also ignores the myriad questions surrounding the effectiveness of the COVID-19 tests in March 2020. In essence, PIIC's interpretation of the Policy sets an impossible standard for Plaintiffs to meet. That is an unreasonable interpretation of the Policy. Plaintiffs' interpretation of the "actual illness" language is supported by a May 20, 2020 Ohio Department of Health Order[12], which provides:

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[11] This reading is consistent with fundamental rules of grammar. *See Zehentbauer Family Land LP v. Chesapeake Exploration, LLC*, N.D.Ohio No. 4:15CV2449, 2020 U.S. Dist. LEXIS 54541, at *38-39 (Mar. 30, 2020) ("The Gross Royalty Leases contemplate two factual scenarios that are separated by the coordinating conjunction 'or' indicating two independent clauses of equal rank."); *see also United States v. Schottenstein, Zox & Dunn (In re Unitcast, Inc.)*, 219 B.R. 741, 751 (Bankr.6thCir.1998), citing *Elliot Coal Mining Co. v. Dir., Office of Workers' Comp. Programs*, 17 F.3d 616, 630 (3d Cir.1994) ("it is the absence of a comma or other punctuation before the coordinate conjunction 'or' that would indicate it and its modifier, the limiting adjective clause, are to be treated separately rather than as part of the whole series.…").

[12] The Director's Order issued May 20, 2020 can be found at https://coronavirus.ohio.gov/static/publicorders/Stay-Safe-Partial-Rescission.pdf (last visited August 4, 2020).

> Persons who have tested positive for COVID-19, are presumptively diagnosed with COVID-19, **or are exhibiting the symptoms identified in the screening guidance** available from the U.S. Centers for Disease Control and Prevention and the Ohio Department of Health, unless they have recovered, shall not enter the State, unless they are doing so under medical orders for the purposes of medical care, are being transported by Emergency Medical Services (EMS), are driving or being driven directly to a medical provider for purposes of initial care, or are a permanent resident of the State. (emphasis added).

In other words, the State of Ohio is treating people who tested positive for COVID-19 and those who were exhibited symptoms the same.

Certainly, PIIC could have defined "actual illness" to include "positive test for communicable disease" or even expressly included a separate "positive test" requirement in the Policy. It did none of these things. "[F]ailing to define key terms may increase the risk that an insured will be unable to understand what losses are intended to be excluded from coverage. *Meridian Citizens Mut. Ins. Co. v. Horton*, E.D.Ky. No. 5:08-CV-302-KKC, 2010 U.S. Dist. LEXIS 28797, at *20 (Mar. 25, 2010). As a last resort, PIIC now asks the Court to judicially alter the terms of the Policy to impose requirements on Plaintiffs that were not bargained for. That is plainly improper.

Instead, because the term "actual illness" is undefined, the Court should look to the dictionary definition to determine the plain and ordinary meaning. *See Westfield Ins. Co. v. Continental Ins. Co.*, 2015 U.S. Dist. LEXIS 45437, 2015 WL 1549277, *4. "Actual" is defined as "existing in fact or reality" or "not false or apparent." *See Actual*, Merriam-Webster, https://www.merriam-webster.com/dictionary/actual (last visited August 3, 2020). "Illness" is defined as "an unhealthy condition of body or mind" or "a specific condition that prevents your body or mind from working normally: a sickness or disease." *See Illness*, Merriam-Webster, https://www.merriam-webster.com/dictionary/illness (last visited August 3, 2020). To

the extent "actual illness" is a requirement in this case—again, it is not—the symptoms alleged to have been suffered by individuals on-site at Plaintiffs' properties satisfy this element because, at a minimum, they demonstrate sickness. (Doc. 22, PageID 5355 ("fever or chills, cough, shortness of breath, fatigue, muscle or body aches, sore throat, congestion or runny nose, or potentially had contact with someone diagnosed with COVID-19.")))[13] Each of these symptoms is consistent with COVID-19[14] and each of these satisfy the dictionary definition of "actual illness" set forth above. At the very least, the term "actual illness" is ambiguous and must be construed against the insurer. *Perry, supra* at 421; *Natl. Union Fire Ins. Co. v. Paterson*, 417 F. Supp. 3d 888, 894 (N.D.Ohio 2019) ("If the Policy remains ambiguous after the policy's undefined terms are properly defined utilizing their plan and ordinary meanings, the ambiguity is construed in favor of Paterson, not National Union, so long as this interpretation is not an unreasonable interpretation of the Policy.").

Finally, despite PIIC's claim that "The Communicable Disease Endorsement Does Not Apply[,]" (Doc. #24, PageID 5388), PIIC's own denial letter completely eviscerates that claim. PIIC has admitted, in writing to its insured, that ***there is coverage*** under the Communicable Disease Endorsement under the very circumstances alleged by Plaintiffs in the SAC. In a May 7, 2020 denial letter to Plaintiff Powell Enterprises (owner of the Goddard School of Westerville

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[13] Despite PIIC's citation to a non-governmental, unauthenticated, inadmissible website, PIIC's claim that it is "extremely unlikely anyone associated with their premises actually suffered from COVID-19," (Doc. 24, PageID 5372), is inappropriate for resolution on a Fed. R. 12(B)(6) motion.

[14] https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (last visited August 4, 2020).

1), PIIC agreed to reimburse its insured for costs incurred "due to reported symptoms of COVID-19 within the premises":

> Pursuant to ¶A.2.a.(1) of the Communicable Disease Endorsement, and as previously advised, PIIC will reimburse the Goddard School for the cost of disinfecting the insured premises due to reported symptoms of COVID-19 within the premises.[15]

¶A.2.a.(1) of the Communicable Disease Endorsement provides that PIIC will pay for "[t]he cost of cleaning your equipment and disinfecting the insured premises in accordance with the jurisdictional Board of Health requirements[.]" (Doc. #24-21, PageID 10009). In the May 7, 2020 denial letter, PIIC tries to thread the proverbial needle by claiming there is no coverage under ¶A.1., but there ***is*** coverage under ¶A.2.a(1). There are several problems with this analysis. First, it ignores that both ¶A.1 and ¶A.2 are triggered by the same Covered Causes of Loss definition. That raises the question: How can ¶A.2 apply but not ¶A.1 when both are triggered by the same Covered Causes of Loss and ¶A.1. includes coverage for both "business income" and "extra expense"? The answer is simple: it can't. PIIC cannot have it both ways. In the denial letter, PIIC expressly told its insured that "reported symptoms of COVID-19 within

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[15] *See* Exhibit 1, May 7, 2020 PIIC Denial Letter. The Court may properly consider Exhibit 1 as it is incorporated in the Second Amended Complaint by reference and was an integral part of the Second Amended Complaint. *See Stevens Transp. TL, Inc. v. Great Am. Ins. Co.*, No. 1:11-CV-00236, 2012 WL 1564207, at *3 (S.D. Ohio May 2, 2012) (Court allowed to consider insurance contract between parties even though it was not attached to the complaint because it was incorporated in the complaint by reference and was an integral part of the complaint); *see also Clutter v. Long*, E.D.N.Y. No. CV 17-4833 (SJF) (ARL), 2018 U.S. Dist. LEXIS 151205, at *29 (Aug. 31, 2018), fn. 4 (considering denial letter when deciding motion to dismiss because it was "integral to the complaint.") (internal citations omitted). Further, the denial letter is clearly relevant to the claims in this case. *See Select Specialty Hosp.-Memphis v. Trustees of the Langston Cos.*, W.D.Tenn. No. 2:19-cv-2654-JPM-tmp, 2020 U.S. Dist. LEXIS 130740, at *18-19 (July 24, 2020) ("While documents integral to the complaint may be relied upon, even if [they are] not attached or incorporated by reference, [i]t must also be clear that there exists no material disputed issues of fact regarding the relevance of the document.").

the premises" triggered coverage under the Communicable Disease Endorsement, and told the insured it would be reimbursed. Now that litigation is being pursued, however, PIIC's position is changing. PIIC's apparent shifting position on this issue is further evidence of its bad faith.

Second, the Covered Causes of Loss definition under the Communicable Disease Endorsement tracks the language contained in ¶A.1. PIIC's position in the May 2020 denial letter was that coverage was both available and applicable based on "reported symptoms of COVID-19 within the premises." *See* Exhibit 1. The SAC expressly alleges that all Plaintiffs have reported individuals on their premises with symptoms of COVID-19. (Doc. #22, PageID #5355). While Plaintiffs disagree with PIIC's interpretation of the Policy as set forth above, even if PIIC's interpretation of the Policy is used as the relevant metric, PIIC's motion to dismiss must be denied.

Construing the factual allegations in a light most favorable to Plaintiffs, accepting the allegations as true, and drawing all reasonable inferences in Plaintiffs favor—as the Court must—the SAC clears the pleading bar. *See, e.g., Pope v. Kroger Co.*, S.D.Ohio No. 1:19-cv-817, 2020 U.S. Dist. LEXIS 108231, at *7 (June 19, 2020).

G. PIIC is Not Entitled to a 12(b)(6) Dismissal Under the Virus Exclusion

Because the SAC plausibly establishes that Plaintiffs suffered physical loss or damage to the premises covered under the Policy, and also that Plaintiffs' losses also are covered under the "civil authority" and communicable disease coverages, the burden shifts to PIIC to establish the application of an exclusion. *U.S. Specialty Ins. Co., supra*, citing *Will Repair, Inc., supra* ("[W]here an insurer relies on an exclusion to deny coverage, the insurer has the burden of proving the applicability of the exclusion.") PIIC has failed to carry its burden.

For ten of the seventeen Plaintiffs, PIIC does not suggest that any exclusion applies. For the other seven Plaintiffs, PIIC argues that their policies contain a "virus exclusion" that bars all of their claims.[16] As noted above, the terms of the "virus exclusion" *reinforce* Plaintiffs' arguments that PIIC intended to provide coverage for losses suffered due to the presence of a virus such as the coronavirus. The exclusion explains that it "applies to all coverage under all forms and endorsements . . . including . . . forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority." Doc. #24-22 at PageID 10012. PIIC would not have needed a "Virus Exclusion" (and certainly wouldn't have needed to state that it precludes business income, extra expense or civil authority coverages) if a virus could never trigger such coverage, as PIIC contends.

Regardless, PIIC's effort to invoke the "Virus Exclusion" against seven of the Plaintiffs fails. First, the provision states that coverage will be excluded "for loss or damage caused by or resulting from any virus[.]" But the seven Plaintiffs that PIIC seeks to use the exclusion against claim their loss or damage was caused by an Ohio Department of Health *Order* that required them to stop operating. As a results, the exclusion doesn't apply.

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[16] PIIC attached to its motion the "Virus Exclusion" for five of the seven schools. *See* Doc. #24-3 (the Goddard School of Dublin) at PageID 6115; Doc. #24-5 (the Goddard School of New Albany) at PageID 6724; Doc. #24-11 (the Goddard School of Tuttle Crossing) at PageID 8570; Doc. #24-14 (the Goddard School of Powell) at PageID 9468; and Doc. #24-15 (the Goddard School of Gahanna) at PageID 9768. PIIC failed to attach to its motion the insurance policies of two of the seven schools, the Goddard School of Chagrin Falls and the Goddard School of Westerville III, and therefore has failed to present proof that those two schools' policies have a "virus exclusion." Although this failure would ordinarily prevent PIIC from making its argument as to these two schools, Plaintiffs acknowledge that the two schools' insurance policies contain "Virus Exclusions" identical to the exclusion contained in the policies of the other five schools.

Second, PIIC is improperly advancing an argument that cannot be made at this stage of the proceedings. PIIC bears the burden of establishing an insurance exclusion. To invoke the "Virus Exclusion," PIIC must present proof that the seven Plaintiffs suffered "loss or damage caused by or resulting from [a] virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." PIIC has not presented any such proof and, indeed, cannot through a Rule 12(b)(6) motion. In fact, PIIC's claim that it is "extremely unlikely anyone associated with their premises actually suffered from COVID-19," (Mot., Doc.# 24, p. 4, fn. 4), cuts against the application of the Virus Exclusion.

Third, each of the seven Plaintiffs also has Communicable Disease coverage. (*See* Section V, *supra*). Applying the Virus Exclusion would make the Communicable Disease coverage illusory. As discussed above, the Policy defines a "communicable disease" as an "illness, sickness, condition or an interruption or disorder of body functions . . . transmissible by an infection or a contagion directly or indirectly through human contact or contact with human fluids, waste, or similar agent." (*See* Doc. #24-21 at PageID 10010). Indisputably, COVID-19 fits this description and therefore is a covered "communicable disease." In the Virus Exclusion PIIC states that it "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." (*See* Doc. #24-22 at PageID 10012). The coronavirus indisputably meets this definition too. As a result, PIIC provided (and the seven Plaintiffs paid for) coverage for losses caused by a communicable disease such as COVID-19, but PIIC now seeks to avoid paying by pointing to an exclusion that would make it impossible for Plaintiffs to obtain the benefit of the coverage they paid for.

Ohio courts avoid interpreting insurance contracts in a way that renders coverage illusory. Under Ohio law, "[a]n insurance provision is illusory [and therefore unenforceable] 'when it appears to grant a benefit to the insured, although in reality it does not.'" *Raudins v. Hobbs*, 2018 Ohio 2309, 104 N.E.3d 1040, 1056 (Ohio Ct. App. June 14, 2018) (quoting *Beaverdam Contr. v. Erie Ins. Co.*, No. 1-08-17, 2008-Ohio-4953, 2008 WL 4378153, at *10 (Ohio Ct. App. 2008)). *See also Will Repair, supra* ("Courts are not inclined to give insurance provisions meanings that would render them illusory."). If the Virus Exclusion is applied to the facts of this case, it would make the Communicable Disease Endorsement illusory.

H. <u>Plaintiffs' Bad Faith Claim is Not Subject to Dismissal.</u>

PIIC makes two argument in support of dismissing Plaintiffs' bad faith claim: (1) because there is no coverage, the bad faith claim fails; and (2) PIIC had "reasonable justification" for denying Plaintiffs' claims. Each of these arguments fail.

First, PIIC argues that ***if*** there is no coverage under the Policy, Plaintiffs cannot maintain a bad faith claim. As explained above, Plaintiffs have alleged sufficient facts triggering coverage under each applicable coverage form. As a result, PIIC's first argument fails.

Second, PIIC is improperly asking the Court—under Fed. R. 12(b)(6)—to make a factual determination about whether PIIC's denial of coverage to Plaintiffs was "reasonably justified." Given the posture of the case, now is not the appropriate time to make that determination. The cases cited by PIIC support this position as each cited by PIIC was decided *after* discovery was concluded. *See Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 558, 1994-Ohio-461, 644 N.E.2d 397 (trial); *Addington v. Allstate Ins. Co.*, 142 Ohio App.3d 677, 679, 756 N.E.2d 750 (9th Dist.2001) (decided on summary judgment); *Florists' Mut. Ins. Co. v. Ludy Greenhouse Mfg. Corp.*, 521 F.Supp.2d 661, 683 (S.D.Ohio 2007) (same). This makes sense given that

"[b]ad faith is a fact-intensive inquiry and cannot be determined by reliance on bright-line rules." *CHKRS, LLC v. City of Dublin*, S.D.Ohio No. 2:18-cv-1366, 2019 U.S. Dist. LEXIS 142878, at *32 (Aug. 22, 2019); see also *In re Equine Oxygen Therapy Resources, Inc.*, Bankr.E.D.Ky. No. 14-51611, 2015 Bankr. LEXIS 900, at *8 (Mar. 20, 2015) ("The question of bad faith is a fact-intensive inquiry.")

Here, no written discovery has been conducted, no depositions have been taken, and initial disclosures were exchanged August 10—one day before the filing of this opposition. PIIC is asking the Court to engage in an inherently fact-intensive inquiry based on nothing more than the SAC. Absent from the record is any *evidence* for the Court to consider regarding if/how PIIC evaluated or adjusted Plaintiffs' claims, no evidence relating to claims handling, or any other aspect of the claims process for that matter. The bottom line is that now is not the appropriate time for the Court to engage in the fact-intensive inquiry regarding any potential bad faith by PIIC. Accordingly, each of PIIC's argument fail and the motion to dismiss must be denied.

IV. CONCLUSION.

PIIC has failed to meet the high burden to dismiss Plaintiffs' claims under Rule 12(b)(6). Plaintiffs' Second Amended Complaint adequately and properly alleged claims for breach of contract, declaratory judgment, and bad faith. Specifically, Plaintiffs have sufficiently alleged facts supporting coverage under several different coverage forms and endorsements. Accordingly, PIIC's motion to dismiss must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Memorandum in Opposition to PIIC's Motion to Dismiss was filed electronically and served electronically on the following counsel of record, this 11th day of August, 2020:

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