RIDLEY PARK FITNESS, LLC	:	**COURT OF COMMON PLEAS**
	:	**PHILADELPHIA COUNTY**
Plaintiff,	:	
v.	:	
	:	**May Term, 2020**
PHILADELPHIA INDEMNITY INSURANCE COMPANY	:	**No. 200501093**
	:	
	:	
Defendant.	:	

ORDER

AND NOW, this _____ day of _____, 2020, upon consideration of the Preliminary Objections of Defendant Philadelphia Indemnity Insurance Company, and any responses thereto, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that the Preliminary Objections are **SUSTAINED**. It is further **ORDERED** that Plaintiff's Amended Complaint is **DISMISSED**, in its entirety, with prejudice.

BY THE COURT:

_____
J.

STRADLEY, RONON, STEVENS & YOUNG, LLP
By: Jeffrey D. Grossman, Esquire (PA ID No. 78537)
2600 One Commerce Square
Philadelphia, PA 19103
(215) 564-8000

DENTONS US LLP
By: Richard L. Fenton, Esq.
(admitted *Pro Hac Vice*)
233 S. Wacker Drive, Suite 5900
Chicago, IL 60606
(312) 876-8000

DENTONS US LLP
By: Jeffrey A. Zachman, Esq.
(admitted *Pro Hac Vice*)
303 Peachtree St., NE Suite 5300
Atlanta, GA 30308
(404) 527-4000

Attorneys for Defendant Philadelphia Indemnity Insurance Company

NOTICE TO PLEAD
To Plaintiff

You are hereby notified to file a written response to these Preliminary Objections within twenty (20) days from service hereof or a judgment may be entered against you.

/s/ Jeffrey D. Grossman
Jeffrey D. Grossman, Esquire

RIDLEY PARK FITNESS, LLC	:	
	:	**COURT OF COMMON PLEAS**
Plaintiff,	:	**PHILADELPHIA COUNTY**
v.	:	
	:	**May Term, 2020**
PHILADELPHIA INDEMNITY	:	**No. 200501093**
INSURANCE COMPANY	:	
	:	
Defendant.	:	

DEFENDANT'S PRELIMINARY OBJECTIONS
TO PLAINTIFF'S AMENDED COMPLAINT PURSUANT TO Pa.R.C.P. 1028(a)(4)

I. INTRODUCTION

1. Plaintiff seeks coverage under a Commercial Lines insurance policy issued by Defendant, Philadelphia Indemnity Insurance Company ("PIIC") (Policy No. PHPK1975212, the "Policy", attached as Exhibit A[1]), providing property insurance coverage for Plaintiff's business premises (the "Covered Property"). (*See* Am. Compl. ¶ 12.)

2. Specifically, the Amended Complaint alleges that PIIC improperly denied coverage for lost business income, extra expenses, and interruption by civil authority caused by the COVID-19 pandemic and related government-issued orders requiring the closure of non-essential businesses as a precaution to prevent further spread of the disease. Plaintiff seeks a declaration of coverage under the Policy. Plaintiff's claim fails for multiple reasons.

3. As an initial matter, the Amended Complaint does not meet the threshold pleading standard because it is devoid of factual averments that would entitle Plaintiff to relief. *See Feingold v. Hendrzak* 15 A.3d 937 (Pa. Super. 2011); *see also Briggs v. Southwestern Energy Prod. Co.,* 224 A.3d 334, 351 (Pa. Sup. 2020) (Complaint must plead facts necessary to establish the causes of action, not just a legal theory) (citing *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949) (then citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955)).

4. Pennsylvania is a fact-pleading state. *Feingold* at 943. Thus, "a complaint must not only give the defendant notice of what the plaintiff's claim is and the grounds upon which it rests,

[1] PIIC may rely upon and attach a complete version of the Policy to Defendant's Preliminary Objections, even though it is not attached, in full, to the Amended Complaint, because the Plaintiff's claims are based on and reference the Policy. *See Satchell v. Insurance Placement Facility of Pennsylvania*, 361 A.2d 375, 377 (Pa. Super. 1976) ("[W]hen the plaintiff bases his cause of action on a written agreement, the defendant may attach the agreement to the preliminary objections, and it may be referred to for purposes of deciding a demurrer."). For ease of reference, PIIC refers to the Bates labeled page numbers on the bottom right corner of Exhibit A.

but the complaint must also formulate the issues by summarizing those facts essential to support the claim." *Id*. (emphasis added).

5. Here, Plaintiff's Policy requires, among other things, "direct physical loss" to plaintiff's business premises, (the "Covered Property") as a prerequisite to Business Income and Extra Expense coverages. Similarly, a prerequisite to Civil Authority coverage is the issuance of civil authority orders barring access to the Covered Property in response to "direct physical loss of or damage to" properties other than the Coverage Property.

6. Although Plaintiff's Amended Complaint sets forth much about the COVID-19 pandemic and resulting emergency orders, it is wholly lacking facts to establish any actual physical loss or damage to any business premises anywhere, and contains no allegations that any insured property required repair or replacement of any kind. All that appears are conclusory non-sequiturs related to the issuance of government shut-down orders generally, and speculative assertions regarding the risk of "contamination" or "damage" resulting COVID-19. (*See* Am. Compl., ¶¶ 42-53.)

7. These allegations fail to establish "direct physical loss or damage" and are insufficient to survive a demurrer. *See Feingold*, 15 A.3d at 942. Defendant's Preliminary Objections must therefore be sustained and the Amended Complaint must be dismissed. *Id*.

8. The Amended Complaint also fails to state a claim under Pa.R.C.P. 1028(a)(4) for several other reasons.

9. First, Plaintiff's claims are barred by the Policy's clear, unambiguous, and specific exclusion of any "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" (the "Virus Exclusion"). (*See* Policy at 67 of 102). Plaintiff unquestionably claims "damage caused

by or resulting from" a "virus" that induces "physical distress, illness or disease," and therefore Plaintiff's claims fall squarely within the Virus Exclusion. *Id.* Plaintiff's conclusory assertion that the Virus Exclusion "does not apply" because the "losses were also caused by the entry of Civil Authority Orders", (Am. Compl. ¶ 31), does not override the express and unambiguous Policy language providing that the Virus Exclusion "applies to all coverage . . . forms or endorsements that cover business income, extra expense or action of civil authority." (Policy at 67 of 102.) To the contrary, Plaintiff admits that the losses in question were caused by a virus. (Am. Compl. ¶ 31). In any event, the Virus Exclusion precludes coverage for all losses "caused by or resulting from" a virus, whether that virus is the exclusive cause or not. (*See* Policy at 67 of 102).

10. Next, Plaintiff's claims fail because its alleged loss is not covered by the Policy--even in the absence of the Virus Exclusion. The Business Income and Extra Expense coverages both require Plaintiff to establish a "direct physical loss" to the Covered Property. To establish direct physical loss under applicable law, Plaintiff must show that the Coverage Property suffered demonstrable, physical alteration. The Amended Complaint, however, fails to set forth any facts establishing such physical alteration, impairment or damage. Although the Amended Complaint repeatedly parrots the phrase "direct physical loss," it does not plead facts establishing physical loss or explain how the spread of an infectious disease throughout the United States would result in tangible physical loss or damage to Plaintiff's business premises.

11. Similarly, Civil Authority Coverage requires that access to Plaintiff's premises be prohibited by civil authorities in response to "direct physical loss of or damage to" property other than the Covered Property. The Amended Complaint contains no allegations establishing "direct physical loss of or damage to" any other structures. Moreover, the governmental orders closing upon which Plaintiff relies were in response to the pandemic and to control further spread of the

disease, not in response to any physical damage to property. So, Plaintiff's claims fail as a matter of law.

12. Further, Plaintiff has established no basis on which to obtain declaratory relief. The Amended Complaint seeks a declaration of legal rights based on abstract assertions that Plaintiff suffered unspecified physical loss or damage at some time *in the past*. *See Corliss v. O'Brien*, 200 F. App'x 80, 84 (3d Cir. 2006)[2] ("Declaratory judgment is inappropriate solely to adjudicate past conduct . . . Nor is declaratory judgment meant simply to proclaim that one party is liable to another.").

13. In addition, the declaration Plaintiff seeks would not resolve the entire dispute between the parties and would thus require further proceedings to determine the precise losses that are covered under the Policy and the amounts, if any, that are due and owing. *See Kozlowski v. Dep't of Corr.*, No. 691 M.D. 2004, 2008 WL 9406062, at *4 (Pa. Cmwlth. Ct. Sept. 24, 2008); *Rendell v. Pennsylvania State Ethics Comm'n*, 938 A.2d 554, 559 (Pa. Cmwlth. Ct. 2007) ("Courts generally should refuse to grant requests for declaratory judgment where it would not resolve the controversy or uncertainty which spurred the request."). For these reasons, declaratory relief is inappropriate.

14. In sum, the allegations of the Amended Complaint simply do not establish a plausible basis for relief and, for that reason, the Amended Complaint should be dismissed in its entirety.

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[2] "[I]t is proper to give deference to federal interpretation of a federal statute when the state statute substantially parallels it." *Commonwealth v. Stuber*, 822 A.2d 870, 873 (Pa. Cmwlth. 2003)) (citing *Commonwealth v. Pennsylvania Labor Relations Board*, 107 Pa. Cmwlth. 132, 527 A.2d 1097 (Pa. Cmwlth. 1987). Here, Pennsylvania's Declaratory Judgment Act is similar to the Federal Declaratory Judgment Act.

II. FACTUAL BACKGROUND

15. Plaintiff operates a fitness center in Delaware County, Pennsylvania. (Am. Compl. ¶ 10.)

16. Plaintiff seeks coverage under a Commercial Lines insurance policy providing property coverage for Plaintiff's business located at 611 N. Swarthmore Ave., Suite A, Ridley Park, Pennsylvania. *Id.* ¶ 11. The Policy period extends from April 26, 2019 through April 26, 2020. (Policy at 10 of 102; Am. Compl. ¶ 13.)

17. The Policy includes coverage for certain lost business income ("Business Income Coverage") if Plaintiff's operations are suspended as a result of "direct physical loss" to the insured premises.

18. Specifically, the Policy provides Business Income Coverage for lost net income incurred during the "Period of Restoration"[3] "when your covered building or business personal property listed on the Declarations is damaged by a Covered Cause of Loss." (Policy at 84-85 of 102.)

19. Similarly, the Policy provides coverage for "Extra Expenses" incurred as a result of a direct physical loss ("Extra Expense Coverage") and defines "Extra Expense" as follows:

> Extra Expense means necessary expenses you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a **Covered Cause of Loss**.

(Id. at 85 of 102.)

[3] "Period of Restoration" is defined in the Policy as the period of time that "(1) Begins with the date of physical loss or damage caused by or resulting from any Covered Cause of Loss; and (2) Ends on the date when the property should be repaired, rebuilt or replaced with reasonable speed and similar quality." (Policy at 85 of 102.)

20. Under the Policy, "Covered Causes of Loss means direct ***physical loss***" unless otherwise excluded or limited under the Policy. (*Id.* at 68 of 102, emphasis added.)

21. Plaintiff also relies on a portion of the Policy that provides additional coverage related to the action of a civil authority ("Civil Authority Coverage"). (*See* Am. Compl. ¶ 14.) That language provides coverage "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**." (*Id.* at 84 of 102, emphasis added.)

22. Thus, both the Business Income Coverage and Extra Expense Coverage require Plaintiff to establish "direct physical loss" to the Covered Property. Similarly, the Civil Authority Coverage requires Plaintiff to establish that a civil authority barred access to the Covered Property in response to direct physical loss or damage to other property. (*Id.*) So, in all cases, direct *physical* loss of or damage to property – either Plaintiff's or someone else's – is a prerequisite to coverage.

23. All of the above coverages are also subject to a Virus Exclusion that excludes coverage for any "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." (Policy at 67 of 102.)

24. The Policy also includes a conspicuous notice highlighting the significance of the Virus Exclusion and encouraged Plaintiff to read all the Policy endorsements carefully. (*Id.* at 13 of 102.)

25. Against that backdrop, Plaintiff alleges that COVID-19 is a global pandemic that "physically infects" and spreads rapidly. (Am. Compl. ¶ 38.) Although Plaintiff does not allege any actual contamination or illness at the Covered Property, it alleges that the Governor of

Pennsylvania and other public officials ordered closure of all non-essential or non-life-sustaining businesses in an effort to limit the spread of the disease, in part because "the requisite contact and interaction causes a heightened risk of the property being contaminated." (*Id*. ¶ 49.) Plaintiff claims that in response to the Pennsylvania Governor's orders, Plaintiff closed its business on March 16, 2020. (*Id.* ¶ 54.)

26. Plaintiff filed this action seeking a declaration that it is entitled to coverage under the Policy. (Am. Compl. ¶¶ 66-73, Prayer for Relief, p. 16-17.)

III. LEGAL STANDARD

27. A preliminary objection under Pa.R.C.P. 1028(a)(4) – legal insufficiency of pleading – is in the nature of a demurrer and "is properly granted where the contested pleading is legally insufficient." *Weiley v. Albert Einstein Medical Center*, 51 A.3d 202, 208 (Pa. Super. 2012).

28. "[T]he question presented by the demurrer is whether, on the facts averred [in the Complaint], the law says with certainty that no recovery is possible." *Id.* at 209.

29. Furthermore, Pa.R.C.P. 1019 requires that "the material facts on which a cause of action or defense is based shall be stated in a concise and summary form." Pa. R. C.P. 1019(a)).

30. "Material facts" are "those facts essential to support the claim raised in the matter." *Lee v. Denner*, 2005 Pa. Dist. & Cnty. Dec. LEXIS 376, *14 (Monroe Cnty. C.P., May 16, 2005) (citing *Baker v. Rangos*, 324 A.2d 498, 505 (1974)).

31. It is a plaintiff's burden to show entitlement to relief with more than "conclusory[,] unsubstantiated suspicions and allegations", and a formulaic recitation "labels and conclusions, and a formulaic recitation of the elements of a cause of action. *Feingold v. Hendrzak* 15 A.3d at 942; *see also Briggs,* 224 A.3d at 351 (complaint must plead facts necessary to establish the causes

of action, not just a legal theory) (citing *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949) (then citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955)).

32. Although under Pa.R.C.P. 1028(a)(4) (legal insufficiency of pleading), the Amended Complaint's material factual allegations as accepted true for purposes of the motion, the Court is not required to accept legal conclusions or formulaic recitation of the elements of a claim. *See Briggs v. Southwestern Energy Prod. Co.,* 224 A.3d 334, 351 (Complaint must plead facts necessary to establish the causes of action, not just a legal theory) (citing *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949 and *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955)). Conclusory allegations are not entitled to the assumption of truth and must be disregarded. *See Feingold v. Hendrzak*, 12 A.3d 937, 942 (PA Super., Feb. 22, 2011).

33. Applying those standards here, and as more fully set forth below, Defendant's preliminary objections to Plaintiff's Amended Complaint should be sustained and the Amended Complaint should be dismissed for failure to state a claim.

IV. ARGUMENT

A. The Amended Complaint Fails To Meet Pa.R.C.P. 1019's Pleading Requirements.

34. Although Plaintiff seeks coverage under a policy of property insurance [4] that requires direct physical loss of or damage to property, Plaintiff pleads no facts describing any physical change, alteration, or damage to property.

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[4] Under Pa. R. C. P. 1019(h) & (i), Plaintiff must attach a copy of the Policy to the Complaint because Plaintiff's declaratory judgment claim is based on the language in the Policy. Pa. R. C. P. 1019(h) & (i); *Williams v. Nationwide Mut. Ins. Co*., 750 A.2d 881, 884 (Pa. Super. Ct. 2000) (dismissing insureds' claim for breach of contract where insureds failed to "attach the pertinent parts of the insurance policies to their complaint as required by Pa.R.C.P. 1019(h)."). As in *Williams*, Plaintiff failed to attach the complete Policy here, instead attaching a letter drafted by PIIC that contains excerpts of the Policy. (*See* Am. Compl., Exhibit 1.) However, so as not to burden the Court with unnecessary procedural minutiae, PIIC herewith submits a copy of the Policy as Exhibit A to its Objections. Notwithstanding Plaintiff's failure to attach the Policy to its

35. Instead, the Amended Complaint repeatedly recites the naked phrase "direct physical loss" without explaining what that loss is or alleging facts establishing how either the pandemic or the governmental emergency orders have physically altered or damaged property. (Am. Compl. ¶ 35 (asserting, again as a conclusion, that "contamination of the Insured Property would be a direct physical loss requiring remediation to clean the surfaces of the fitness center.").)

36. Such threadbare conclusions are insufficient to state a claim. *See Briggs v. Southwestern Energy Prod. Co.,* 224 A.3d 334, 351 (Complaint must plead facts necessary to establish the causes of action, not just a legal theory) (citing *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949) (then citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955)).

37. No facts are alleged establishing any "direct physical loss of or damage to" Plaintiff's respective properties, nor does Plaintiff claim that any insured property required repair or replacement of any kind.

38. The facts[5] set forth in the Amended Complaint allege that Plaintiff suspended its operations as a result of the pandemic and governmental closure orders. (Am. Compl. ¶¶ 42-45, 54.)

39. That, however, is not "direct physical loss or damage" to property. Indeed, Plaintiff admits COVID-19 *was not* physically present at the Covered Property. *Id.* ¶¶ 56.

40. Instead, Plaintiff filed suit based on the *risk* that the insured properties *might* be contaminated. *Id.* ¶¶ 57.

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pleading, the Court may consider the Policy terms in connection with these Objections. *See Satchell, supra.*

[5] A fact is "[s]omething that actually exists" or "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation." *Black's Law Dictionary* (10th ed. 2014).

41. The risk of contamination is not physical loss or damage.

42. Thus, facts related to the risk of future injury cannot save the Amended Complaint from dismissal.

43. Plaintiff attempts to cure its pleading defect by alleging that *Friends of DeVito, et. al v. Wolf*, a case having nothing to do with either insurance coverage or property damage, somehow "support[s] Plaintiff's position that physical loss and damage exists" *id.* ¶ 46, and that civil authority orders "were entered because of the contamination and damage of property caused by the Coronavirus near Plaintiff's Insured Property." (*Id.* ¶ 51.) Neither proposition withstands scrutiny.

44. First, *Friends* simply does not address "physical loss or damage" at any property, let alone address the question whether Plaintiff's property suffered physical loss or damage.

45. The issue in *Friends* was whether Governor Wolf's Executive Order requiring shutdown of certain non-essential activities in response to the COVID-19 pandemic was a valid exercise of the Governor's emergency powers.

46. In upholding the Governor's Executive Order, the court expressly stated that Governor Wolf issued the relevant closure orders in response to the pandemic generally, and to control further spread of the disease, not in response to "direct physical loss or damage to" any property. *See Friends*, 68 MM 2020 at 8 ("By its terms, the Executive Order compels the closure of all businesses in the state deemed to be non-life sustaining to prevent the spread of COVID-19 by limiting person-to-person interactions through social distancing.").

47. Second, Plaintiff's conclusory allegations regarding the impetus for Governor Wolf's Executive Order are belied by the order itself. Specifically, that order states that it was issued to mitigate the spread of the virus—not in response to property damage. *See e.g.*

Proclamation of Disaster Emergency, March 6, 2020 (https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf), last visited July 31, 2020; Pennsylvania Amendment to Proclamation of Disaster Emergency, June 3, 2020 (https://www.governor.pa.gov/wp-content/uploads/2020/06/20200603-TWW-amendment-to-COVID-disaster-emergency-proclamation.pdf), last visited July 31, 2020); *Feingold* at 942 ("conclusory[,] unsubstantiated suspicions and allegations" fail to satisfy the requisite pleading standard). Accordingly, *Friends* does not support Plaintiff's position here.

48. Accordingly, the Amended Complaint sets forth no facts establishing "direct physical loss or damage" to the Covered Property necessary to trigger Business Income or Extra Expense Coverages.

49. And Plaintiff pleads no facts establishing the government orders were in response to any physical loss of or damage to other property, which is prerequisite to any Civil Authority Coverage. *See Source Food Tech*, 465 F.3d at 837–38 (8th Cir. 2006) (insured did not suffer "direct physical loss" where government prohibited access to its property, reasoning that although plaintiff lost access to property, the property was not damaged in any way); *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 286-88 (S.D.N.Y. 2005) (airport parking company's financial losses arising from government-issued orders grounding all flights after 9/11 did not satisfy insurance policy's direct physical loss requirement because "the claimed loss must be physical in nature"); *United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F. 3d 128, 134-135 (2nd Cir. 2006) (civil authority coverage not available for airport closure ordered after September 2011 terrorist attacks even though nearby Pentagon was damaged, since "the government's … decision to halt operations at the Airport … was based on fears of future attacks" and not upon "damage to adjacent premises").

50. In short, Plaintiff pleads no facts that would establish a plausible claim for relief under the Policy as required under Pa.R.C.P. 1019(a). Thus, Defendant's Preliminary Objections should be sustained and Plaintiff's Amended Complaint should be dismissed.

B. The Amended Complaint Otherwise Fails To State A Claim Under The Plain Terms Of The Policy And Defendant's Preliminary Objections Under Pa.R.C.P. 1028(a)(4) Must be Sustained.

51. Quite apart from the Amended Complaint's Pa.R.C.P. 1019 deficiencies, the Amended Complaint otherwise fails to state a claim on which relief can be granted and, accordingly, Defendant's Preliminary Objections must be sustained and Plaintiff's Amended Complaint must be dismissed under Pa.R.C.P. 1028(a)(4).

1. The Virus Exclusion Bars Coverage.

52. As an initial matter, the Policy contains a clear and unambiguous Virus Exclusion excluding any "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." (Policy at 67 of 102.)

53. The Policy also includes a notice highlighting the significance of the Virus Exclusion and encouraging Plaintiff to read all the Policy endorsements carefully. (*Id.* at 15 of 102.)

54. To the extent Plaintiff has alleged any facts regarding its alleged loss, that loss clearly results from a "virus . . . that induces or is capable of inducing physical distress, illness or disease." (*Id*.)

55. Thus, on its face, the Virus Exclusion bars Plaintiff's claim for declaratory judgment. *See Gavrilides Mgmt. Co. v. Michigan Ins. Co*., No. 20-258-CB, (Ingham County, MI Circuit Ct.), transcript of July 1, 2020 hearing, attached hereto as Exhibit B, pp. 20-23 (finding

virus exclusion barred COVID-19 claim arising from government closure orders as a matter of law).

a. Plaintiff's Conclusory Allegation That The Virus Exclusion "Does Not Apply" To Plaintiff's Loss Cannot Be Considered.

56. Notwithstanding the plain language of the Virus Exclusion, Plaintiff baldly alleges that it does not apply because the "losses were not *solely* caused by a virus." (Am. Compl. ¶ 31.) As discussed above, Plaintiff's assertion that the Virus Exclusion "does not apply" is contradicted by the plain terms of the Policy and the unambiguous language of the exclusion. *See e.g. Lemanski v. Genalo*, 2011 Pa. Dist. & Cnty. Dec. LEXIS 508, *8 (Monroe Cty. C.P., Feb. 18, 2011) ("The 'court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion.") (citing *Penn Title Ins. Co. v. Deshler*, 661 A.2d 481, 483 (Pa. Cmwlth. 1995)).

57. The Policy language is clear—all losses "caused by or resulting from" viruses are excluded, whether the virus is the exclusive cause or not. (*See* Policy at 67 of 102).[6]

58. Accordingly, and even taking the well pleaded facts in the Amended Complaint as true, Plaintiff's claim is barred by the Virus Exclusion and must be dismissed under Pa.R.C.P. 1028(a)(4).

[6] Further, to the extent Plaintiff contends that its loss was caused exclusively by government-issued orders, rather than a virus, Plaintiff specifically concedes that its loss was not "direct" or "physical," as required by the Policy. Government orders, rules, requirements, or regulations unrelated to any physical loss or damage to property are not covered under the Policy. *See Philadelphia Parking Auth.,* 385 F. Supp. 2d at 286-88 (under Pennsylvania law, government-issued orders grounding all flights after 9/11 did not constitute direct physical loss requirement because "the claimed loss must be physical in nature."). Thus, either Plaintiff's loss "result[ed] from" a virus--in which case Plaintiff's claim is barred by the Virus Exclusion--or the loss did not "result[ ] from" a virus, in which it did arise from any physical loss or damage as required by the Policy.

b. Regulatory Estoppel Does Not Bar Application of the Virus Exclusion.

59. Plaintiff's Amended Complaint implies that PIIC should be estopped from enforcing the Virus Exclusion because the exclusion was allegedly procured "due to misleading and fraudulent statements." (Am. Compl. ¶ 21.) To the extent Plaintiff seeks to rely on the doctrine of regulatory estoppel to avoid the Virus Exclusion, it cannot do so.

60. Under Pennsylvania law, the essence of regulatory estoppel is a change in a party's legal position that is inconsistent with the position previously taken in front of a regulatory body:

> In essence, the [regulatory estoppel] doctrine prohibits parties from switching legal positions to suit their own ends. Thus, having represented to the insurance department, a regulatory agency, that the new language in the [] policies . . . did not involve a significant decrease in coverage from the prior language, the insurance industry will not be heard to assert the opposite position when claims are made by the insured policyholders.

Sunbeam Corp. v. Liberty Mut. Ins. Co., 566 Pa. 494, 500, 781 A.2d 1189, 1192 (2001).

61. To establish regulatory estoppel, Plaintiff must show that a party: (1) made a statement to a regulatory agency; (2) the regulatory agency relied upon the statement when deciding the issue presented to it; and (3) the party subsequently adopted a litigation position opposite to the one it presented to the regulatory agency. *Simon Wrecking Co., Inc. v. AIU Ins. Co.*, 530 F. Supp. 2d 706, 714 (E.D. Pa. 2008) (citing *Sunbeam Corp.*, 781 A.2d at 1189); *Hussey Copper Ltd. v. Royal Ins. Co. of Am.*, No. 07-758, 2009 WL 2913959, at *1 (W.D. Pa. Sept. 9, 2009).

62. Specifically, Plaintiff must show that PIIC took a position that "*directly contradict[s]*" the position it takes now. *Takeda Pharm. U.S.A., Inc. v. Spireas*, 400 F. Supp. 3d 185, 207 (E.D. Pa. 2019) (emphasis added).

63. "An industry that makes representations to a regulatory agency to win agency approval will not be heard to assert the opposite position when claims are made by [litigants such as] insured policyholders." *Hussey Copper, Ltd. v. Arrowood Indem. Co.*, 391 F. App'x 207, 211 (3d Cir. 2010); *Chem. Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 89 F.3d 976, 992 (3d Cir. 1996) (regulatory estoppel applied where insurer sought to give language different meaning than the meaning previously proffered to regulators).

64. Here, Plaintiff does not allege that PIIC itself made any representations to any regulator regarding the effect of the Virus Exclusion.

65. Plaintiff apparently assumes that PIIC can be estopped as a result of ISO's[7] representations to regulators because PIIC utilizes the ISO form virus exclusion.

66. This Court need not address whether regulatory estoppel can be applied vicariously, however, because the Amended Complaint demonstrates that PIIC's position here is *entirely* consistent with ISO's regulatory submissions and thus the doctrine of regulatory estoppel does not apply.

67. Plaintiff's Amended Complaint relies upon an ISO Circular[8] published in 2006 that includes the 2006 ISO regulatory filing for approval of the Virus Exclusion.

68. ISO's position in that filing is *identical* to the coverage position PIIC takes here. Specifically, the ISO Regulatory filing states:

> While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face

[7] ISO is the Insurance Services Office, Inc. (*See* Am. Compl. ¶ 17.)

[8] Plaintiff references the ISO Circular in the Amended Complaint, (*see* Am. Compl. ¶ 21), and relies on that document to support its regulatory estoppel argument. Thus, the Court may consider the ISO Circular for purposes of these Objections. *See Satchell v. Insurance Placement Facility of Penn.*, 361 A.2d 375, 377 (Pa. Super. 1976).

> claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.
>
> In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.
>
> ****
>
> ***The amendatory endorsement presented in this filing states that there is no coverage 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. The exclusion (which is set forth in Paragraph B of the endorsement) applies to property damage, time element and all other coverages***; introductory Paragraph A prominently makes that point. Paragraphs C and D serve to avoid overlap with other exclusions, and Paragraph E emphasizes that other policy exclusions may still apply.

(ISO Circular, attached hereto as Exhibit C (emphasis added).)

69. Thus, ISO fully disclosed that in the event of a pandemic or similar event, insureds might attempt to expand coverage under existing policies, and that the Virus Exclusion was being proffered to make clear that there was no coverage for virus-related losses. That position is on all fours with PIIC's position here.

70. So, even taking the facts pleaded in the Amended Complaint as true, PIIC's position with respect to coverage under the Policy is identical to the position ISO took when it submitted the Virus Endorsement for approval.

71. Plaintiff nevertheless alleges that when it submitted the virus exclusion to regulators, ISO misrepresented that property insurance policies "do not and were not intended to cover losses caused by viruses . . ." (Am. Compl. ¶ 21.)

72. But Plaintiff cites no authority establishing that virus-related losses, or losses related to a pandemic generally, were covered under property insurance policies prior to

submission of the ISO exclusion. And PIIC has found none.[9] So no facts are pleaded (or could be pleaded) that would establish that ISO's statement was incorrect or misleading.[10]

73. Finally, even where otherwise applicable, regulatory estoppel does not void clear and unambiguous policy provisions or provide a basis for rescission. It simply prevents a party from asserting a position in litigation contrary to the position it previously asserted before a regulatory agency. *See Simon Wrecking Co., Inc., supra,* 530 F. Supp. 2d at 711; *Chem. Leaman*, 89 F.3d at 992.

74. Since the Amended Complaint identifies no position currently being taken by PIIC that is in any way contrary the positions asserted in the ISO submission, there is nothing to "estop."

2. <u>The Amended Complaint Fails To Assert *Facts* Establishing A "Direct Physical Loss."</u>

75. Even if the Virus Exclusion were absent, the Amended Complaint still fails as a matter of law because Plaintiff has not pled facts showing "direct physical loss" to the Covered

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[9] The website link in paragraph 21 of the Amended Complaint leads to an *opinion* piece arguing that courts should not enforce the virus exclusion. It does not provide support for the proposition that claims arising from viral pandemics were generally covered under property policies. On the contrary, the law as of submission of the virus exclusion appears to support the ISO statement. Although it did not arise in the context of a pandemic , the Third Circuit in considering a similar claim involving asbestos contamination held that "[i]n ordinary parlance and widely accepted definition, physical damage to property means 'a distinct, demonstrable, and physical alteration' of its structure." *Port Authority of N.Y. and N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002) (citing 10 Couch on Insurance § 148:46 (3d ed.1998)). That decision was issued in 2002, just four years before ISO submitted the virus exclusion for approval.

[10] Even if ISO's statement about sources of recovery was arguably incorrect – and it was not – regulatory estoppel would still not apply. To invoke regulatory estoppel, Plaintiff must show that PIIC is taking a legal position *contrary* to the position previously taken before a regulatory body. *Simon Wrecking Co., Inc., supra,* 530 F. Supp. 2d at 706. Plaintiff has identified no inconsistency – and has certainly alleged no "direct contradict[ion]" – between ISO's prior regulatory statements and PIIC's coverage position here. Regulatory estoppel therefore does not apply. *See Takeda Pharm.*, 400 F. Supp. 3d at 207; *see also Hussey Copper, Ltd. v. Arrowood Indem. Co.*, 391 F. App'x 207, 211 (3d Cir. 2010) (rejecting regulatory estoppel argument and reasoning that "ISO's statements were not so contrary to [defendant's] position that [defendant] should be estopped from invoking the pollution exclusion here.").

Property, which is prerequisite to Business Income or Extra Expense coverage under the Policy. *See supra* IV.A.

76. To establish "physical damage" to property, Plaintiff must show "a distinct, demonstrable, and physical alteration of its structure." *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002) ("The mere presence of asbestos, or the general threat of future damage from that presence, lacks the distinct and demonstrable character necessary for first-party insurance coverage"); *Philadelphia Parking Auth. v. Fed. Ins. Co*., 385 F. Supp. 2d 280, 286-88 (S.D.N.Y. 2005) (under Pennsylvania law, financial losses arising from government-issued orders grounding all flights after 9/11 in response to threat of future harm did not constitute direct physical loss); "Physical" loss or damage, 10A Couch on Ins. § 148:46 ("The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.").

77. Moreover, "[p]hysical damage to a building as an entity by sources unnoticeable to the naked eye must meet a higher threshold." *Id.*

78. The presence of a source "unnoticeable to the naked eye" – such as asbestos or, as here, the COVID-19 – can only satisfy the definition of physical damage "[w]hen the presence of large quantities" "make the structure uninhabitable and unusable." *Id.*

79. For this reason, courts evaluating insurance claims arising from the COVID-19 pandemic have interpreted identical policy language to require a physical *change* to property. *See Social Life Magazine, Inc. v. Sentinel Ins. Co*., No. 20-cv-3311-VEC, (S.D.N.Y.), transcript of May 14, 2020 hearing, attached hereto as Exhibit D, p. 15 (finding plaintiff had no likelihood of

success on merits of business interruption claim related to COVID-19 where plaintiff had not shown damage to property that caused loss); *Gavrilides Management*, Exhibit B, pp. 18-23 (granting summary disposition of business interruption claim, without opportunity for leave to amend, arising from COVID-19 pandemic and finding "direct physical loss" "has to be something with material existence. . . . that alters the physical integrity of the property.").

80. Here, as discussed above, the Amended Complaint lacks any well pleaded facts establishing any physical loss or damage to the Covered Property.

81. And although Plaintiff asserts that "there is an ever-present risk that the Insured Property is contaminated and would continue to be contaminated," (Am. Compl. ¶ 56), the ***risk*** of harm is not a direct physical loss. *See Philadelphia Parking Auth*., 385 F. Supp. 2d at 286-88 (under Pennsylvania law, government closure orders based on *risk* of future harm did not constitute direct physical loss or damage); *White Mountain Communities Hosp. Inc. v. Hartford Cas. Ins. Co*., No. 3:13-CV-8194 JWS, 2015 WL 1755372, at *2 (D. Ariz. Apr. 17, 2015) (finding loss was not caused by "direct physical damage" despite threat of forest fire, where loss was caused by government closure orders, not fire or smoke damage to property); *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co*., 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014) (phrase "direct physical loss or damage" did not include closure of insured law firm after utility company preemptively shut off power to lower Manhattan due to potential for future damage caused by impending Superstorm Sandy).

82. Plaintiff does not allege that the virus is present at the Covered Property,[11] much less plead facts establishing that the virus physically changed or altered that property in any way.

[11] Even if Plaintiff had alleged that COVID-19 was present at the Covered Property, that would not render the property unusable, unsuitable or unsafe – much less have caused "physical damage" to the property. At most, the Covered Property would have required cleaning or sanitizing – a

83. Nor does Plaintiff allege that any property required repair or replacement.

84. Accordingly, even taking the well pleaded facts in the Amended Complaint as true, it fails to state a claim.

3. The Civil Authority Coverage Does Not Apply Because Plaintiff Has Not Alleged Any Facts Related To That Coverage.

85. Mirroring similar requirements found in the Business Income and Extra Expense Coverages, the Civil Authority provision provides coverage "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**." (Policy at 84 of 102, emphasis added.)

86. Accordingly, to establish coverage, Plaintiff must show that "distinct, demonstrable, physical alteration" to property other that its own *caused* a civil authority to issue an order prohibiting access to the Covered Property. *See Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 685 (5th Cir. 2011) (interpreting an almost identical coverage provision and holding that "the action of civil authority prohibiting access to the described premises must be caused by direct physical loss of or damage to property other than at the described premises; and [] the loss or damage to property other than the described premises must be caused by or result from a covered cause of loss as set forth in the policy.").

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purely economic loss that the courts have recognized is ***not*** "physical loss of or damage to property."[11] *See Universal Image Prods., Inc. v. Federal Ins. Co.*, 475 Fed. App'x. 569, 573-74 (6th Cir. 2012) (economic losses from cleaning and remediation expenses sustained due to contamination of mold and bacteria did not constitute physical damage because the building itself was not physically damaged);[11] *Mama Jo's, Inc. v. Sparta Ins. Co.*, No. 17-cv-23362, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018) ("***cleaning*** is not considered direct physical loss"); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App.3d 23, 884 N.E.2d 1130, 1144 (Ohio Ct. App. 2008) (mold on exterior siding of house was not "physical damage" because it could be removed by ***cleaning*** with bleach).

87. As with the Business Income and Extra Expense Coverages, the order must arise from a *present* physical alteration, rather than the threat of future harm. *Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co.*, 440 F. Supp. 3d 520, 530-31 (D.S.C. 2020) (When the focus of the executive order is on the potential, future, or predicted impacts on life and property then the order was not issued because of direct physical loss or damage to property); *Philadelphia Parking Auth*., 385 F. Supp. 2d at 286-88 (under Pennsylvania law, government closure orders based on *risk* of future harm did not constitute direct physical loss or damage); *White Mountain Communities Hosp. Inc. v. Hartford Cas. Ins. Co*., No. 3:13-CV-8194 JWS, 2015 WL 1755372, at *2 (D. Ariz. Apr. 17, 2015) (finding loss was not caused by "direct physical damage" despite threat of forest fire, where loss was caused by government closure orders, not fire or smoke damage to property).

88. Here, Plaintiff has failed to allege facts establishing damage to property other than Plaintiff's.

89. As discussed above, Plaintiff cannot equate the *potential* presence of COVID-19 in or around its property with actual contamination or damage. *See id.*

90. Further, none of the orders upon which Plaintiff relies were issued in response to any present, dangerous condition caused by physical damage to specific property.

91. To the contrary, Governor Wolf's Executive Order, upon which Plaintiff relies, states that it was issued to mitigate the *further* spread of the virus—not in response to any property damage. *See e.g.* Proclamation of Disaster Emergency, March 6, 2020 (https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf), last visited July 31, 2020; Pennsylvania Amendment to Proclamation of Disaster Emergency, June 3, 2020 (https://www.governor.pa.gov/wp-

content/uploads/2020/06/20200603-TWW-amendment-to-COVID-disaster-emergency-proclamation.pdf), last visited July 31, 2020). Thus, even if the few facts alleged in the Amended Complaint were true, Plaintiff would not be entitled to Civil Authority Coverage.

C. Plaintiff Is Not Entitled To A Declaratory Judgment

92. As discussed above, Plaintiff conclusorily alleges that it has suffered an unidentified "direct physical loss" caused by the pandemic and certain government orders. Even if these allegations were supported by sufficient facts (they are not) Plaintiff would not be entitled to the declaratory judgment sought in Count I of the Amended Complaint.

93. Under 42 Pa. C.S. § 7537, "[t]he court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Thus, "[w]ithin [Pennsylvania's] declaratory relief jurisprudence, it is well established that, generally, our courts should refuse to grant requests for declaratory judgment where such a grant would not resolve the controversy or uncertainty which spurred the request." *Kozlowski v. Dep't of Corr.*, No. 691 M.D. 2004, 2008 WL 9406062, at *4 (Pa. Cmwlth. Ct. Sept. 24, 2008); *Rendell v. Pennsylvania State Ethics Comm'n*, 938 A.2d 554, 559 (Pa. Cmwlth. Ct. 2007) ("Courts generally should refuse to grant requests for declaratory judgment where it would not resolve the controversy or uncertainty which spurred the request.").

94. Here, Plaintiff generally seeks a declaration stating that its losses are covered by the Policy. (*See* Am. Compl. ¶¶ 67-72.) But even if Plaintiff obtained the declaration it seeks, a second action would be necessary to determine the losses that are covered under the Policy and the amounts, if any, that are due and owing.

95. Plaintiff cannot use Pennsylvania's Declaratory Judgment Act to split its claim into separate liability and damages actions, or to obtain an advance ruling on liability for past conduct.

See Kozlowski, 2008 WL 9406062, at *4 (declining to award declaratory relief where litigation would resolve only one part of controversy); *see also Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 246 (1952)[12] (One cannot bring a declaratory-judgment action just to resolve one isolated issue in a possible future controversy); *Corliss v. O'Brien*, 200 F. App'x 80, 84 (3d Cir. 2006) ("Declaratory judgment is inappropriate solely to adjudicate past conduct" and is not "meant simply to proclaim that one party is liable to another."); *Butta v. GEICO Cas. Co.*, 400 F. Supp. 3d 225, 235 (E.D. Pa. 2019) (rejecting declaratory judgment seeking declaration of coverage under insurance policy as duplicative of breach of contract action for breach of same policy). For that independent reason, the Amended Complaint should be dismissed.

V. CONCLUSION

96. For all the reasons set forth above, Defendant's Preliminary Objections under Pa.R.C.P. 1028(a)(4) should be sustained and Plaintiff's Amended Complaint should be dismissed in its entirety.

[12] "[I]t is proper to give deference to federal interpretation of a federal statute when the state statute substantially parallels it." *Commonwealth v. Stuber*, 822 A.2d 870, 873 (Pa. Cmwlth. 2003)) (citing *Commonwealth v. Pennsylvania Labor Relations Board*, 107 Pa. Cmwlth. 132, 527 A.2d 1097 (Pa. Cmwlth. 1987). Here, Pennsylvania's Declaratory Judgment Act is similar to the Federal Declaratory Judgment Act. For that reason, "[a] court's discretionary authority is the same under the Pennsylvania and federal declaratory judgment acts." *New Berry Inc. v. Smith*, No. 2:18-CV-1024, 2020 WL 806550, at *7 (W.D. Pa. Jan. 14, 2020), *report and recommendation adopted*, No. CV 18-1024, 2020 WL 805992 (W.D. Pa. Feb. 18, 2020); *Amica Mut. Ins. Co. v. Boyd*, No. CIV.A. 09-393, 2009 WL 790864, at *1 (E.D. Pa. Mar. 13, 2009) (same).

Respectfully,

/s/ Jeffrey D. Grossman

Jeffrey D. Grossman
Stradley Ronon Stevens & Young LLP
2600 One Commerce Square
Philadelphia, PA 19103
Telephone: 215.564.8000
Facsimile: 215.564-8120

Richard L. Fenton
(admitted *Pro Hac Vice*)
Dentons US LLP
233 S. Wacker Drive, Suite 5900
Chicago, IL 60606
Telephone: 312.876.8000
Facsimile: 312.876.7934

Jeffrey A. Zachman
(admitted *Pro Hac Vice*)
Dentons US LLP
303 Peachtree St., NE Suite 5300
Atlanta, GA 30308
Telephone: 404.527.4000
Facsimile: 404.527.4198

Attorneys for Defendant

Dated: August 5, 2020

CERTIFICATE OF SERVICE

I, Jeffrey D. Grossman, do hereby certify that a true and correct copy of the foregoing Preliminary Objections to Plaintiff's Amended Complaint and Memorandum in Support thereof, with Exhibits A through D, was filed this date via the First Judicial District of Philadelphia Court of Common Pleas Civil Trial Division's E-Filing System and thereby deemed served on all counsel of record pursuant to Rule 205.4(g) of the Pennsylvania Rules of Civil Procedure and Local Rule *205.4(f)(7) and via first class mail to the following parties:

Daniel C. Levin
Levin Sedran & Berman LLP
510 Walnut Street, Suite 500
Philadelphia, Pennsylvania 19106-3697
(215) 592-1500
Counsel for Plaintiff, Ridley Park Fitness, LLC

Dated: August 5, 2020

/s/ *Jeffrey D. Grossman*
Jeffrey D. Grossman

STRADLEY, RONON, STEVENS & YOUNG, LLP
By: Jeffrey D. Grossman, Esquire (PA ID No. 78537)
2600 One Commerce Square
Philadelphia, PA 19103
(215) 564-8000

DENTONS US LLP
By: Richard L. Fenton, Esq.
(admitted *Pro Hac Vice*)
233 S. Wacker Drive, Suite 5900
Chicago, IL 60606
(312) 876-8000

DENTONS US LLP
By: Jeffrey A. Zachman, Esq.
(admitted *Pro Hac Vice*)
303 Peachtree St., NE Suite 5300
Atlanta, GA 30308
(404) 527-4000

Attorneys for Defendant Philadelphia Indemnity Insurance Company

RIDLEY PARK FITNESS, LLC	:	
	:	**COURT OF COMMON PLEAS**
Plaintiff,	:	**PHILADELPHIA COUNTY**
v.	:	
	:	**May Term, 2020**
PHILADELPHIA INDEMNITY INSURANCE COMPANY	:	**No. 200501093**
	:	
Defendant.	:	

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY OBJECTIONS TO PLAINTIFF'S AMENDED COMPLAINT PURSUANT TO Pa.R.C.P. 1028(a)(4)

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I. INTRODUCTION

Plaintiff seeks coverage under a Commercial Lines insurance policy issued by Defendant, Philadelphia Indemnity Insurance Company ("PIIC") (Policy No. PHPK1975212, the "Policy") (Exhibit A[1]), providing property insurance coverage for Plaintiff's business premises (the "Covered Property"). (*See* Am. Compl. ¶ 12.) Specifically, the Amended Complaint alleges that PIIC improperly denied coverage for lost business income, extra expenses, and interruption by civil authority caused by the COVID-19 pandemic and related government-issued orders requiring the closure of non-essential businesses as a precaution to prevent further spread of the disease. Plaintiff seeks a declaration of coverage under the Policy. Plaintiff's claim fails for multiple reasons.

As an initial matter, the Amended Complaint does not meet the threshold pleading standard because it is devoid of factual averments that would entitle Plaintiff to relief. *See Feingold v. Hendrzak* 15 A.3d 937 (Pa. Super. 2011); *see also Briggs v. Southwestern Energy Prod. Co.,* 224 A.3d 334, 351 (Pa. Sup. 2020) (complaint must plead facts necessary to establish the causes of action, not just a legal theory) (citing *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949) (then citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955)). Pennsylvania is a fact-pleading state. *Feingold* at 943. Thus, "a complaint must not only give the defendant notice of what the plaintiff's claim is and the grounds upon which it rests, *but the complaint must also formulate the issues by summarizing those facts essential to support the claim*." *Id*. (emphasis added).

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[1] PIIC may rely upon and attach a complete version of the Policy to Defendant's Preliminary Objections, even though it is not attached, in full, to the Amended Complaint, because the Plaintiff's claims are based on and reference the Policy. *See Satchell v. Insurance Placement Facility of Pennsylvania*, 361 A.2d 375, 377 (Pa. Super. 1976) ("[W]hen the plaintiff bases his cause of action on a written agreement, the defendant may attach the agreement to the preliminary objections, and it may be referred to for purposes of deciding a demurrer."). For ease of reference, PIIC refers to the Bates labeled page numbers on the bottom right corner of Exhibit A.

Here, Plaintiff's Policy requires, among other things, "direct physical loss" to plaintiff's business premises, (the "Covered Property") as a prerequisite to Business Income and Extra Expense coverages. Similarly, a prerequisite to Civil Authority coverage is the issuance of civil authority orders barring access to the Covered Property in response to "direct physical loss of or damage to" properties other than the Coverage Property. Although Plaintiff's Amended Complaint sets forth much about the COVID-19 pandemic and resulting emergency orders, it is wholly lacking facts to establish any actual physical loss or damage to any business premises anywhere, and contains no allegations that any insured property required repair or replacement of any kind. All that appears are conclusory non-sequiturs related to the issuance of government shut-down orders generally, and speculative assertions regarding the risk of "contamination" or "damage" resulting COVID-19. (*See* Am. Compl., ¶¶ 42-53.) These allegations fail to establish "direct physical loss or damage" and are insufficient to survive a demurrer. *See Feingold*, 15 A.3d at 942. Defendant's Preliminary Objections must therefore be sustained and the Amended Complaint must be dismissed. *Id*.

The Amended Complaint also fails to state a claim under Pa.R.C.P. 1028(a)(4) for several other reasons. First, Plaintiff's claims are barred by the Policy's clear, unambiguous, and specific exclusion of any "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" (the "Virus Exclusion"). (*See* Policy at 67 of 102). Plaintiff unquestionably claims "damage caused by or resulting from" a "virus" that induces "physical distress, illness or disease," and therefore Plaintiff's claims fall squarely within the Virus Exclusion. *Id.* Plaintiff's conclusory assertion that the Virus Exclusion "does not apply" because the "losses were also caused by the entry of Civil Authority Orders", (Am. Compl. ¶ 31), does not override the express and unambiguous Policy

language providing that the Virus Exclusion "applies to all coverage…forms or endorsements that cover business income, extra expense or action of civil authority." (Policy at 67 of 102.) To the contrary, Plaintiff admits that the losses in question were caused by a virus. (Am. Compl. ¶ 31). In any event, the Virus Exclusion precludes coverage for all losses "caused by or resulting from" a virus, whether that virus is the exclusive cause or not. (*See* Policy at 67 of 102).

Next, Plaintiff's claims fail because its alleged loss is not covered by the Policy--even in the absence of the Virus Exclusion. The Business Income and Extra Expense coverages both require Plaintiff to establish a "direct physical loss" to the Covered Property. To establish direct physical loss under applicable law, Plaintiff must show that the Coverage Property suffered demonstrable, physical alteration. The Amended Complaint, however, fails to set forth any facts establishing such physical alteration, impairment or damage. Although the Amended Complaint repeatedly parrots the phrase "direct physical loss," it does not plead facts establishing physical loss or explain how the spread of an infectious disease throughout the United States would result in tangible physical loss or damage to Plaintiff's business premises. Similarly, Civil Authority Coverage requires that access to Plaintiff's premises be prohibited by civil authorities in response to "direct physical loss of or damage to" property other than the Covered Property. The Amended Complaint contains no allegations establishing "direct physical loss of or damage to" any other structures. Moreover, the governmental orders closing upon which Plaintiff relies were in response to the pandemic and to control further spread of the disease, not in response to any physical damage to property. So, Plaintiff's claims fail as a matter of law.

Further, Plaintiff has established no basis on which to obtain declaratory relief. The Amended Complaint seeks a declaration of legal rights based on abstract assertions that Plaintiff suffered unspecified physical loss or damage at some time *in the past*. *See Corliss v. O'Brien*, 200

F. App'x 80, 84 (3d Cir. 2006)[2] ("Declaratory judgment is inappropriate solely to adjudicate past conduct . . . Nor is declaratory judgment meant simply to proclaim that one party is liable to another.").

In addition, the declaration Plaintiff seeks would not resolve the entire dispute between the parties and would thus require further proceedings to determine the precise losses that are covered under the Policy and the amounts, if any, that are due and owing. *See Kozlowski v. Dep't of Corr.*, No. 691 M.D. 2004, 2008 WL 9406062, at *4 (Pa. Cmwlth. Ct. Sept. 24, 2008); *Rendell v. Pennsylvania State Ethics Comm'n*, 938 A.2d 554, 559 (Pa. Cmwlth. Ct. 2007) ("Courts generally should refuse to grant requests for declaratory judgment where it would not resolve the controversy or uncertainty which spurred the request."). For these reasons, declaratory relief is inappropriate.

In sum, the allegations of the Amended Complaint simply do not establish a plausible basis for relief and, for that reason, the Amended Complaint should be dismissed in its entirety. As such, PIIC, by and through its undersigned counsel, submits the within Memorandum of Law in support of its Preliminary Objections to the Amended Complaint of Plaintiff, Ridley Park Fitness, LLC, and states as follows:

II. MATTER BEFORE THE COURT

Motion to determine Defendant's Preliminary Objections to Plaintiff's Amended Complaint.

[2] "[I]t is proper to give deference to federal interpretation of a federal statute when the state statute substantially parallels it." *Commonwealth v. Stuber*, 822 A.2d 870, 873 (Pa. Cmwlth. 2003)) (citing *Commonwealth v. Pennsylvania Labor Relations Board*, 107 Pa. Cmwlth. 132, 527 A.2d 1097 (Pa. Cmwlth. 1987). Here, Pennsylvania's Declaratory Judgment Act is similar to the Federal Declaratory Judgment Act.

III. STATEMENT OF QUESTIONS PRESENTED

1. Should this Honorable Court sustain Defendant's Preliminary Objections as the Policy's Virus Exclusion precludes coverage for loss or damage resulting from a virus and Plaintiff's purported losses arose from a virus?

Suggested Answer: Yes

2. Should this Honorable Court sustain Defendant's Preliminary Objections because the Policy permits coverage for Business Income or Extra Expense only in instances where an insured suffers a direct, physical loss to its property, and Plaintiff failed to plead facts showing such a loss to its property?

Suggested Answer: Yes

3. Should this Honorable Court sustain Defendant's Preliminary Objections because the Policy's Civil Authority provision permits coverage for Business Income or Extra Expense only in instances in which distinct, demonstrable, physical alteration to property other than the insured's causes a civil authority to issue an order prohibiting access to the insured's property, and Plaintiff failed to plead facts showing such damage or orders?

Suggested Answer: Yes

4. Should this Honorable Court sustain Defendant's Preliminary Objections because the declaratory relief Plaintiff seeks would not resolve the controversy before the Court or the uncertainty spurred by the issues presented?

Suggested Answer: Yes

IV. STATEMENT OF FACTS

Plaintiff operates a fitness center in Delaware County, Pennsylvania. (Am. Compl. ¶ 10.) Plaintiff seeks coverage under a Commercial Lines insurance policy providing property coverage

for Plaintiff's business located at 611 N. Swarthmore Ave., Suite A, Ridley Park, Pennsylvania. *Id.* ¶ 11.

The Policy period extends from April 26, 2019 through April 26, 2020. (Policy at 10 of 102; Am. Compl. ¶ 13.) The Policy includes coverage for certain lost business income ("Business Income Coverage") if Plaintiff's operations are suspended as a result of "direct physical loss" to the insured premises. Specifically, the Policy provides Business Income Coverage for lost net income incurred during the "Period of Restoration"[3] "when your covered building or business personal property listed on the Declarations is damaged by a Covered Cause of Loss." (Policy at 84-85 of 102.)

Similarly, the Policy provides coverage for "Extra Expenses" incurred as a result of a direct physical loss ("Extra Expense Coverage") and defines "Extra Expense" as follows:

> Extra Expense means necessary expenses you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a **Covered Cause of Loss**.

(Id. at 85 of 102.) Under the Policy, "Covered Causes of Loss means direct ***physical loss****"* unless otherwise excluded or limited under the Policy. (*Id.* at 68 of 102, emphasis added.)

Plaintiff also relies on a portion of the Policy that provides additional coverage related to the action of a civil authority ("Civil Authority Coverage"). (*See* Am. Compl. ¶ 14.) That language provides coverage "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

[3] "Period of Restoration" is defined in the Policy as the period of time that "(1) Begins with the date of physical loss or damage caused by or resulting from any Covered Cause of Loss; and (2) Ends on the date when the property should be repaired, rebuilt or replaced with reasonable speed and similar quality." (Policy at 85 of 102.)

direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any **Covered Cause of Loss**." (*Id.* at 84 of 102, emphasis added.)

Thus, both the Business Income Coverage and Extra Expense Coverage require Plaintiff to establish "direct physical loss" to the Covered Property. Similarly, the Civil Authority Coverage requires Plaintiff to establish that a civil authority barred access to the Covered Property in response to direct physical loss or damage to other property. (*Id*.) So, in all cases, direct *physical* loss of or damage to property – either Plaintiff's or someone else's – is a prerequisite to coverage. All of the above coverages are also subject to a Virus Exclusion that excludes coverage for any "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." (Policy at 67 of 102.) The Policy also includes a conspicuous notice highlighting the significance of the Virus Exclusion and encouraged Plaintiff to read all the Policy endorsements carefully. (*Id.* at 13 of 102.)

Against that backdrop, Plaintiff alleges that COVID-19 is a global pandemic that "physically infects" and spreads rapidly. (Am. Compl. ¶ 38.) Although Plaintiff does not allege any actual contamination or illness at the Covered Property, it alleges that the Governor of Pennsylvania and other public officials ordered closure of all non-essential or non-life-sustaining businesses in an effort to limit the spread of the disease, in part because "the requisite contact and interaction causes a heightened risk of the property being contaminated." (*Id*. ¶ 49.) Plaintiff claims that in response to the Pennsylvania Governor's orders, Plaintiff closed its business on March 16, 2020. (*Id.* ¶ 54.)

Plaintiff filed this action seeking a declaration that it is entitled to coverage under the Policy. (Am. Compl. ¶¶ 66-73, Prayer for Relief, p. 16-17.)

V. LEGAL STANDARD

A preliminary objection under Pa.R.C.P. 1028(a)(4) – legal insufficiency of pleading – is in the nature of a demurrer and "is properly granted where the contested pleading is legally insufficient." *Weiley v. Albert Einstein Medical Center*, 51 A.3d 202, 208 (Pa. Super. 2012). "[T]he question presented by the demurrer is whether, on the facts averred [in the Complaint], the law says with certainty that no recovery is possible." *Id.* at 209. Furthermore, Pa.R.C.P. 1019 requires that "the material facts on which a cause of action or defense is based shall be stated in a concise and summary form." Pa. R. C.P. 1019(a)). "Material facts" are "those facts essential to support the claim raised in the matter." *Lee v. Denner*, 2005 Pa. Dist. & Cnty. Dec. LEXIS 376, *14 (Monroe Cnty. C.P., May 16, 2005) (citing *Baker v. Rangos*, 324 A.2d 498, 505 (1974)). It is a plaintiff's burden to show entitlement to relief with more than "conclusory[,] unsubstantiated suspicions and allegations", and a formulaic recitation "labels and conclusions, and a formulaic recitation of the elements of a cause of action. *Feingold v. Hendrzak* 15 A.3d at 942; *see also Briggs,* 224 A.3d at 351 (Complaint must plead facts necessary to establish the causes of action, not just a legal theory) (citing *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949) (then citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955)).

Although under Pa.R.C.P. 1028(a)(4) (legal insufficiency of pleading), the Amended Complaint's material factual allegations as accepted true for purposes of the motion, the Court is not required to accept legal conclusions or formulaic recitation of the elements of a claim. *See Briggs v. Southwestern Energy Prod. Co.,* 224 A.3d 334, 351 (Complaint must plead facts necessary to establish the causes of action, not just a legal theory) (citing *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949 and *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955)). Conclusory allegations are not entitled to the assumption of truth and must be disregarded. *See Feingold v. Hendrzak*, 12 A.3d 937, 942 (PA Super., Feb. 22, 2011). Applying those standards here, and as more fully set forth

below, Defendant's preliminary objections to Plaintiff's Amended Complaint should be sustained and the Amended Complaint should be dismissed for failure to state a claim.

VI. ARGUMENT

A. The Amended Complaint Fails To Meet Pa.R.C.P. 1019's Pleading Requirements.

Although Plaintiff seeks coverage under a policy of property insurance [4] that requires direct physical loss of or damage to property, Plaintiff pleads no facts describing any physical change, alteration, or damage to property. Instead, the Amended Complaint repeatedly recites the naked phrase "direct physical loss" without explaining what that loss is or alleging facts establishing how either the pandemic or the governmental emergency orders have physically altered or damaged property. (Am. Compl. ¶ 35 (asserting, again as a conclusion, that "contamination of the Insured Property would be a direct physical loss requiring remediation to clean the surfaces of the fitness center.").) Such threadbare conclusions are insufficient to state a claim. *See Briggs v. Southwestern Energy Prod. Co.,* 224 A.3d 334, 351 (Complaint must plead facts necessary to establish the causes of action, not just a legal theory) (citing *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949) (then citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955)). No facts are alleged establishing any "direct physical loss of or damage to" Plaintiff's respective properties, nor does Plaintiff claim that any insured property required repair or replacement of any kind.

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[4] Under Pa. R. C. P. 1019(h) & (i), Plaintiff must attach a copy of the Policy to the Complaint because Plaintiff's declaratory judgment claim is based on the language in the Policy. Pa. R. C. P. 1019(h) & (i); *Williams v. Nationwide Mut. Ins. Co*., 750 A.2d 881, 884 (Pa. Super. Ct. 2000) (dismissing insureds' claim for breach of contract where insureds failed to "attach the pertinent parts of the insurance policies to their complaint as required by Pa.R.C.P. 1019(h)."). As in *Williams*, Plaintiff failed to attach the complete Policy here, instead attaching a letter drafted by PIIC that contains excerpts of the Policy. (*See* Am. Compl., Exhibit 1.) However, so as not to burden the Court with unnecessary procedural minutiae, PIIC herewith submits a copy of the Policy as Exhibit A to its Objections. Notwithstanding Plaintiff's failure to attach the Policy to its pleading, the Court may consider the Policy terms in connection with these Objections. *See Satchell, supra.*

The facts[5] set forth in the Amended Complaint allege that Plaintiff suspended its operations as a result of the pandemic and governmental closure orders. (Am. Compl. ¶¶ 42-45, 54.) That, however, is not "direct physical loss or damage" to property. Indeed, Plaintiff admits COVID-19 *was not* physically present at the Covered Property. *Id.* ¶¶ 56. Instead, Plaintiff filed suit based on the *risk* that the insured properties *might* be contaminated. *Id.* ¶¶ 57. The risk of contamination is not physical loss or damage. Thus, facts related to the risk of future injury cannot save the Amended Complaint from dismissal.

Plaintiff attempts to cure its pleading defect by alleging that *Friends of DeVito, et. al v. Wolf*, a case having nothing to do with either insurance coverage or property damage, somehow "support[s] Plaintiff's position that physical loss and damage exists" *id.* ¶ 46, and that civil authority orders "were entered because of the contamination and damage of property caused by the Coronavirus near Plaintiff's Insured Property." (*Id.* ¶ 51.) Neither proposition withstands scrutiny.

First, *Friends* simply does not address "physical loss or damage" at any property, let alone address the question whether Plaintiff's property suffered physical loss or damage. The issue in *Friends* was whether Governor Wolf's Executive Order requiring shutdown of certain non-essential activities in response to the COVID-19 pandemic was a valid exercise of the Governor's emergency powers. In upholding the Governor's Executive Order, the court expressly stated that Governor Wolf issued the relevant closure orders in response to the pandemic generally, and to control further spread of the disease, not in response to "direct physical loss or damage to" any

[5] A fact is "[s]omething that actually exists" or "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation." *Black's Law Dictionary* (10th ed. 2014).

property. *See Friends*, 68 MM 2020 at 8 ("By its terms, the Executive Order compels the closure of all businesses in the state deemed to be non-life sustaining to prevent the spread of COVID-19 by limiting person-to-person interactions through social distancing.").

Second, Plaintiff's conclusory allegations regarding the impetus for Governor Wolf's Executive Order are belied by the order itself. Specifically, that order states that it was issued to mitigate the spread of the virus—not in response to property damage. *See e.g.* Proclamation of Disaster Emergency, March 6, 2020 (https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf), last visited July 31, 2020; Pennsylvania Amendment to Proclamation of Disaster Emergency, June 3, 2020 (https://www.governor.pa.gov/wp-content/uploads/2020/06/20200603-TWW-amendment-to-COVID-disaster-emergency-proclamation.pdf), last visited July 31, 2020); *Feingold* at 942 ("conclusory[,] unsubstantiated suspicions and allegations" fail to satisfy the requisite pleading standard). Accordingly, *Friends* does not support Plaintiff's position here.

Accordingly, the Amended Complaint sets forth no facts establishing "direct physical loss or damage" to the Covered Property necessary to trigger Business Income or Extra Expense Coverages. And Plaintiff pleads no facts establishing the government orders were in response to any physical loss of or damage to other property, which is prerequisite to any Civil Authority Coverage. *See Source Food Tech*, 465 F.3d at 837–38 (8th Cir. 2006) (insured did not suffer "direct physical loss" where government prohibited access to its property, reasoning that although plaintiff lost access to property, the property was not damaged in any way); *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 286-88 (S.D.N.Y. 2005) (airport parking company's financial losses arising from government-issued orders grounding all flights after 9/11 did not satisfy insurance policy's direct physical loss requirement because "the claimed loss must be

physical in nature"); *United Air Lines, Inc. v. Ins. Co. of State of Pa*., 439 F. 3d 128, 134-135 (2nd Cir. 2006) (civil authority coverage not available for airport closure ordered after September 2011 terrorist attacks even though nearby Pentagon was damaged, since "the government's … decision to halt operations at the Airport … was based on fears of future attacks" and not upon "damage to adjacent premises").

In short, Plaintiff pleads no facts that would establish a plausible claim for relief under the Policy as required under Pa.R.C.P. 1019(a). Thus, Defendant's Preliminary Objections should be sustained and Plaintiff's Amended Complaint should be dismissed.

B. <u>The Amended Complaint Otherwise Fails To State A Claim Under The Plain Terms Of The Policy And Defendant's Preliminary Objections Under Pa.R.C.P. 1028(a)(4) Must be Sustained.</u>

Quite apart from the Amended Complaint's Pa.R.C.P. 1019 deficiencies, the Amended Complaint otherwise fails to state a claim on which relief can be granted and, accordingly, Defendant's Preliminary Objections must be sustained and Plaintiff's Amended Complaint must be dismissed under Pa.R.C.P. 1028(a)(4).

1. <u>The Virus Exclusion Bars Coverage.</u>

As an initial matter, the Policy contains a clear and unambiguous Virus Exclusion excluding any "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." (Policy at 67 of 102.) The Policy also includes a notice highlighting the significance of the Virus Exclusion and encouraging Plaintiff to read all the Policy endorsements carefully. (*Id.* at 15 of 102.) To the extent Plaintiff has alleged any facts regarding its alleged loss, that loss clearly results from a "virus . . . that induces or is capable of inducing physical distress, illness or disease." (*Id*.) Thus, on its face, the Virus Exclusion bars Plaintiff's claim for declaratory judgment. *See Gavrilides Mgmt. Co. v. Michigan Ins. Co*., No. 20-258-CB, (Ingham County, MI Circuit Ct.), transcript of

July 1, 2020 hearing, Exhibit B, pp. 20-23 (finding virus exclusion barred COVID-19 claim arising from government closure orders as a matter of law).

a. Plaintiff's Conclusory Allegation That The Virus Exclusion "Does Not Apply" To Plaintiff's Loss Cannot Be Considered.

Notwithstanding the plain language of the Virus Exclusion, Plaintiff baldly alleges that it does not apply because the "losses were not *solely* caused by a virus." (Am. Compl. ¶ 31.) As discussed above, Plaintiff's assertion that the Virus Exclusion "does not apply" is contradicted by the plain terms of the Policy and the unambiguous language of the exclusion. *See e.g. Lemanski v. Genalo*, 2011 Pa. Dist. & Cnty. Dec. LEXIS 508, *8 (Monroe Cty. C.P., Feb. 18, 2011) ("The 'court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion.") (citing *Penn Title Ins. Co. v. Deshler*, 661 A.2d 481, 483 (Pa. Cmwlth. 1995)). The Policy language is clear—all losses "caused by or resulting from" viruses are excluded, whether the virus is the exclusive cause or not. (*See* Policy at 67 of 102).[6] Accordingly, and even taking the well pleaded facts in the Amended Complaint as true, Plaintiff's claim is barred by the Virus Exclusion and must be dismissed under Pa.R.C.P. 1028(a)(4).

[6] Further, to the extent Plaintiff contends that its loss was caused exclusively by government-issued orders, rather than a virus, Plaintiff specifically concedes that its loss was not "direct" or "physical," as required by the Policy. Government orders, rules, requirements, or regulations unrelated to any physical loss or damage to property are not covered under the Policy. *See Philadelphia Parking Auth.,* 385 F. Supp. 2d at 286-88 (under Pennsylvania law, government-issued orders grounding all flights after 9/11 did not constitute direct physical loss requirement because "the claimed loss must be physical in nature."). Thus, either Plaintiff's loss "result[ed] from" a virus--in which case Plaintiff's claim is barred by the Virus Exclusion--or the loss did not "result[ ] from" a virus, in which it did arise from any physical loss or damage as required by the Policy.

b. Regulatory Estoppel Does Not Bar Application of the Virus Exclusion.

Plaintiff's Amended Complaint implies that PIIC should be estopped from enforcing the Virus Exclusion because the exclusion was allegedly procured "due to misleading and fraudulent statements." (Am. Compl. ¶ 21.) To the extent Plaintiff seeks to rely on the doctrine of regulatory estoppel to avoid the Virus Exclusion, it cannot do so.

Under Pennsylvania law, the essence of regulatory estoppel is a change in a party's legal position that is inconsistent with the position previously taken in front of a regulatory body:

> In essence, the [regulatory estoppel] doctrine prohibits parties from switching legal positions to suit their own ends. Thus, having represented to the insurance department, a regulatory agency, that the new language in the [] policies . . . did not involve a significant decrease in coverage from the prior language, the insurance industry will not be heard to assert the opposite position when claims are made by the insured policyholders.

Sunbeam Corp. v. Liberty Mut. Ins. Co., 566 Pa. 494, 500, 781 A.2d 1189, 1192 (2001).

To establish regulatory estoppel, Plaintiff must show that a party: (1) made a statement to a regulatory agency; (2) the regulatory agency relied upon the statement when deciding the issue presented to it; and (3) the party subsequently adopted a litigation position opposite to the one it presented to the regulatory agency. *Simon Wrecking Co., Inc. v. AIU Ins. Co.*, 530 F. Supp. 2d 706, 714 (E.D. Pa. 2008) (citing *Sunbeam Corp.*, 781 A.2d at 1189); *Hussey Copper Ltd. v. Royal Ins. Co. of Am.*, No. 07-758, 2009 WL 2913959, at *1 (W.D. Pa. Sept. 9, 2009). Specifically, Plaintiff must show that PIIC took a position that "*directly contradict[s]*" the position it takes now. *Takeda Pharm. U.S.A., Inc. v. Spireas*, 400 F. Supp. 3d 185, 207 (E.D. Pa. 2019) (emphasis added). "An industry that makes representations to a regulatory agency to win agency approval will not be heard to assert the opposite position when claims are made by [litigants such as] insured policyholders." *Hussey Copper, Ltd. v. Arrowood Indem. Co.*, 391 F. App'x 207, 211 (3d Cir.

2010); *Chem. Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 89 F.3d 976, 992 (3d Cir. 1996) (regulatory estoppel applied where insurer sought to give language different meaning than the meaning previously proffered to regulators).

Here, Plaintiff does not allege that PIIC itself made any representations to any regulator regarding the effect of the Virus Exclusion. Plaintiff apparently assumes that PIIC can be estopped as a result of ISO's[7] representations to regulators because PIIC utilizes the ISO form virus exclusion. This Court need not address whether regulatory estoppel can be applied vicariously, however, because the Amended Complaint demonstrates that PIIC's position here is *entirely* consistent with ISO's regulatory submissions and thus the doctrine of regulatory estoppel does not apply.

Plaintiff's Amended Complaint relies upon an ISO Circular[8] published in 2006 that includes the 2006 ISO regulatory filing for approval of the Virus Exclusion. ISO's position in that filing is *identical* to the coverage position PIIC takes here. Specifically, the ISO Regulatory filing states:

> While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.
>
> In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.
>
> ****

[7] ISO is the Insurance Services Office, Inc. (*See* Am. Compl. ¶ 17.)

[8] Plaintiff references the ISO Circular in the Amended Complaint, (*see* Am. Compl. ¶ 21), and relies on that document to support its regulatory estoppel argument. Thus, the Court may consider the ISO Circular for purposes of these Objections. *See Satchell v. Insurance Placement Facility of Penn.*, 361 A.2d 375, 377 (Pa. Super. 1976).

> ***The amendatory endorsement presented in this filing states that there is no coverage 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. The exclusion (which is set forth in Paragraph B of the endorsement) applies to property damage, time element and all other coverages***; introductory Paragraph A prominently makes that point. Paragraphs C and D serve to avoid overlap with other exclusions, and Paragraph E emphasizes that other policy exclusions may still apply.

(ISO Circular, Exhibit C (emphasis added).)

Thus, ISO fully disclosed that in the event of a pandemic or similar event, insureds might attempt to expand coverage under existing policies, and that the Virus Exclusion was being proffered to make clear that there was no coverage for virus-related losses. That position is on all fours with PIIC's position here. So, even taking the facts pleaded in the Amended Complaint as true, PIIC's position with respect to coverage under the Policy is identical to the position ISO took when it submitted the Virus Endorsement for approval.

Plaintiff nevertheless alleges that when it submitted the virus exclusion to regulators, ISO misrepresented that property insurance policies "do not and were not intended to cover losses caused by viruses . . ." (Am. Compl. ¶ 21.) But Plaintiff cites no authority establishing that virus-related losses, or losses related to a pandemic generally, were covered under property insurance policies prior to submission of the ISO exclusion. And PIIC has found none.[9] So no facts are

[9] The website link in paragraph 21 of the Amended Complaint leads to an *opinion* piece arguing that courts should not enforce the virus exclusion. It does not provide support for the proposition that claims arising from viral pandemics were generally covered under property policies. On the contrary, the law as of submission of the virus exclusion appears to support the ISO statement. Although it did not arise in the context of a pandemic , the Third Circuit in considering a similar claim involving asbestos contamination held that "[i]n ordinary parlance and widely accepted definition, physical damage to property means 'a distinct, demonstrable, and physical alteration' of its structure." *Port Authority of N.Y. and N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002) (citing 10 Couch on Insurance § 148:46 (3d ed.1998)). That decision was issued in 2002, just four years before ISO submitted the virus exclusion for approval.

pleaded (or could be pleaded) that would establish that ISO's statement was incorrect or misleading.[10]

Finally, even where otherwise applicable, regulatory estoppel does not void clear and unambiguous policy provisions or provide a basis for rescission. It simply prevents a party from asserting a position in litigation contrary to the position it previously asserted before a regulatory agency. *See Simon Wrecking Co., Inc., supra,* 530 F. Supp. 2d at 711; *Chem. Leaman*, 89 F.3d at 992. Since the Amended Complaint identifies no position currently being taken by PIIC that is in any way contrary the positions asserted in the ISO submission, there is nothing to "estop."

2. <u>The Amended Complaint Fails To Assert *Facts* Establishing A "Direct Physical Loss."</u>

Even if the Virus Exclusion were absent, the Amended Complaint still fails as a matter of law because Plaintiff has not pled facts showing "direct physical loss" to the Covered Property, which is prerequisite to Business Income or Extra Expense coverage under the Policy. *See supra* IV.A.

To establish "physical damage" to property, Plaintiff must show "a distinct, demonstrable, and physical alteration of its structure." *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002) ("The mere presence of asbestos, or the general threat of future damage from that presence, lacks the distinct and demonstrable character necessary for

[10] Even if ISO's statement about sources of recovery was arguably incorrect – and it was not – regulatory estoppel would still not apply. To invoke regulatory estoppel, Plaintiff must show that PIIC is taking a legal position *contrary* to the position previously taken before a regulatory body. *Simon Wrecking Co., Inc., supra,* 530 F. Supp. 2d at 706. Plaintiff has identified no inconsistency – and has certainly alleged no "direct contradict[ion]" – between ISO's prior regulatory statements and PIIC's coverage position here. Regulatory estoppel therefore does not apply. *See Takeda Pharm.*, 400 F. Supp. 3d at 207; *see also Hussey Copper, Ltd. v. Arrowood Indem. Co.*, 391 F. App'x 207, 211 (3d Cir. 2010) (rejecting regulatory estoppel argument and reasoning that "ISO's statements were not so contrary to [defendant's] position that [defendant] should be estopped from invoking the pollution exclusion here.").

first-party insurance coverage"); *Philadelphia Parking Auth. v. Fed. Ins. Co*., 385 F. Supp. 2d 280, 286-88 (S.D.N.Y. 2005) (under Pennsylvania law, financial losses arising from government-issued orders grounding all flights after 9/11 in response to threat of future harm did not constitute direct physical loss); "Physical" loss or damage, 10A Couch on Ins. § 148:46 ("The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.").

Moreover, "[p]hysical damage to a building as an entity by sources unnoticeable to the naked eye must meet a higher threshold." *Id.* The presence of a source "unnoticeable to the naked eye" – such as asbestos or, as here, the COVID-19 – can only satisfy the definition of physical damage "[w]hen the presence of large quantities" "make the structure uninhabitable and unusable." *Id.* For this reason, courts evaluating insurance claims arising from the COVID-19 pandemic have interpreted identical policy language to require a physical *change* to property. *See Social Life Magazine, Inc. v. Sentinel Ins. Co*., No. 20-cv-3311-VEC, (S.D.N.Y.), transcript of May 14, 2020 hearing, Exhibit D, p. 15 (finding plaintiff had no likelihood of success on merits of business interruption claim related to COVID-19 where plaintiff had not shown damage to property that caused loss); *Gavrilides Management*, Exhibit B, pp. 18-23 (granting summary disposition of business interruption claim, without opportunity for leave to amend, arising from COVID-19 pandemic and finding "direct physical loss" "has to be something with material existence. . . . that alters the physical integrity of the property.").

Here, as discussed above, the Amended Complaint lacks any well pleaded facts establishing any physical loss or damage to the Covered Property. And although Plaintiff asserts

that "there is an ever-present risk that the Insured Property is contaminated and would continue to be contaminated," (Am. Compl. ¶ 56), the ***risk*** of harm is not a direct physical loss. *See Philadelphia Parking Auth*., 385 F. Supp. 2d at 286-88 (under Pennsylvania law, government closure orders based on *risk* of future harm did not constitute direct physical loss or damage); *White Mountain Communities Hosp. Inc. v. Hartford Cas. Ins. Co*., No. 3:13-CV-8194 JWS, 2015 WL 1755372, at *2 (D. Ariz. Apr. 17, 2015) (finding loss was not caused by "direct physical damage" despite threat of forest fire, where loss was caused by government closure orders, not fire or smoke damage to property); *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co*., 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014) (phrase "direct physical loss or damage" did not include closure of insured law firm after utility company preemptively shut off power to lower Manhattan due to potential for future damage caused by impending Superstorm Sandy).

Plaintiff does not allege that the virus is present at the Covered Property,[11] much less plead facts establishing that the virus physically changed or altered that property in any way. Nor does Plaintiff allege that any property required repair or replacement. Accordingly, even taking the well pleaded facts in the Amended Complaint as true, it fails to state a claim.

[11] Even if Plaintiff had alleged that COVID-19 was present at the Covered Property, that would not render the property unusable, unsuitable or unsafe – much less have caused "physical damage" to the property. At most, the Covered Property would have required cleaning or sanitizing – a purely economic loss that the courts have recognized is ***not*** "physical loss of or damage to property."[11] *See Universal Image Prods., Inc. v. Federal Ins. Co.*, 475 Fed. App'x. 569, 573-74 (6th Cir. 2012) (economic losses from cleaning and remediation expenses sustained due to contamination of mold and bacteria did not constitute physical damage because the building itself was not physically damaged);[11] *Mama Jo's, Inc. v. Sparta Ins. Co.*, No. 17-cv-23362, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018) ("***cleaning*** is not considered direct physical loss"); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App.3d 23, 884 N.E.2d 1130, 1144 (Ohio Ct. App. 2008) (mold on exterior siding of house was not "physical damage" because it could be removed by ***cleaning*** with bleach).

3. The Civil Authority Coverage Does Not Apply Because Plaintiff Has Not Alleged Any Facts Related To That Coverage.

Mirroring similar requirements found in the Business Income and Extra Expense Coverages, the Civil Authority provision provides coverage "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**." (Policy at 84 of 102, emphasis added.)

Accordingly, to establish coverage, Plaintiff must show that "distinct, demonstrable, physical alteration" to property other that its own *caused* a civil authority to issue an order prohibiting access to the Covered Property. *See Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 685 (5th Cir. 2011) (interpreting an almost identical coverage provision and holding that "the action of civil authority prohibiting access to the described premises must be caused by direct physical loss of or damage to property other than at the described premises; and [] the loss or damage to property other than the described premises must be caused by or result from a covered cause of loss as set forth in the policy.").

As with the Business Income and Extra Expense Coverages, the order must arise from a *present* physical alteration, rather than the threat of future harm. *Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co.*, 440 F. Supp. 3d 520, 530-31 (D.S.C. 2020) (When the focus of the executive order is on the potential, future, or predicted impacts on life and property then the order was not issued because of direct physical loss or damage to property); *Philadelphia Parking Auth.*, 385 F. Supp. 2d at 286-88 (under Pennsylvania law, government closure orders based on *risk* of future harm did not constitute direct physical loss or damage); *White Mountain Communities Hosp. Inc. v. Hartford Cas. Ins. Co.*, No. 3:13-CV-8194 JWS, 2015 WL 1755372, at *2 (D. Ariz. Apr.

17, 2015) (finding loss was not caused by "direct physical damage" despite threat of forest fire, where loss was caused by government closure orders, not fire or smoke damage to property).

Here, Plaintiff has failed to allege facts establishing damage to property other than Plaintiff's. As discussed above, Plaintiff cannot equate the *potential* presence of COVID-19 in or around its property with actual contamination or damage. *See id.* Further, none of the orders upon which Plaintiff relies were issued in response to any present, dangerous condition caused by physical damage to specific property.

To the contrary, Governor Wolf's Executive Order, upon which Plaintiff relies, states that it was issued to mitigate the *further* spread of the virus—not in response to any property damage. *See e.g.* Proclamation of Disaster Emergency, March 6, 2020 (https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf), last visited July 31, 2020; Pennsylvania Amendment to Proclamation of Disaster Emergency, June 3, 2020 (https://www.governor.pa.gov/wp-content/uploads/2020/06/20200603-TWW-amendment-to-COVID-disaster-emergency-proclamation.pdf), last visited July 31, 2020). Thus, even if the few facts alleged in the Amended Complaint were true, Plaintiff would not be entitled to Civil Authority Coverage.

C. Plaintiff Is Not Entitled To A Declaratory Judgment

As discussed above, Plaintiff conclusorily alleges that it has suffered an unidentified "direct physical loss" caused by the pandemic and certain government orders. Even if these allegations were supported by sufficient facts (they are not) Plaintiff would not be entitled to the declaratory judgment sought in Count I of the Amended Complaint. Under 42 Pa. C.S. § 7537, "[t]he court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Thus, "[w]ithin [Pennsylvania's] declaratory relief jurisprudence, it is well

established that, generally, our courts should refuse to grant requests for declaratory judgment where such a grant would not resolve the controversy or uncertainty which spurred the request." *Kozlowski v. Dep't of Corr.*, No. 691 M.D. 2004, 2008 WL 9406062, at *4 (Pa. Cmwlth. Ct. Sept. 24, 2008); *Rendell v. Pennsylvania State Ethics Comm'n*, 938 A.2d 554, 559 (Pa. Cmwlth. Ct. 2007) ("Courts generally should refuse to grant requests for declaratory judgment where it would not resolve the controversy or uncertainty which spurred the request.").

Here, Plaintiff generally seeks a declaration stating that its losses are covered by the Policy. (*See* Am. Compl. ¶¶ 67-72.) But even if Plaintiff obtained the declaration it seeks, a second action would be necessary to determine the losses that are covered under the Policy and the amounts, if any, that are due and owing. Plaintiff cannot use Pennsylvania's Declaratory Judgment Act to split its claim into separate liability and damages actions, or to obtain an advance ruling on liability for past conduct. *See Kozlowski*, 2008 WL 9406062, at *4 (declining to award declaratory relief where litigation would resolve only one part of controversy); *see also Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 246 (1952)[12] (One cannot bring a declaratory-judgment action just to resolve one isolated issue in a possible future controversy); *Corliss v. O'Brien*, 200 F. App'x 80, 84 (3d Cir. 2006) ("Declaratory judgment is inappropriate solely to adjudicate past conduct" and is not "meant simply to proclaim that one party is liable to another."); *Butta v. GEICO Cas. Co.*, 400 F. Supp. 3d 225, 235 (E.D. Pa. 2019) (rejecting declaratory judgment seeking declaration of

[12] "[I]t is proper to give deference to federal interpretation of a federal statute when the state statute substantially parallels it." *Commonwealth v. Stuber*, 822 A.2d 870, 873 (Pa. Cmwlth. 2003)) (citing *Commonwealth v. Pennsylvania Labor Relations Board*, 107 Pa. Cmwlth. 132, 527 A.2d 1097 (Pa. Cmwlth. 1987). Here, Pennsylvania's Declaratory Judgment Act is similar to the Federal Declaratory Judgment Act. For that reason, "[a] court's discretionary authority is the same under the Pennsylvania and federal declaratory judgment acts." *New Berry Inc. v. Smith*, No. 2:18-CV-1024, 2020 WL 806550, at *7 (W.D. Pa. Jan. 14, 2020), *report and recommendation adopted*, No. CV 18-1024, 2020 WL 805992 (W.D. Pa. Feb. 18, 2020); *Amica Mut. Ins. Co. v. Boyd*, No. CIV.A. 09-393, 2009 WL 790864, at *1 (E.D. Pa. Mar. 13, 2009) (same).

coverage under insurance policy as duplicative of breach of contract action for breach of same policy). For that independent reason, the Amended Complaint should be dismissed.

VII. RELIEF REQUESTED

For all the reasons set forth above, Defendant's Preliminary Objections under Pa.R.C.P. 1028(a)(4) should be sustained and Plaintiff's Amended Complaint should be dismissed in its entirety.

Respectfully,

/s/ Jeffrey D. Grossman

Jeffrey D. Grossman
Stradley Ronon Stevens & Young LLP
2600 One Commerce Square
Philadelphia, PA 19103
Telephone: 215.564.8000
Facsimile: 215.564-8120

Richard L. Fenton
(admitted *Pro Hac Vice*)
Dentons US LLP
233 S. Wacker Drive, Suite 5900
Chicago, IL 60606
Telephone: 312.876.8000
Facsimile: 312.876.7934

Jeffrey A. Zachman
(admitted *Pro Hac Vice*)
Dentons US LLP
303 Peachtree St., NE Suite 5300
Atlanta, GA 30308
Telephone: 404.527.4000
Facsimile: 404.527.4198

Attorneys for Defendant

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