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

INDIAN HARBOR INSURANCE COMPANY,	:	
Plaintiff,	:	**CIVIL ACTION**
v.	:	**NO. 12-1506**
F&M EQUIPMENT LTD., f/k/a FURNIVAL MACHINERY COMPANY,	:	
Defendant.	:	

MEMORANDUM

Tucker, C.J. **July 17, 2017**

Before the Court are the following:

1. Indian Harbor Insurance Company's Motion for Partial Summary Judgment (Doc. 62);
2. F&M Equipment, Ltd.'s Motion for Partial Summary Judgment (Doc. 64);
3. Indian Harbor Insurance Company's Brief in Opposition to F&M Equipment Ltd's Motion for Partial Summary Judgment (Doc. 65);
4. Counter-Plaintiff F&M Equipment Ltd's Memorandum of Law in Opposition to [Counter-]Defendant's Motion for [Partial] Summary Judgment (Doc. 66);
5. Counter-Plaintiff F&M Equipment, Ltd's Reply Memorandum of Law in Support of its Motion for [Partial] Summary Judgment (Doc. 67); and
6. Indian Harbor Insurance Company's Reply in Support of Motion for Partial Summary Judgment (Doc. 68).

Upon consideration of the Parties' submissions, Defendant F&M Equipment Ltd.'s Motion for Partial Summary Judgment (Doc. 64) is GRANTED IN PART AND DENIED IN PART and

Plaintiff Indian Harbor Insurance Company's Motion for Partial Summary Judgment (Doc. 62) is DENIED.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Parties have filed cross-motions for summary judgment requesting, in essence, that the Court decide whether Indian Harbor Insurance Company ("Indian Harbor") breached its obligation under an insurance policy it has with F&M Equipment, Ltd. ("Furnival") by failing to offer Furnival a renewal policy that would meet the Third Circuit's definition of the term "renewal." The Parties' disagreement centers on whether Indian Harbor's failure to incorporate language relating to the Parties' cancellation and non-renewal rights, as set forth in the original insurance policy, renders the new policy a nonrenewal, and constitutes a breach of Indian Harbor's obligation to offer a renewal.

This Court and the United States Court of Appeals for the Third Circuit have extensively recounted the factual and procedural background of this case in earlier opinions.[1] For this reason, at this time, the Court will provide a concise summary of the factual and procedural background only to the extent necessary to resolve the single issue raised by the Parties' cross-motions for summary judgment.

A. Initial Litigation and Third Circuit Appeal

In December 2001, Furnival contracted with Indian Harbor for a ten-year Pollution and Remediation Legal Liability Policy ("Policy"). Pl.'s Br. in Supp. of Mot. for Partial Summ. J. Ex. A, at 1; Bartle Decl. Ex. 1, at 1. This Policy consisted of a form agreement and a number of

[1] *See generally Indian Harbor Ins. Co. v. F&M Equipment, Ltd.*, 804 F.3d 310 (3d Cir. 2015) (providing a fuller statement of the facts and procedural history, which is undisputed by the Parties); *Indian Harbor Ins. Co. v. F&M Equipment, Ltd.*, 2013 WL 4405685 (E.D. Pa., Aug. 15, 2013), *rev'd*, 804 F.3d 310 (3d Cir. 2015) (providing same).

separately negotiated endorsements that altered and/or supplemented the Policy's standard terms. *See generally* Pl.'s Br. in Supp. of Mot. for Part. Summ. J. Ex. A; Bartle Decl. Ex 1.

i. Endorsement No. 16: Cancellation and Non-Renewal Modification

Among the endorsements that the Parties negotiated and ultimately executed was Endorsement No. 16 titled, "Cancellation and Non-Renewal Modification." Pl.'s Br. in Supp. of Mot. for Part. Summ. J. Ex. A, at 30; Bartle Decl. Ex. 1, at 30. By its own terms, Endorsement No. 16 "change[d] the policy." Pl.'s Br. in Supp. of Mot. for Part. Summ. J. Ex. A, at 30; Bartle Decl. Ex. 1, at 30. The first sentence of Endorsement No. 16, in fact, provided that "[t]his endorsement . . . forms a part of Policy No. PEC0010805." Pl.'s Br. in Supp. of Mot. for Part. Summ. J. Ex. A, at 30; Bartle Decl. Ex. 1, at 30. Endorsement No. 16 provided:

> I. The INSURED and the Company agree that the Company may cancel at any time or refuse to offer a renewal extension of coverage for the following reasons:
>
> a. the INSURED has made a material misrepresentation . . . [; or]
> b. the INSURED materially breaches . . . ; or
> c. material failure on the part of the INSURED to comply with Policy terms, conditions, or contractual duties; or
> d. a material change in the operations or lack of operations performed by the INSURED. . . .
>
> II. Furthermore, the INSURED and the Company agree that the Company may refuse to offer a renewal extension of coverage to the INSURED for the following reason:
>
> a. Loss of reinsurance or a substantial decrease in reinsurance has occurred . . . .
>
> The Company <u>agrees that it shall not cancel nor non-renew this Policy except for the reasons stated above.</u>
>
> All other terms and conditions remain the same.

Pl.'s Br. in Supp. of Mot. for Part. Summ. J. Ex. A, at 30 (emphasis added); Bartle Decl. Ex. 1, at 30. (emphasis added). Under Endorsement No. 16, therefore, Indian Harbor agreed to restrict the

conditions under which it could cancel or decide not to offer a renewal of the Policy to Furnival. Pl.'s Br. in Supp. of Mot. for Part. Summ. J. Ex. A, at 30; Bartle Decl. Ex. 1, at 30. Indeed, the conditions outlined in Endorsement No. 16 represent the exclusive reasons that either Party could cancel or not renew the Policy.

ii. Furnival Seeks to Renew the Policy on Identical Terms and Conditions

In late 2011, as the Policy was set to expire, Furnival requested that Indian Harbor provide Furnival with a proposed renewal policy as required under Endorsement No. 16. Bartle Aff. Ex. 3, at 2; Pl.'s Br. in Supp. of Mot. for Part. Summ. J. 2. In response, Indian Harbor sent Furnival an "Indication of Coverage." Bartle Aff. Ex. 4. The Indication of Coverage would renew the Policy, but with four differences. *Id.* at 2–19. These four differences were: "1) an updated price; 2) one year of coverage instead of ten; 3) $5 million coverage limit instead of $14 million; 4) exclusion of Elizabethtown [as a covered geographical site]." *Id.* Furnival rejected Indian Harbor's offer to renew on the altered terms. Bartle Aff. Ex. 6. Instead, Furnival insisted that Indian Harbor provide a renewal policy on terms identical to those contained in the Policy. *Id.* Indian Harbor refused. Bartle Aff. Ex. 7.

Indian Harbor then commenced this suit seeking, among other things, a declaration that the Indication of Coverage, despite the four differences from the Policy constituted a valid offer of renewal as required by Endorsement No. 16. Furnival asserted a counterclaim against Indian Harbor for breach of contract and then filed a motion for summary judgment. This Court denied the motion for summary judgment. Furnival appealed this Court's decision to the Third Circuit, which reversed and remanded for further proceedings.

B. Parties' Negotiations After Remand from the Third Circuit

After the Third Circuit's decision to remand, the Parties requested that the Court stay this case to afford the Parties an opportunity to settle the matter without further Court intervention. Pl.'s Br. in Supp. of Mot. for Part. Summ. J. 4; Def.'s Mem. of Law in Supp. of Mot. for Part. Summ. J. 7. The Parties have since engaged in extensive negotiations over what terms should be included in Indian Harbor's renewal policy offer in light of the Third Circuit's decision. Pl.'s Br. in Supp. of Mot. for Part. Summ. J. 4; Def.'s Mem. of Law in Supp. of Mot. for Part. Summ. J. 7. The Parties agreed on all matters relating to the renewal policy except whether Indian Harbor was required to incorporate the terms from Endorsement No. 16 relating to cancellation and nonrenewal. Pl.'s Br. in Supp. of Mot. for Part. Summ. J. 4; Def.'s Mem. of Law in Supp. of Mot. for Part. Summ. J. 3.

In short, Indian Harbor contends that it need not include the "broad renewal provisions" from the initial policy in its new policy for the new policy to constitute a valid renewal. Therefore, Indian Harbor concludes, its failure to include such terms in its new policy offer does not constitute a breach of its obligation to offer a renewal under the Policy.

By contrast, Furnival contends that the Third Circuit's decision requires Indian Harbor to do the opposite. Furnival contends that Indian Harbor must incorporate the very same cancellation and non-renewal modifications contained in Endorsement No. 16 in the new policy offer in order for the new policy offer to constitute a valid renewal. Indian Harbor's failure to do so, Furnival reasons, constitutes a breach of the initial Policy. For these reasons, Furnival requests judgment in its favor for breach of contract.

II. STANDARD OF REVIEW

Under Rule 56 of the Federal Rules of Civil Procedure, a court shall grant summary judgment in favor of the moving party only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. A fact is "material" if it is "one that might 'affect the outcome of the suit under governing law.'" *Smith v. Johnson & Johnson*, 593 F.3d 280, 284 (3d Cir. 2010) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A dispute as to a material fact is "genuine" if it "is one that 'may reasonably be resolved in favor of either party.'" *Lomando v. United States*, 667 F.3d 363, 371 (3d Cir. 2011) (quoting *Anderson*, 477 U.S. at 250).

The movant has the initial "burden of identifying specific portions of the record that establish the absence of a genuine issue of material fact." *Santini v. Fuentes*, 795 F.3d 410, 416 (3d Cir. 2015). When assessing a motion for summary judgment, the court "must construe all evidence in the light most favorable to the nonmoving party." *Id.*

The standard of review for cross-motions for summary judgment is identical to the standard applicable to routine motions for summary judgment. *Lawrence v. City of Phila.*, 527 F.3d 299, 310 (3d Cir. 2008). "When confronted with cross-motions for summary judgment . . . 'the court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the summary judgment standard.'" *Arsdel v. Liberty Life Assurance Co. of Bos.*, No. CV 14-2579, 2017 WL 1177174, at *4 (E.D. Pa. Mar. 30, 2017) (citing *Erbe v. Conn. Gen. Life Ins. Co.*, No. Civ.A. 06-113, 2009 WL 605836, at *1 (W.D. Pa. Mar. 9, 2009)).

III. DISCUSSION

A. Pennsylvania Law Applies

The Court must apply Pennsylvania law in the present dispute because the Court sits in diversity. *See Liggon-Redding v. Estate of Sugarman*, 659 F.3d 258, 262 (3d Cir. 2011) (providing that when a federal court sits in diversity, the court will apply the forum state's substantive law while adhering to federal procedural law).

B. Breach of Contract

Under Pennsylvania law, it is well-established that to state a claim for breach of contract, a plaintiff must establish three elements: "(1) the existence of a contract, including its essential terms; (2) the defendant's breach of duty imposed by the terms; and (3) actual loss or injury as a direct result of the breach." *Angino v. Wells Fargo Bank, N.A.*, 666 F. App'x 204, 207 (3d Cir. 2016) (citing *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 225 (3d Cir. 2003)).

It is similarly well-established that:

> [c]ontract interpretation is a question of law that requires the court to ascertain and give effect to the intent of the contracting parties as embodied in the written agreement. Courts assume that a contract's language is chosen carefully and that the parties are mindful of the meaning of the language used. When a writing is clear and unequivocal, its meaning must be determined by its contents alone.

Old Summit Mfg., LLC v. Pennsummit Tubular, LLC (In re Old Summit Mfg., LLC), 523 F.3d 134, 137 (3d Cir. 2008) (citing *Dep't of Transp. v. Pa. Indus. for the Blind and Handicapped*, 886 A.2d 706, 711 (Pa. Commw. Ct. 2008)); *see also D&M Sales, Inc. v. Lorillard Tobacco Co.*, No. CIV.A.09-2644, 2010 WL 786550, at *3 (E.D. Pa. Mar. 8, 2010) (providing that "the court's goal is 'to ascertain and give effect to the intent of the contracting parties,'" and "[w]hen the words of an agreement are clear and unambiguous, the court will ascertain the intent of the parties from the language used in the agreement."). In interpreting a contract, courts will "not

consider merely individual terms utilized in the insurance contract, but the entire insurance provision to ascertain the intent of the parties." *401 Fourth St., Inc. v. Inv'r Ins. Group*, 879 A.2d 166, 172 (Pa. 2005).

Contractual language is ambiguous only "if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." *Gov't Emps. Ins. Co. v. Ayers*, 955 A.2d 1025, 1028–29 (Pa. Super. Ct. 2008) (citing *Inv'r Ins. Group*, 879 A.2d at 171). In short, "Courts must give plain meaning to a clear and unambiguous contract provision unless to do so would be contrary to a clearly expressed public policy." *Erie Ins. Exch. v. Conley*, 29 A.3d 389, 392 (Pa. Super. Ct. 2011) (citing *Ayers*, 955 A.2d 1025 at 1028–29 (Pa. Super. Ct. 2008)).

In the present case, the Parties' cross-motions for summary judgment converge on the second element of the breach of contract claim: whether there has been a breach of a duty imposed by the terms of the contract. More specifically, the question presented is whether Indian Harbor must, under the terms of Endorsement No. 16, include the same cancellation and non-renewal terms contained in Endorsement No. 16 in its new policy in order for the new policy to constitute a "renewal" as defined by the Third Circuit.

C. Definition of "Renewal"

In the appeal of this case, the Third Circuit articulated a general rule that "for a contract to be considered a renewal, it must contain the same, or nearly the same, terms as the original contract." *F&M Equipment*, 804 F.3d at 311. The Third Circuit held that Indian Harbor's original Indication of Coverage did not meet the definition of a "renewal." *Id.* at 315. In so holding, the Third Circuit did not affirmatively state what terms must be "the same or nearly the same" as the Policy for any later policy from Indian Harbor to constitute a "renewal." Still, the

Third Circuit advised that, in this case, the Indication of Coverage was not a renewal because the Indication of Coverage substantively altered or deleted various terms in the Policy. *Id.* The Third Circuit further advised that although "a reasonable change in price should not alone render a new contract a nonrenewal" the "remaining terms must be recognizable extensions of the initial Policy, and [in this case] they are not." *Id.* (emphasis added).

The Third Circuit noted that the terms in the Indication of Coverage were not recognizable extensions of the initial Policy because "[t]he length of coverage is different, the amount of coverage is different, and the scope of coverage is different." *F&M Equipment*, 804 F.3d at 315. In particular, the Indication of Coverage differed from the Policy in that it had "1) an updated price; 2) one year of coverage instead of ten; 3) $5 million coverage limit instead of $14 million; 4) exclusion of Elizabethtown." *Id.* These differences between the terms in the Indication of Coverage and the Policy were such that the Third Circuit concluded that the Indication of Coverage was not on "nearly the same terms as the original [Policy]" and, therefore, could not constitute a renewal. *Id*. Ultimately, "[b]ecause Indian Harbor did not offer a contract that is either the same or nearly the same as the Policy, it breached its promise to offer a renewal extension of coverage." *Id*.

In dicta, the Third Circuit addressed an ancillary issue raised by Indian Harbor as part of its argument against a strict construction of the term "renewal." The Third Circuit stated:

> Indian Harbor complains that holding it to its promise would require renewing the renewal provision itself, and that would obligate Indian Harbor to recursively renew the contract in perpetuity. To the extent Indian Harbor argues that a contract it drafted was not careful enough, we are unmoved. Moreover, in future policies, Indian Harbor need not incorporate the broad renewal provisions that are included here. The issue of a perpetual contract is, however, a question for another day. We hold here only that the terms of a renewal must be the same or nearly the same as the initial contract. The question of being held to a perpetual renewal is not before us and we will not opine on such a question at this time.

F&M Equipment, 804 F.3d at 316. This passage of the Third Circuit's decision has engendered disagreement between the Parties who advance competing interpretations of this language and the language's import on the issue now before this Court.

In essence, Furnival contends that by this passage, the Third Circuit impliedly held that Indian Harbor must include the same cancellation and nonrenewal provisions from Endorsement No. 16 in any renewal policy. By contrast, Indian Harbor contends that as it relates to the specific renewal of the Policy in this case, the Third Circuit affirmatively held that Indian Harbor need not incorporate the terms of Endorsement No. 16 into its renewal policy offer when the Third Circuit stated that "in future policies, Indian Harbor need not incorporate the broad renewal provisions that are included here." *Id.*

The Parties each place too much weight on this passage and fail to note the reality that the Third Circuit was clear that it would take no position on the specific issue now presented. The Third Circuit explicitly acknowledged that "[t]he issue of a perpetual contract is, however, a question for another day. We hold here only that the terms of a renewal must be the same or nearly the same as the initial contract. The question of being held to a perpetual renewal is not before us and we will not opine on such a question at this time." *Id.* (emphasis added). The Third Circuit, thus, made clear that its holding was specific to the facts of the case and whether the Indication of Coverage constituted a renewal.

D. Failure to Include Some Recognizable Extension of the Cancellation and Nonrenewal Terms into the New Policy Renders the New Policy a Nonrenewal

As the Third Circuit's decision in the earlier appeal of this matter applies to the question now presented by the Parties, the Court concludes that Indian Harbor's failure to incorporate any language even remotely resembling the cancellation and nonrenewal terms set forth in

Endorsement No. 16 of the Policy renders the new policy a nonrenewal and, therefore, Indian Harbor has breached an essential duty under the Policy. The Court notes, however, consistent with the Third Circuit's decision in the earlier appeal of this case, that Indian Harbor need not have included the verbatim language on cancellation and nonrenewal as provided by Endorsement No. 16. Rather, Indian Harbor need only have, at a minimum, incorporated terms that could be considered recognizable extensions of the cancellation and nonrenewal terms contained in Endorsement No. 16.

At the outset, the Court notes the obvious: the new policy from Indian Harbor does not meet the Third Circuit's first part of the definition of "renewal" because the terms of Indian Harbor's new offer are not identical to the terms of the Policy. As the terms of the new policy are not identical, the new policy and the Policy cannot be considered the "same." Therefore, the present offer cannot be considered a "renewal" on this basis.

Having determined that the new policy cannot constitute a renewal because its terms are not the "same" as the terms from the Policy, the Court must next consider whether the terms of the new policy are otherwise "nearly the same" as those in the Policy. Generally, on the issue of renewal, the Third Circuit noted that the "[c]ase law . . . is quite thin."[2] Thus, in this analysis, the Court remains mindful of, and is guided by, the Third Circuit's observation that though a reasonable change in price between an initial policy and a new policy will not generally render the new policy a nonrenewal, the new policy's "remaining terms must be recognizable extensions of the initial Policy." *F&M Equip.*, 804 F.3d at 315 (emphasis added).

As the Third Circuit's decision applies to the present facts, the Court concludes that the categorical omission of any terms that can be considered recognizable extensions of the Policy's

[2] Indian Harbor similarly acknowledged that "controlling case law is sparse." Pl.'s Brief in Supp. of Mot. for Partial Summ. J. 9.

initial cancellation and non-renewal terms renders the present offer from Indian Harbor a nonrenewal because it is not "nearly the same" as the Policy. Therefore, Indian Harbor has breached its duty to provide a renewal offer. This conclusion accords with, and effectuates, the intent of the Parties as evidenced by the clear and unambiguous terms of the Policy when read in light of the Third Circuit's definition of the term "renewal."

As the Third Circuit acknowledged in the appeal of this case, "[t]he fundamental rule in interpreting the meaning of a contract is to ascertain and give effect of the intent of the contracting parties." *F&M Equip.*, 804 F.3d at 313 (citing *Murphy v. Duquesne Univ.*, 777 A.2d 418, 429 (Pa. 2001)). Where, as here, the terms of a contract are clear and unambiguous, the Court is constrained to the writing itself to determine the Parties' intent.[3] The Court's analysis, thus, begins and ends with the intent of the Parties as articulated by the unambiguous written words of the Policy. As discussed in detail below, the Court concludes that the Parties intended, based upon the clear language of the Policy read in light of the Third Circuit's definition of "renewal" that some form of the cancellation and nonrenewal terms contained in Endorsement No. 16 would be incorporated into any subsequent renewal policy.

Any renewal of the Policy must include Endorsement No. 16 because Endorsement No. 16 was made an essential part of the Policy. The language of Endorsement No. 16 reveals Indian Harbor's painstaking incorporation of Endorsement No. 16 into the Policy and Indian Harbor's warnings to Furnival of the critical changes wrought by its execution. By its terms, Endorsement No. 16 proclaimed that it "forms a part of Policy No. PEC0010805" and "CHANGES THE POLICY." Pl.'s Brief in Supp. of Mot. for Part. Summ. J. Ex. A, at 30. The changes were of

[3] The Parties do not argue that the terms of Endorsement No. 16 are ambiguous. Indeed, the Parties previously have stipulated that the terms of Endorsement No. 16 are unambiguous. Pl.'s Br. in Opp. to Def.'s Mot. for Part. Summ. J. 4 (citing Def.'s Mem. in Supp. of Renewed Mot. 1, at n.1, Doc. 26-1).

such great import that Indian Harbor warned Furnival to "PLEASE READ [Endorsement No. 16] CAREFULLY." *Id.* Drawing Furnival's attention to the changes made to the Policy was sensible because Endorsement No. 16 "modified insurance provided under the following: POLLUTION AND REMEDIATION LEGAL LIABILITY." *Id.* Thus, Indian Harbor clearly understood that execution of Endorsement No. 16 made critical and material alterations to the Policy as a whole, and that Endorsement No. 16 was, by its own terms, made an essential part of the Policy.

Indeed, this prefatory language helpfully and accurately introduced the terms contained in Endorsement No. 16, terms that critically altered the relationship between the Parties by providing an exclusive and exhaustive list of conditions under which the Parties could cancel or non-renew the Policy. In drafting and executing Endorsement No. 16, Indian Harbor "agree[d] that it shall not cancel nor non-renew this Policy except for the reasons stated." Pl.'s Brief in Supp. of Mot. for Part. Summ. J. Ex. A, at 30 (emphasis added). In so writing, the Parties specifically bargained for and agreed to two substantive changes to the Policy. First, the Parties bargained for and agreed to terms that diverged from the standard terms relating to cancellation that would otherwise have applied under the Policy.[4] Second, the Parties negotiated and agreed to terms that vested in Furnival a right to a renewal of the Policy that Furnival would not have otherwise had because the Policy was otherwise silent on the issue of renewal. These changes, thus, modified significant and substantive terms of the Policy.

Having determined that Endorsement No. 16 was specifically and wholly incorporated into the Policy and that the language of Endorsement No. 16 changed and added critical terms to

[4] The standard language in the Policy regarding cancellation provided a nonexhaustive and nonexclusive method for canceling the Policy upon "written notice." *See generally* Pl.'s Brief in Supp. of Mot. for Part. Summ. J., Ex. A, 10 (providing the standard terms regarding cancellation that were ultimately altered upon execution of Endorsement No. 16).

the Policy, it is apparent that in agreeing to offer to Furnival a renewal of "this Policy," Indian Harbor agreed, and the Parties intended, that the Policy be renewed as a whole inclusive of Endorsement No. 16 and its critical terms. The plain language of Endorsement No. 16 provides that Indian Harbor is to renew "this Policy," which is an unambiguous reference to the Policy as a whole. That the words "this Policy" refers to the whole Policy including its endorsements is clear for three reasons.[5]

First, when the term "this Policy" is read in the context of Endorsement No. 16's incorporation provisions discussed above, it is apparent that the Parties understood the term to refer to the Policy inclusive of the terms set forth in Endorsement No. 16.

Second, the term "this Policy" is used consistently throughout the writing to refer to the entire agreement including all its endorsements. For example, by its own terms, the Policy enumerated in its body each of the "Endorsements Attached to this Policy" including "Endorsement No. 016 . . . . Cancellation and Non-Renewal Modification." Pl.'s Brief in Supp. Ex. A, at 2.

Third, that the term "this Policy" refers to the entire Policy inclusive of all its endorsements is consistent with the Third Circuit's view that the Policy's endorsements contained critical terms the alteration of which between the Policy and Indian Harbor's Indication of Coverage rendered the Indication of Coverage a nonrenewal. As discussed above, the Third Circuit determined that Indian Harbor's Indication of Coverage constituted a nonrenewal in breach of the Policy because it altered certain terms beyond recognition. For

[5] Indian Harbor would have the Court interpret the term "this Policy" to mean everything but the renewal provision. Pl.'s Brief in Supp. of Mot. for Part. Summ. J. 11. However, to interpret the term in this manner, and out of context, would force this Court to ignore the well-established rule that courts must "not consider merely individual terms utilized in the insurance contract, but the entire insurance provision to ascertain the intent of the parties." *401 Fourth St.*, 879 A.2d at 172.

example, the Third Circuit noted that the "exclusion of Elizabethtown [Landfill Site]" as a covered location under the Indication of Coverage rendered the Indication of Coverage a nonrenewal. *F&M Equip.*, 804 F.3d at 315. Elizabethtown, of course, was listed as a covered site under Endorsement No. 1. Pl.'s Brief in Supp. Ex. A, at 13. Accordingly, it stands to reason that the Third Circuit believed that Endorsement No. 1 and its terms were material terms of the Policy as a whole and the alteration of the term in Endorsement No. 1 relating to Elizabethtown was a significant factor in finding that the Indication of Coverage constituted a nonrenewal. Just as the terms of Endorsement No. 1 were critical terms the inclusion of which, in some recognizable form, was necessary for a new policy to constitute a renewal, so too are the terms of Endorsement No. 16 critical terms that must be incorporated, in some recognizable form, into Indian Harbor's new policy for the new policy to constitute a renewal.

For these reasons, it is clear that by agreeing to offer a renewal of "this Policy," Indian Harbor agreed to renew the Policy inclusive of the critical terms from the Policy's endorsements including the critical cancellation and nonrenewal terms contained in Endorsement No. 16. The categorical exclusion of terms that even remotely resemble the terms contained in Endorsement No. 16 materially alters the contractual relationship initially bargained for by the Parties when they agreed to execute Endorsement No. 16. Without some recognizable extension of the terms of Endorsement No. 16 in the new policy, the new policy cannot be considered a renewal.

In arguing that it need not include any language relating to cancellation and non-renewal as set forth in Endorsement No. 16 into its purported renewal policy, Indian Harbor cites to three Pennsylvania state cases dealing with real estate leases containing covenants to renew.[6] Indian

[6] In its brief, Indian Harbor cites to the 1925 Pennsylvania Supreme Court case of *Pettit v. Tourison*, 129 A. 587(Pa. 1925), the 1902 Pennsylvania Superior Court case of *Swigert v.*

Harbor cites to these cases for the proposition that "renewal provisions do not need to be included in renewal contracts even where the contract requires that the renewal be on the same terms and conditions." Pl.'s Brief in Supp. of Mot. for Part. Summ. J. 9. Indian Harbor, however, draws too broad a conclusion from these real estate cases. As an initial matter, these real estate cases are factually distinguishable from the present insurance contract case by virtue of the fact that they deal with real estate.[7] Still, the cases cited by Indian Harbor serve simply to reinforce the well-established rule that a court must effectuate the intent of the contracting parties when reviewing a contract and refrain from injecting terms into a contract for which the parties had not bargained.

Indeed, in *Pettit v. Tourison*, the Pennsylvania Supreme Court reviewed a lease agreement and a renewal provision contained in the lease that provided that the lease could be renewed "under the same terms and conditions" at the expiration of its first seven year term. 129 A. at 587. After the initial seven year term, the lessee renewed. *Id*. The issue before the Pennsylvania Supreme Court was whether in opting to renew the lease "under the same terms and conditions" the lessee was entitled to exercise an option to purchase the property that was contained in the original lease. *Id.* The Pennsylvania Supreme Court held that the option to purchase was specific to the initial lease and did not carry over into the renewal lease because the Parties did not intend to renew the option. *Id.* at 588. The Pennsylvania Supreme Court explained that "[t]he lease in questions confers no such right [to extend the option to purchase]

Hartzell, 20 Pa. Super. 56 (1902), and the Chester County Court of Common Pleas case of *Barr v. March*, 61 Pa. D. & C.2d 588 (Pa. Com. Pl. 1972).

[7] Cases involving real property interests are often treated differently by the courts because of the general view that real property is, by its nature, unique. *See, e.g., Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 256 (3d Cir. 2011) (citing *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009)) (acknowledging that preliminary injunctive relief may be a particularly appropriate remedy in cases involving real property interests "because of the unique nature of the property interest").

upon the lessee. It is clear that the limit which the parties by their agreement provided in this case" was that the option to purchase would expire at the end of the initial seven year lease term. *Id.* (emphasis added). In arriving at this conclusion, the Pennsylvania Supreme Court found the intent of the contracting parties, as evidenced in the written agreement, to be dispositive of whether the option to purchase extended to the lease in its renewed form.

That the intent of contracting parties as evidenced in their unambiguous written agreement is dispositive, even in the context of lease agreements, was confirmed fifty-one years after the decision in *Pettit* by the Pennsylvania Superior Court in *Bennetch v. Dreistadt*, a case that was not cited by Indian Harbor. 364 A.2d 398 (Pa. Super. Ct. 1976). In *Bennetch*, a lessor and lessee executed an agreement that included an option to purchase as well as a "renewal clause" that indicated that upon the expiration of the term of the lease, if the lessee were to continue to occupy the premises, then "the Lease and all of its terms, provisions, conditions, covenants, confessions or confessions of judgment, waivers, remedies and all and distinct rights and powers upon the lessee" would renew. *Id.* at 399. After the initial lease term, during one of the renewal terms, the lessee sought to execute the option to purchase, but the lessor refused believing that the option to purchase was not incorporated into the subsequent renewals. *Id.* The Pennsylvania Superior Court found that while a lease renewal generally applies specifically to the actual demise, that in this case, the clear language of the renewal provision evidenced the parties intent that the option to purchase be incorporated into all subsequent renewals of the lease. *Id.* at 401. Thus, in *Bennetch* as in *Pettit*, the intent of the contracting parties as evidenced in their unambiguous writing was dispositive on the issue of what terms are intended to be incorporated into a later renewal of a contract.

These cases, thus, stand for the unremarkable proposition that courts must effectuate the intent of the parties as stated in an unambiguous writing when passing on issues of contractual interpretation. The Court concludes that the Policy and Endorsement No. 16 clearly and unambiguously evidence the Parties' intent to renew the Policy inclusive of the critical cancellation and nonrenewal terms in Endorsement No. 16 in some recognizable form. To hold otherwise would require the Court to read into the Policy an implied term that compels the exclusion of Endorsement No. 16's from the renewal policy, an implied term that has no support in the Policy's or in Endorsement No. 16's clear terms.

E. Inclusion of Cancellation and Nonrenewal Terms Does Not Violate Public Policy That Disfavors Perpetual Contracts

The Court is unpersuaded by Indian Harbor's contention that requiring Indian Harbor to include language relating to cancellation and nonrenewal from Endorsement No. 16 would transform the Policy into a perpetual contract in contravention of public policy because the presence of such language in the Policy and/or its renewal does not automatically render it and/or its renewal perpetual. Indeed, the Policy, by virtue of Endorsement No. 16's cancellation and nonrenewal modifications specifically eliminated any possibility that the Policy be transformed into an impermissibly perpetual contract.

It is accepted that "Pennsylvania law disfavors perpetual contracts." *Wyeth Pharms., Inc. v. Borough of West Chester*, 126 A.3d 1055, 1064 (Pa. 2015); *see also Hutchinson v. Sunbeam Coal Corp.*, 519 A.2d 385, 390 n.5 (Pa. 1986) (providing same). For this reason, "a contract for an indefinite period will be construed to be for a 'reasonable time or terminable at will unless the intention of the parties can be ascertained.'" *Wyeth Pharms.*, 126 A.3d at 1064 (emphasis added). In resolving most contract questions, when considering whether a contract is impermissibly perpetual, the reviewing court must focus on effectuating the intent of the

contracting parties. To determine the intent of the parties in this regard, the court should consider whether the "agreement specifies the sole or exclusive conditions that will give rise to termination, [because then] it is definite in duration and therefore not terminable at will as a matter of law. In contrast, where an agreement merely specifies conditions that *may* result in termination of the agreement, it is indefinite in duration and terminable at will." *Roberts Tech. Group, Inc. v. Curwood, Inc.*, 2015 WL 5584498 at *5 (E.D. Pa. Sept. 23, 2015) (citing *D & M Sales, Inc. v. Lorillard Tobacco Co.*, 2010 WL 786550 at *3 (E.D. Pa. Mar. 8, 2010)).

Though not binding, the Second Circuit case *Payroll Express Corp. v. Aetna Cas. and Sur. Co.*, is persuasive and instructive on the present facts. 659 F.2d 285, 292 (2d Cir. 1981). In *Payroll*, an insured sued its provider of a crime insurance policy for breach of contract when the insurer attempted to cancel the policy despite the insurer's earlier issuance of a letter endorsement that made the policy "non-cancellable by [the insurer] except for non-payment of premiums." *Id.* at 290. After a non-jury trial, the trial court concluded that the noncancellation endorsement was unenforceable because the noncancellation endorsement made it impossible for the policy to terminate and, therefore, transformed the policy into a de facto perpetual contract in violation of the policy against perpetual contracts. *Id*. at 289. The Second Circuit reversed the trial court explaining that:

> [W]here a contract contains no provisions for termination, the court will look to the intention of the parties, absent which the contract will be held 'terminable within a reasonable time or revocable at will, dependent upon the circumstances.' However, where the parties, while providing no fixed 'date for the termination of the promisor's obligation . . . condition the obligation upon an event which would necessarily terminate the contract,' no such presumption of perpetuity is justified and they will be deemed to have accepted the obligation to continue until the condition occurs.

Id. at 292 (citations omitted). Applied to the facts before it, the Second Circuit held that the noncancellation endorsement did not create a perpetual contract, but merely a contract that could

be terminated only upon the insured's nonpayment of premiums. *Id*. In so concluding, the Second Circuit dismissed the insurer's argument that somehow, the noncancellation endorsement was "illusory" because under the terms of the endorsement the insurer was "permanently bound, whereas [the insured] may cancel at any time simply by not paying premiums." *Id.* at 291. To conclude otherwise would "render unenforceable most life insurance contracts, which may be cancelled by the insured only for non-payment of premiums but by the insured at will." *Id*.

The Second Circuit further explained that "[c]onstruction of the agreement as obligating [the insurer] to continue to provide coverage as long as [the insured] paid premiums set by [the insurer] does not work any undue hardship of unfairness of the type sought to be avoided by the policy against perpetuity, since [the insurer] under the terms of the policy remains free, within the limits allowed by the law, to fix the premium rates according to the risks undertaken by it." *Id*. at 292. The Second Circuit, thus, concluded that holding the insurer to its bargain was wholly appropriate.

In the present case, neither the Policy nor any renewal of the Policy—so long as the renewal contains terms that are recognizable extensions of the cancellation and nonrenewal terms of Endorsement No. 16—can be considered impermissibly perpetual because the terms of Endorsement No. 16 specify the exclusive conditions that give rise to cancellation and/or nonrenewal. Endorsement No. 16 provides that Indian Harbor "agrees that it shall not cancel nor non-renew this Policy except for the reasons stated above." Pl.'s Brief in Supp. of Mot. for Part. Summ. J. Ex. A, 30 (emphasis added). Like the noncancellation endorsement in *Payroll* did not render the policy at issue a perpetual contract, Endorsement No. 16 does not render the Policy and/or its renewal a perpetual contract in view of the clear intent of the Parties in setting forth the exclusive conditions under which the contractual relationship could end.

Endorsement No. 16 is not, like the noncancellation endorsement at issue in *Payroll* was not, a perpetual contract in view of the clear intent of the Parties in setting forth the exclusive conditions under which the contractual relationship could end.

Finally, regarding Indian Harbor's argument that under the terms of Endorsement No. 16, Furnival wields outsized and improper power with respect to cancellation and renewal, this Court is, as the Third Circuit was, unmoved.[8] This argument parallels the argument made by the insurer in *Payroll* that claimed such an unequal relationship between insurer and insured rendered the contract "illusory" because under the terms of the endorsement the insurer was "permanently bound, whereas [the insured] may cancel at any time simply by not paying premiums." *Payroll*, 659 F.2d at 291. However, this Court concludes on the present facts, as the Second Circuit concluded on the facts before it, that such an arrangement is not per se improper.

F. Furnival's Motion for Partial Summary Judgment

The foregoing conclusions apply equally to Furnival's Motion for Partial Summary Judgment as they do to Indian Harbor's Motion for Summary Judgment because both motions rely on the same set of material and undisputed facts. The Court, however, specifically rejects Furnival's Motion for Partial Summary Judgment to the extent that it argues Furnival is entitled to a renewal of the Policy inclusive of the verbatim terms contained in Endorsement No. 16. The Third Circuit plainly held that "the terms of a renewal must be the same or nearly the same as the initial contract." *F&M Equip.*, 804 F.3d at 316 (emphasis added). Indian Harbor's duty to offer a renewal, therefore, may be satisfied if its offer provides terms that constitute "recognizable extensions" of the cancellation and nonrenewal terms in Endorsement No. 16. What Indian

[8] The Third Circuit remarked in its earlier decision in this case that "[t]o the extent Indian Harbor argues that a contract it drafted was not careful enough, we are unmoved." *F&M Equip.*, 804 F.3d at 316.

Harbor may not do, however, is categorically delete all terms on the subject of cancellation and nonrenewal as set forth in Endorsement No. 16.

IV. CONCLUSION

For the reasons set forth above, Defendant F&M Equipment LTD's Motion for Partial Summary Judgment is GRANTED IN PART AND DENIED IN PART and Plaintiff Indian Harbor Insurance Company's Motion for Summary Judgment is DENIED. An appropriate Order follows.