

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

Grand America Associates LLC and 201 West  
79th Street Realty Corp. D/B/A Hotel Lucerne,

Plaintiffs,

- against-

Strathmore Insurance Company,

Defendant.

Index No. \_\_\_\_\_

**SUMMONS**

Plaintiffs designate New York County as  
the place of trial

Venue is proper under New York law.

TO THE ABOVE-NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer on Plaintiffs' attorney within twenty (20) days after the service of this summons, exclusive of the date of service, or within 30 (30) days after the service is complete if this summons is not personally delivered to you within the State of New York. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in this complaint.

Dated: March 11, 2022  
New York, New York

REED SMITH LLP

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TO:

Strathmore Insurance Company  
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**COMPLAINT**

**JURY TRIAL DEMANDED**

Plaintiffs Grand America Associates LLC and 201 West 79th Street Realty Corp. D/B/A Hotel Lucerne (collectively “Grand America”), by their undersigned counsel, hereby submits its Complaint against Strathmore Insurance Company (“Strathmore”) as follows:

**NATURE OF ACTION**

1. This is an action for declaratory judgment and breach of contract arising out of the refusal of Strathmore, a multi-billion dollar business, to live up to its promise to its policyholder, Grand America. Strathmore promised to pay for, in exchange for premiums paid, physical loss of or damage to and related business interruption losses and expenses at its insured location(s), all of which are insured locations under an “all risk” insurance policy sold to Grand America by Strathmore.

2. For over 30 years, Grand America owned and operated a thirteen-story hotel in New York, New York known as Hotel Lucerne. In addition to offering first-class hotel accommodations, Plaintiff leased rooms and commercial restaurant premises at the hotel and generated income from food and beverage sales to guests and visitors. Daily, Plaintiff accommodated hundreds of guests visiting New York and its many attractions and employed dozens of individuals to keep its operations running on a daily basis.

3. Hotel Lucerne provided the community a first class hotel experience that could introduce both domestic and international travelers to the Upper West Side. Hotel Lucerne has had the pleasure and honor of hosting dignitaries, musicians, business travelers and families to the community, where people are attracted by new restaurants, stores and residential and commercial buildings in the neighborhood, as well as businesses across New York.

4. This all changed in 2020 with the COVID-19 pandemic. The pandemic had an unprecedented and catastrophic effect on Grand America's property and business operations, causing millions of dollars in losses across Grand America's business.

5. The havoc wrought by the pandemic is well-documented. According to the Centers for Disease Control ("CDC"), to date, COVID-19 has infected more than 78 million people and killed nearly 950,000 in the United States. The states where Grand America's premises are located have not been spared from this tragedy.

6. Beyond the human toll, the pandemic has had a devastating impact on the economies of the state and city where Grand America's premises is located, causing widespread physical losses, property damage and loss for many businesses, including Grand America. As a result of the pandemic, Grand America has been prevented from conducting normal business operations and deprived of the use of its business premises.

7. Due to covered loss or damage depriving Grand America of its use of the business premises as a hotel, and to preserve continued business operations in the face of ongoing losses and Strathmore's refusal to acknowledge any coverage obligations for losses under the insurance policy, Grand America converted Hotel Lucerne to reopen business with a new purpose as a homeless shelter in July 2020, resulting in additional losses for which Strathmore is responsible. Even when able to re-open the property in a new capacity, as a result of the spread of COVID-19,

Grand America was unable to operate without substantial physical alterations, reductions in physical capacity, and other protective measures. Further, the presence of COVID-19 and SARS-CoV-2 within Grand America's insured properties also caused direct physical loss of or damage to properties (or both) by transforming the properties from usable and safe into properties that are unsatisfactory and prohibited for use, uninhabitable, unfit for their intended function, and extremely dangerous and potentially deadly for humans, requiring extensive physical alterations.

8. SARS-CoV-2 and COVID-19 caused direct physical loss of or damage to properties (or both) throughout the locales where Grand America's premises are based, including to Grand America's covered premises and surrounding properties, by altering the physical conditions of the properties so that they were no longer safe or fit for occupancy or use, and/or permitted to be used. Specifically, SARS-CoV-2 attaches itself to surfaces and properties, thereby producing physical change in the condition of the surfaces and properties—from safe and touchable to unsafe and deadly. SARS-CoV-2 and COVID-19 also physically alter and damage the air within buildings such that the air is no longer safe to breathe.

9. It is often the case that the source of a covered property insurance loss can ultimately be cleaned, removed, contained, or remediated, yet that does not mean that there was no "loss of or damage to" property in the first place. This was true for mold, odors, smoke, fumes, and asbestos fibers that triggered coverage in other cases and the same is true here. That is especially significant when it comes to business interruption losses, where even modest impacts to property lead to covered losses. There are plenty of cases in which a right to claim business interruption loss was found where nothing had to be done to fix the property damage, which cleared by natural action. The coronavirus can be disinfected or cleaned, but it still causes a distinct and

demonstrable alteration to property. That is what has triggered coverage for Grand America's significant losses here.

10. Because of the physical alterations of its properties, including the air, airspaces, and surfaces in its properties, which rendered the insured properties incapable of performing their essential functions, Grand America sustained direct physical loss of or damage to its property (or both). The disruption of normal business operations resulted in the severe and substantial losses more particularly described below.

11. As a direct cause from the COVID-19 pandemic and/or the closure orders, together with Strathmore's failure to live up to its obligations under the "all risk" policy, Grand America has suffered millions of dollars in loss and damage, all of which remains unreimbursed by Strathmore despite being covered under the terms of the policy purchased.

12. The insurance policy Strathmore sold to the Grand America is specifically intended to apply to losses caused by viruses and pandemics. It was revised intentionally by Strathmore to provide the coverage sought in this lawsuit. Strathmore repeatedly stated its intent to provide coverage for virus and pandemic caused losses to its domiciliary regulator, the New York Insurance Department, recognizing that its policyholders in the hotel industry like Grand America need and expect this type of coverage.

13. Grand America is yet another victim of the insurance industry's universal denial and rejection of its coverage obligations for COVID-19 business interruption losses. Strathmore has left Grand America with no choice but to seek judicial intervention to enforce the obligations owed to it by Strathmore pursuant to the terms and conditions of the "all risk" policy (the "All Risk Policy"). The All Risk Policy Strathmore sold to Grand America is attached hereto as **Exhibit A**, and is incorporated herein by reference.

14. The All Risk Policy specifically insures against business interruption losses, losses occasioned by government orders, decontamination costs, extra expense payments to continue business as nearly normal as practicable, loss as a result of communicable disease, among many other covered losses. Grand America has experienced losses that fall within all of these coverages. For this broad, “all risk” business interruption protection, Grand America paid significant premium.

15. Grand America’s purchase of this broad “all risk” coverage created a reasonable expectation that the coverage will apply if Grand America has a business interruption resulting from unforeseen and fortuitous events, such as the physical damage to and inability to use its properties or a forced government shutdown of its businesses as a result of a pandemic or other large-scale natural disaster. In particular, Grand America could not foresee the physical damage produced by the COVID-19 pandemic or the government orders shuttering all of its premises as a result of the physical damage produced by the COVID-19 pandemic. After faithfully paying a high premium for “all risk” coverage, business owner-insured Grand America, who was forced to completely suspend and extensively modify its business operations because of these unprecedented events, had a reasonable expectation that its “all risk” business interruption insurance would apply and protect it. Grand America had such expectations and sought coverage from Strathmore for the losses.

16. Despite the coverage provided and the expectations of Grand America, who paid a significant premium for it, Strathmore preemptively denied claims submitted by businesses for “all risk” coverage during the COVID-19 pandemic. In violation of state law, Strathmore denied coverage without conducting an investigation or considering supporting evidence. Through its conduct, Strathmore wrongfully breached its obligations under the All Risk Policy and left Grand

America without the insurance benefits it paid for, relied upon, and desperately needed during the business closures and interruptions and to remediate its ongoing property damage.

17. The insurance industry has repeatedly and falsely warned courts and the media that COVID-19-related claims will bankrupt insurers and force them to raise premiums and restrict coverages – but they have reaped enormous profits by denying covered claims and have continued to raise premiums despite refusing to uphold their coverage obligations.

18. These statements are especially odious when applied to Strathmore which has told its lead regulatory agency, the New York insurance Department, in filings made with the Department that it understands policyholders like Grand America want and expect this coverage and that their all-risk policy is designed to provide that coverage to them.

19. Grand America seeks a declaration that the presence, statistically certain presence, or suspected presence of the SARS-CoV-2 virions in or on Grand America's property and the ubiquitous presence of the virions throughout New York City, causes direct physical loss or damage to property within the meaning of those phrases as used in the All Risk Policy sufficient to trigger coverage under the All Risk Policy, including under the coverages for Business Interruption, Extra Expense, and various Additional Coverages and Coverage Extensions, such as Attraction or Leader Property, Civil Authority, and Extended Business Income.

20. Grand America also seeks a declaration that various orders issued by New York state and local governmental officials on account of the presence of persons infected with and/or suffering from COVID-19 and the presence of SARS-CoV-2 in places of business and gathering prevented Grand America from accessing and using its insured property to conduct its ordinary business activities and deprived Grand America of its property and the functionality of its property, thereby constituting "physical loss or damage" to property within the meaning of that phrase as



used in the All Risk Policy sufficient to trigger coverage in favor of Grand America under the All Risk Policy, including under the coverages for Business Interruption, Extra Expense, and various Additional Coverages and Coverage Extensions, such as Attraction or Leader Property, Civil Authority, and Extended Business Income.

21. Grand America seeks a further declaration that the terms of the All Risk Policy obligate Strathmore to pay for physical loss or damage to the premises, and all Business Interruption loss, and Extra Expense incurred, including those expenses that would not have been incurred if there had not been “risk of physical loss or damage” or “physical loss or damage” to covered property, including expenses to temporarily continue as close to normal the conduct of the insured premises, and all incurred and to be incurred losses falling within the scope of Additional Coverages and Coverage Extensions, including Attraction or Leader Property, Civil Authority, and Extended Business Income.

22. Grand America also seeks monetary damages for Strathmore’s breach of its obligations under the All Risk Policy as declared by the Court and to pay Grand America’s losses in full including, without limitation, loss mitigation expenses.

### **THE PARTIES**

23. Plaintiff Grand America Associates LLC is a New York limited liability company with its principal place of business in New York, New York. Grand America’s premises and business income are insured under the All-Risk Policy.

24. Plaintiff 201 West 79th Street Realty Corp. D/B/A Hotel Lucerne is a New York corporation with its principal place of business in New York, New York. Grand America’s premises and business income are insured under the All-Risk Policy.

25. Upon information and belief, Defendant Strathmore Insurance Company, is a corporation duly organized and existing under the laws of New York with a principal place of

business at 200 Madison Avenue, New York, New York. Defendant sells policies of insurance, including property and business interruption insurance policies.

### **JURISDICTION AND VENUE**

26. This Court has jurisdiction over this action pursuant to Judiciary Law § 140-b.

27. This Court has personal jurisdiction over Strathmore pursuant to CPLR § 301 and § 302(a)(1), in that it is licensed to conduct insurance business in New York. Further, upon information and belief, pursuant to New York Insurance Law § 1212, Strathmore has appointed the Superintendent of Financial Services as its agent for service of process. Strathmore also transacts business in New York.

28. The Court has personal jurisdiction over Strathmore pursuant to CPLR § 301 and § 302(a)(1), in that it is a New York corporation that manages Strathmore.

29. Venue is proper in this County pursuant to CPLR § 503, because Grand America has its principal place of business in New York County.

### **FACTUAL BACKGROUND**

#### **I. THE COVID-19 GLOBAL PANDEMIC**

30. In December 2019, an outbreak of illness known as COVID-19 caused by a novel coronavirus formally known as SARS-CoV-2 was first identified in Wuhan, Hubei Province, China. In an unprecedented event that has not occurred in more than a century, a pandemic of global proportions then ensued, with the illness and virus quickly spreading to Europe and then to the United States.

31. In 2020, COVID-19 decimated the economy of the state and city where Grand America's New York property located, including Grand America's business operations.

32. COVID-19 is highly transmissible and spreads rapidly. For example, as of March 1, 2020 there were 87,137 confirmed COVID-19 cases across the globe.<sup>1</sup> That number increased to over 800,000 confirmed cases in April and over 3,000,000 cases in May.<sup>2</sup> According to the CDC, to date, COVID-19 has infected more than seventy-eight million people and killed nearly 945,000 in the United States.

33. At the pandemic's peak, over 4,000 Americans were perishing per day from COVID-19.<sup>3</sup> A substantial number of Americans are still dying daily, with surges of cases and new and ever more contagious variants of the Coronavirus occurring throughout the U.S.<sup>4</sup> COVID-19 is now the third-leading cause of death in this country, surpassed only by heart disease and cancer.<sup>5</sup>

34. COVID-19 can be transmitted in several ways, including via human-to-human contact, airborne viral particles, particularly within enclosed properties like the insured locations, and touching surfaces or objects that have SARS-CoV-2 virions on them.

35. COVID-19 spreads easily from person to person and person to surface or object. Research has revealed that COVID-19 primarily is spread by small, physical droplets expelled from the nose or mouth when an infected person talks, yells, sings, coughs, or sneezes. A person

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<sup>1</sup> See <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200301-sitrep-41-covid-19.pdf>.

<sup>2</sup> See <https://graphics.reuters.com/CHINA-HEALTH-MAP/0100B59S39E/index.html>.

<sup>3</sup> Eugene Garcia, Lisa Marie Pane and Thalia Beaty, *U.S. tops 4,000 daily deaths from coronavirus for 1st time*, AP NEWS, Jan. 8, 2021, <https://apnews.com/article/us-coronavirus-death-4000-daily-16c1f136921c7e98ec83289942322ee4> (last visited May 25, 2021).

<sup>4</sup> [https://covid.cdc.gov/covid-data-tracker/#trends\\_dailytrendsdeaths](https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendsdeaths) (last visited May 25, 2021); Johns Hopkins Medicine, *Coronavirus Second Wave? Why Cases Increase*, updated Nov. 17, 2020, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/first-and-second-waves-of-coronavirus> (last visited May 25, 2021).

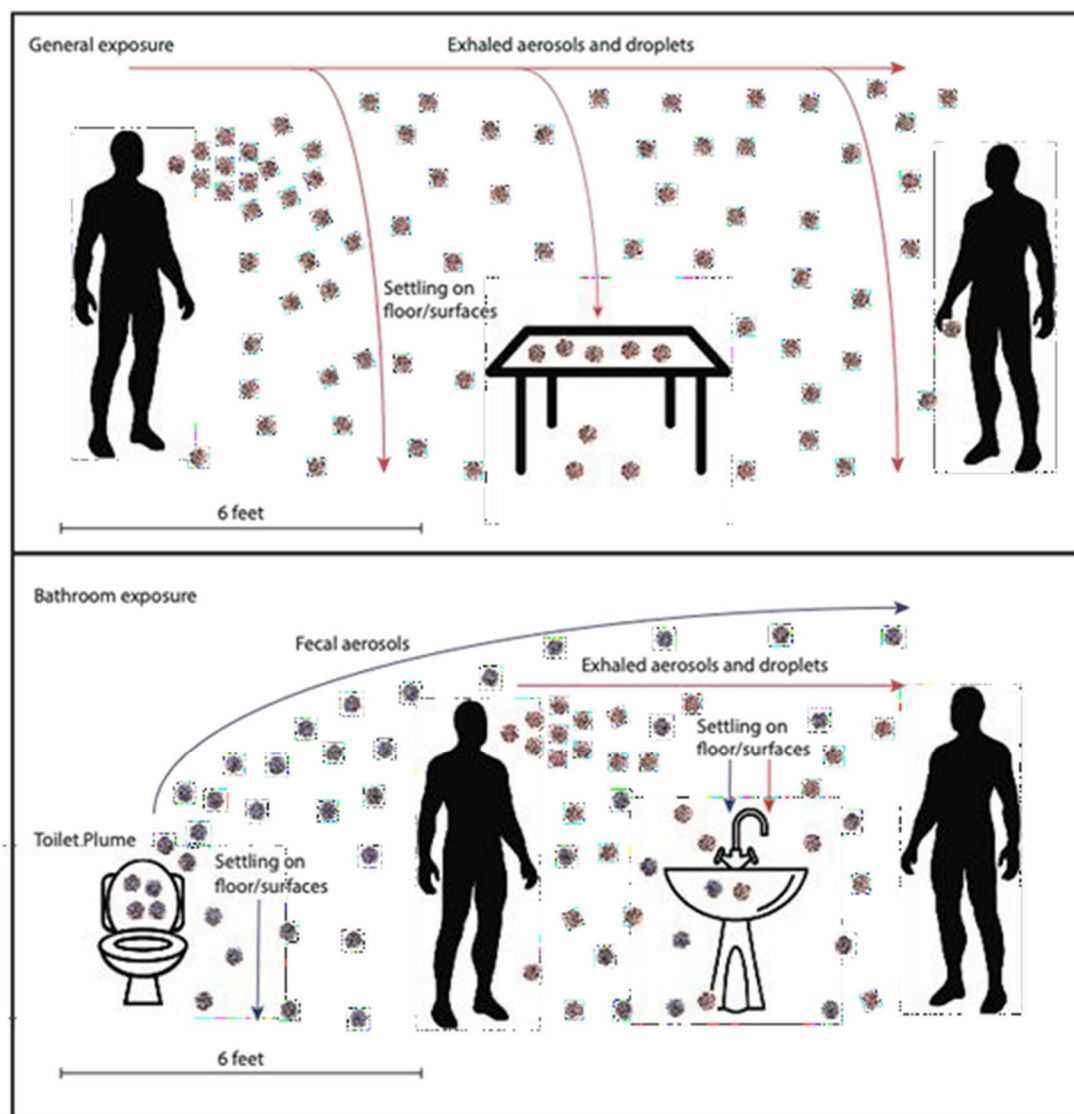
<sup>5</sup> Gary Stix & Youyou Zhou, *COVID-19 Is Now the Third Leading Cause of Death in the U.S.*, SCI. AM. (Oct. 8, 2020), <https://www.scientificamerican.com/article/covid-19-is-now-the-third-leading-cause-of-death-in-the-u-s1/> (last visited June 3, 2021).

who sneezes can release a cloud of SARS-CoV-2-containing droplets that can span as far as 23 to 27 feet. The CDC has stated that SARS-CoV-2 is most likely to spread when people are within six feet of each other, but has also recognized that SARS-CoV-2 may spread from an infected person who is more than six feet away or who has left a given space. Further, according to the CDC, longer exposure time likely increases exposure risk to COVID-19.

36. Infected people shed copious amounts of SARS-CoV-2 into the air and surfaces around them by several different mechanisms, as illustrated in the below figure.<sup>6</sup> SARS-CoV-2 damages the air and surfaces of a property.

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<sup>6</sup> Grand America already has engaged a virologist expert, Dr. Angela Rasmussen, Ph.D., who at the appropriate phase of this litigation will substantiate and elaborate on SARS-CoV-2 and the physical damage it causes to property. Dr. Rasmussen is an affiliate of the Georgetown Center for Global Health Science and Security and a research scientist III (Associate Professor equivalent) at the Vaccine and Infectious Disease Organization-International Vaccine Centre (VIDO-InterVac), as well as an adjunct professor in the department of biochemistry, microbiology, and immunology at the University of Saskatchewan.



37. SARS-CoV-2 is exhaled in respiratory particles through normal breathing, as well as coughing, speaking, singing, shouting, or exerted breathing, into the air by persons with COVID-19, including symptomatic and asymptomatic persons, where it persists in respiratory aerosols and droplets. Aerosols can remain suspended in the air for prolonged periods of time, where they can travel distances greater than 6 feet and eventually settle on surfaces to become fomites (infectious objects). Infectious aerosols can accumulate in enclosed spaces and present a significant infection risk in a manner that is dependent on concentration, not distance. Notably, without adequate ventilation and air filtration, the transformation of indoor air by people in an

enclosed space for a long period of time presents a substantial infection hazard that cannot be mitigated solely with masks and distancing, resulting in damage to the property.

38. In addition to damage to the property via transformation of the indoor air, SARS-CoV-2 can be deposited on surfaces either through direct contact with respiratory secretions or saliva of an infected person (transfer by hand or tissue) or by settling of particles from the air.

39. Inhalation of infectious aerosols is a major mode of SARS-CoV-2 transmission, providing a clear mechanism for SARS-CoV-2 in the air to damage property. Although fomite transmission is thought to be uncommon, it is still a viable mode of transmission along with the more dominant modes of transmission by direct contact and inhalation of infectious SARS-CoV-2, and risk of fomite transmission is dependent on prevalence in the community, virus shedding, environmental features such as heat or humidity, mitigation efforts such as masks, distancing, or ventilation, rate of deposition of virus particles onto surfaces, frequency of exposure to those surfaces, and achieving minimum infectious dose.

40. These modes of transmission have been demonstrated in multiple experimental models. Exhaled respiratory particles and fecal bioaerosols present a significant transmission risk even after they have settled and are no longer suspended in the air, and disturbances can resuspend them in the air.

41. Thus, SARS-CoV-2 causes property damage by rendering property unsafe and unfit for habitation and use, by transforming both the shared air breathed by the property's occupants and the physical surfaces of the property itself.

42. The presence of infected people on the property ensure that infectious SARS-CoV-2 will inevitably be shed into the air and onto surfaces, damaging the property by rendering it unsafe for occupation and use without extreme mitigation measures.

43. Making matters worse, pre-symptomatic and asymptomatic individuals can also transmit COVID-19.<sup>7</sup> Over 40% of all infections occur from people without any symptoms.<sup>8</sup> Thus, even individuals who appear healthy and present no identifiable symptoms of the disease have and continue to spread the virus by breathing, speaking, or touching objects and surfaces. These activities deposit SARS-CoV-2 virions in the air and on surfaces rendering the air and surfaces changed from their previous condition. According to the World Health Organization (the “WHO”), the incubation period for COVID-19, i.e., the time between exposure to SARS-CoV-2 and symptom onset, can be up to 14 days. Other studies suggest that the period may be up to 21 days.

44. Before infected individuals exhibit symptoms, *i.e.*, the so-called “pre-symptomatic” period, they are most contagious, as their viral loads will likely be very high, and they may not know they have become carriers. In addition, studies from the CDC and others estimate that between 40% to 70% of infected individuals may never become symptomatic (referred to as “asymptomatic” carriers). Pre-symptomatic and asymptomatic carriers are likely unaware that they are spreading SARS-CoV-2 by merely touching objects and surfaces, or by expelling droplets into the air. The National Academy of Sciences has found that the majority of transmission is attributable to people who are not showing symptoms, either because they are pre-symptomatic or asymptomatic.

45. Although these virus-containing droplets are very small, they are still physical, tangible objects that can travel and attach to other surfaces, “such as tables, doorknobs, and handrails,” and cause harm, loss, and damage, and physically alter the property and/or the integrity

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<sup>7</sup> See <https://www.nature.com/articles/s41591-020-0869-5>.

<sup>8</sup> See *id.*; <https://www.nbcnews.com/health/healthnews/asymptomatic-covid-19-cases-may-be-more-common-suspected-n1215481>.

of the property. Viruses, themselves, are microscopic and made up of genetic material surrounded by a protein shell<sup>9</sup>, but they are capable of being observed and can attach themselves to other things they encounter. When droplets and viruses contact objects, they alter those objects, although not in way perceptible by the naked human eye. These virus-containing droplets physically exist ubiquitously in the communities and buildings in which Grand America operates.

46. According to the CDC and the WHO, a person may become infected by touching these surfaces or objects that have SARS-CoV-2 on them, and then touching his or her mouth, eyes, or nose. And, when an uninfected person touches a surface containing SARS-CoV-2, the uninfected person may transmit COVID-19 to another person, by touching and infecting a second surface, which is subsequently touched by that other person. The CDC has thus recommended certain physical and structural remedial measures for businesses to put into place in order to limit transmission and continued surface alteration.

47. Numerous scientific studies have reported that SARS-CoV-2 can survive and persist within the air and on surfaces and buildings after infected persons are present at a given location. Studies have found that SARS-CoV-2 remains active and dangerous in the air in properties and on common surfaces, including plastic, stainless steel, glass, wood, cloth, ceramics, rubber, and even money.<sup>10</sup> All of these materials are widely present at Grand America's insured hotel location and subject to touch by the multitudes of people visiting Grand America's hotel daily.

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<sup>9</sup> See <https://rockedu.rockefeller.edu/component/what-are-viruses-made-of/>.

<sup>10</sup> See, e.g., [https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247\(20\)30003-3/fulltext](https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247(20)30003-3/fulltext); <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4659470/>; See <https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days>; <https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html>.



48. Generally being enclosed spaces where large numbers of people gather in close proximity for social and business purposes, highly trafficked properties like Grand America's hotel property, are reportedly particularly susceptible to circumstances favorable to the spread of SARS-CoV-2 virions. An article published in April 2020 analyzed a case study of three families (families A, B, and C) who had eaten at an air-conditioned restaurant in Guangzhou, China.<sup>11</sup> One member of family A, patient A1, had recently traveled from Wuhan, China. On January 24, 2020, that family member ate at a restaurant with families A, B, and C. By February 5, 2020, 4 members of family A, 3 members of family B, and 2 members of family C had become ill with COVID-19. The only known source for those affected persons in families B and C was patient A1 at the restaurant. Moreover, a study detected SARS-CoV-2 inside the heating and ventilation ("HVAC") system connected to hospital rooms of sick patients. The study found SARS-CoV-2 in ceiling vent openings, vent exhaust filters, and ducts located as much as 56 meters (over 183 feet) from the rooms of the sick patients.<sup>12</sup>

49. Additionally, the CDC has stated that "there is evidence that under certain conditions, people with COVID-19 seem to have infected others who were more than 6 feet away" and infected people who entered the space shortly after the person with COVID-19 had left.<sup>13</sup> A published systematic review of airborne transmission of SARS-CoV-2 corroborated the CDC's concerns and recommended procedures to improve ventilation of indoor air environments to

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<sup>11</sup> See [https://wwwnc.cdc.gov/eid/article/26/7/20-0764\\_article](https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article).

<sup>12</sup> Karolina Nissen, et al., *Long-distance airborne dispersal of SARS-CoV-2 in COVID-19 wards*, 10 NATURE SCI. REPORTS 19589 (Nov. 11, 2020), <https://doi.org/10.1038/s41598-020-76442-2> (last visited May 25, 2021).

<sup>13</sup> CDC, *How COVID-19 Spreads* (last updated Oct. 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited May 25, 2021).

decrease bioaerosol concentration and physically reduce potential spread of SARS-CoV-2 in properties like the insured locations.<sup>14</sup>

50. The CDC has recommended “ventilation interventions” to help reduce exposure to the airborne Coronavirus in indoor spaces, including increasing airflow and air filtration (such as with high-efficiency particulate air (“HEPA”) fan/filtration systems).<sup>15</sup> These and other remedial measures must be implemented, at high cost and extra expense, to reduce the amount of the SARS-CoV-2 present in a given space and to make property safe for its intended use. These remedial measures demonstrate direct physical loss of or damage to interior spaces like the insured locations even where no virus is present.

51. The extent and nature of presymptomatic viral shedding suggests that property damage through environmental exposure and persistence in the air, surfaces, and floors is inevitable for high-traffic venues such as hotels, restaurants, hospitals, casinos, cruise line vessels, and event spaces, environments that are highly conducive to SARS-CoV-2 spread. This leads to additive, sustained property damage, as those who are infected then shed virus themselves, further damaging the property and rendering it unsafe and unfit for use.

52. A single introduction of SARS-CoV-2 can persist in indoor environments for long periods of time. SARS-CoV-2 RNA has been detected on packages even after international

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<sup>14</sup> Zahra Noorimotlagh, et al., *A systematic review of possible airborne transmission of the COVID-19 virus (SARS-CoV-2) in the indoor air environment*, 193 ENV'T RSCH. 110612, 1-6 (Feb. 2021), [https://www.sciencedirect.com/science/article/pii/S0013935120315097?dgcid=rss\\_sd\\_all](https://www.sciencedirect.com/science/article/pii/S0013935120315097?dgcid=rss_sd_all) (last visited May 25, 2021).

<sup>15</sup> CDC, *Ventilation in Buildings* (last updated Feb. 9, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html#:~:text=HEPA%20filters%20are%20even%20more,with%20SARS%2DCoV%2D2> (last visited May 25, 2021).

transport, as well as on numerous environmental samples in locations where infected people have visited or shopped, such as hotels, markets, airplanes, ships, or event venues.

53. The proposition advanced by the insurance industry that an indoor space containing the infectious SARS-CoV-2 virions can be made safe and fit for its functional and intended use even though the virions remain in the air and circulating throughout indoor environments either affixed to property or in an aerosol capacity because the virions can be removed by routine surface cleaning, is false.

54. A number of studies have also demonstrated that SARS-CoV-2 is “much more resilient to cleaning than other respiratory viruses so tested.”<sup>16</sup> The measures that must be taken to remove the Coronavirus from property are significant and far beyond ordinary or routine cleaning.

55. Efficacy of disinfecting agents for viruses is based on a number of factors, including the initial amount of virus present, contact time with the disinfecting agent, dilution, temperature, and pH, among many others. Detergent surfactants are not recommended as single agents, but rather in conjunction with complex disinfectant solutions.<sup>17</sup>

56. Additionally, it can be challenging to accurately determine the efficacy of disinfecting agents. The toxicity of an agent may inhibit the growth of cells used to determine the presence of virus, making it difficult to determine if lower levels of infectious virus are actually still present on treated surfaces.<sup>18</sup>

57. In order to be effective, cleaning and disinfecting procedures require strict adherence to protocols not necessarily tested under “real life” or practical conditions, where treated

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

surfaces or objects may not undergo even exposure or adequate contact time.<sup>19</sup> Studies of coronaviruses have demonstrated viral RNA persistence on objects despite cleaning with 70% alcohol.<sup>20</sup>

58. When considering disinfection, the safety of products and procedures must be considered as well, due to the risks of harmful chemical accumulation, breakdown of treated materials, flammability, and potential for allergen exposure.<sup>21</sup>

59. Moreover, the aerosolized SARS-CoV-2 particles and virions cannot be eliminated by routine cleaning. Cleaning surfaces in an indoor space will not remove the aerosolized SARS-CoV-2 particles and virions from the air that people can inhale and develop COVID-19 – no more than cleaning friable asbestos particles that have landed on a surface will remove the friable asbestos particles suspended in the air that people can inhale.

60. Moreover, given the ubiquity and pervasiveness of SARS-CoV-2, no amount of cleaning or ventilation intervention will prevent a person infected and contagious with the virus from entering an indoor space like the insured properties and exhaling millions of additional particles and virions into the air, further: (a) filling the air with the aerosolized SARS-CoV-2 virions that can be inhaled, sometimes with deadly consequences; and (b) depositing SARS-CoV-2 particles and virions on surfaces, physically altering and transforming those surfaces into disease-transmitting fomites.

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<sup>19</sup> *Id.*

<sup>20</sup> Joon Young Song, et al., *Viral Shedding and Environmental Cleaning in Middle East Respiratory Syndrome Coronavirus Infection*, 47 INFECTION & CHEMOTHERAPY 4, 252-5 (2015), <https://www.icjournal.org/DOIx.php?id=10.3947/ic.2015.47.4.252> (last visited May 25, 2021).

<sup>21</sup> *Id.*

61. Even as vaccines to protect against COVID-19 have recently become more available, distribution remains uneven in the United States. Effective control of the disease's spread since the pandemic began has necessarily relied on measures designed to reduce human-to-human and surface-to-human exposure. Similarly, the governmental orders closing or severely limiting use of Grand America's business premises, and closing all non-essential properties that prospective guests would want to visit, are one of the most common modes of preventing transmission of the disease because, among other things, the orders reduce the size and frequency of social gatherings and the physical use of properties.

## **II. COVID-19 AND SARS-COV-2 CAUSE DIRECT PHYSICAL LOSS AND DAMAGE**

62. Virologists, scientists, and researchers all have confirmed that SARS-CoV-2 remains viable and is active on physical surfaces after deposited on property as in the air. The persistent presence of the deadly, viable SARS-CoV-2 on surfaces and in the air damages buildings and properties rendering them damaged, lost, unsafe, unfit, and uninhabitable for normal occupancy or use.

63. Specifically, the scientific community has confirmed that SARS-CoV-2 and COVID-19 alter the conditions of properties and buildings such that the premises are physically damaged and no longer safe and habitable for normal use. In this regard, SARS-CoV-2 and COVID-19 cause direct physical loss of or damage to buildings and properties (or both).

64. This direct physical loss of or damage to property (or both) results because SARS-CoV-2 has a corporeal existence and is contained in respiratory droplets. Once expelled from infected individuals, these droplets land on, attach, and adhere to surfaces and objects and physically changes these once safe surfaces to "fomites." Fomites are objects, previously safe to touch, that now serve as a vehicle and mechanism for transmissions of an infectious agent. Fomites

are the result of SARS-CoV-2 physically changing air and property, making it unsafe. This physical alteration and change makes physical contact with those previously safe indoor spaces and inert surfaces (*e.g.*, walls, handrails, desks) unsafe and potentially deadly. This represents a physical change in the affected enclosed space, surface or object, causing severe property loss and damage. Affected properties are unusable, dangerous, and unsafe until the COVID-19-related conditions are fully rectified.

65. Medical and scientific research also has established that SARS-CoV-2 and COVID-19 spread through indoor airborne transmission. When individuals carrying SARS-CoV-2 breathe, talk, cough, or sneeze, they expel aerosolized droplet nuclei that remain in the air, accumulate in buildings, and, like dangerous fumes, make the premises unsafe and affirmatively dangerous. According to experts, buildings and properties accumulate the airborne SARS-CoV-2 indoors, which plays a significant role in community transmission. As a result, SARS-CoV-2 and COVID-19 cause direct physical loss of or damage to properties and buildings (or both) by changing the physical condition of air in buildings from safe and breathable to unsafe and dangerous.

66. Further, airborne viral particles are known to be able to spread into a facility's HVAC system, leading to transmission of SARS-CoV-2 from person to person. The Environmental Protection Agency ("EPA") has recommended that facilities make improvements to their ventilation and HVAC systems by, for example, increasing ventilation with air filtration and outdoor air. Accordingly, COVID-19 and SARS-CoV-2 cause direct physical loss of or damage to property (or both) by, among other things, destroying, distorting, corrupting, attaching to, and physically altering property, including its surfaces, and by rendering property unusable, uninhabitable, unfit for intended functions, dangerous, and unsafe.

67. Fomites, droplets, droplet nuclei, and aerosols containing SARS-CoV-2 are not theoretical, informational, or incorporeal, but rather are dangerous physical objects that have a tangible existence. Their presence within an insured property causes direct physical loss of or damage to property (or both) by necessitating remedial measures that include without limitation repairing or replacing air filtration systems, remodeling and reconfiguring physical spaces, removal of fomites by certified technicians, and other measures. The presence of COVID-19 and SARS-CoV-2 within an insured property also causes direct physical loss of or damage to properties (or both) by transforming property from usable and safe into a property that is unsatisfactory for use, uninhabitable, unfit for its intended function, and extremely dangerous and potentially deadly for humans.

68. The presence of SARS-CoV-2 on property similarly creates the imminent threat of further damage to that property or to nearby property. Individuals who come into contact, for example, with respiratory droplets at one location in the property by touching a doorknob, table, or handrail, will carry those droplets on their hands and deposit them elsewhere in the property, causing additional damage and loss. Property impacted by SARS-CoV-2 is just as dangerous as property impacted by fire or fumes or vapors (if not more), and all such damaged property is equally incapable of producing revenues. Like the impact of fire, smoke, or noxious fumes, the impact of potentially fatal COVID-19 constitutes direct physical loss of or damage to property (or both).

69. The direct physical loss of or damage to property (or both) described in this section has occurred at Grand America's insured location, leading to losses covered by the All Risk Policy. Grand America had to take action to secure and preserve its properties and its business operations and to modify its operations to prevent additional losses. To the extent that the All Risk Policy

requires structural alteration to establish “physical damage,” which Grand America disputes, such alteration has occurred and rendered the insured properties incapable of performing their essential functions. Grand America’s losses are ongoing and are likely to increase substantially given the length and ultimate severity of the outbreak, repeated impacts on Grand America business, and the government response. Moreover, to the extent that the All Risk Policy requires a permanent loss of property to establish “physical loss,” which Grand America disputes, such permanent loss has occurred.

### **III. REACTIONS AT THE NATIONAL, STATE, AND LOCAL LEVELS**

70. Federal and state governments tried to slow the spread of COVID-19 and protect people, property, and businesses. Unprecedented directives were issued, requiring certain businesses to close and requiring residents to remain in their homes unless performing “essential” activities.

71. On January 31, 2020, the United States Department of Health and Human Services declared that a public health emergency existed nationwide because of confirmed cases of COVID-19 in the United States.

72. Beginning in March 2020, U.S. state and local governments issued orders suspending or severely curtailing the operations of all “non-essential” or “high risk” businesses in response to the virus and/or risks created by virus.

73. Beginning in March 2020, the state, county and city where Grand America’s insured premises is located declared states of emergency to help prepare for broader spread of COVID-19. The premises was only permitted to reopen with physically reduced capacities and physical changes to premises.

74. Beginning in March 2020, the state, county and city where Grand America’s insured premises is located issued orders prohibiting all premises within those counties/cities from



selling merchandise on premises. The Orders where applicable allowed premises to continue to operate only for purposes of offering products to customers *via* delivery service, customer take-out, pick-up, or for drive-thru service (subject to certain restrictions). Similar orders closed or restricted access to the hotel location insured under the Policy. These orders, together with similarly construed orders issued by government officials, effectively curtailed Grand America's location' on-premises business operations, resulting in an interruption of business operations and an immediate Business Interruption and Extra Expense loss.

75. On March 7, 2020, New York Governor Andrew Cuomo declared a Disaster Emergency for the entire state of New York as a result of COVID-19.

76. On March 16, 2020, Governor Cuomo issued Emergency Executive Order No. 100, declaring a disaster emergency for the entire State of New York, stating in relevant part that the Order was given "because of the propensity of the virus to spread person to person and also because the *virus physically is causing property loss and damage.*" (emphasis added).

77. Likewise, on March 16, 2020, the Mayor of New York City, Bill de Blasio, issued Emergency Executive Order 100, in part "because the virus physically is causing property loss and damage" and requiring that all restaurants, bars and cafes close until further notice.

78. On March 20, 2020, Governor Cuomo issued Executive Order 202.8, which required non-essential businesses to close in-office personnel functions effective March 22, 2020 at 8:00 P.M. Also, on March 20, 2020, Governor Cuomo issued the "New York State on PAUSE" order, which was a 10-point policy: (i) requiring all non-essential businesses to close, effective March 22, 2020 at 8:00 P.M.; (ii) prohibiting non-essential gatherings of any size; and (iii) requiring social distancing when leaving the home to obtain essential services or items. This included restaurants, bars, and caterers, among other "non-essential" businesses. These orders

required Grand America to close amenities in its hotel including bars, restaurants, meeting spaces, and gyms, and to regulate strictly the use of common areas. New York's stay-at-home order was effective on March 22, 2020 and was in place until May 15, 2020 per Executive Order 202.31.

79. Because of the danger posed by COVID-19 and its spread as described above, Grand America also determined that closure was necessary to slow the spread of COVID-19 as a result of infected persons on the property or from those who would enter the property.

80. Other states, and county and city officials have issued similar orders throughout the United States referencing physical property loss or damage or imminent threatened physical property loss or damage from the virus.

81. A motivating factor behind these orders was to protect persons and property from direct physical loss of or damage to property (or both) caused by SARS-CoV-2 and COVID-19.

82. Prior to issuing any of the orders curtailing or suspending non-essential business operations, hundreds of individuals would be present in Grand America's premises on a daily basis. The vast majority of those individuals were customers who would spend a substantial period of time in the hotel, often enjoying the company of others in celebratory settings involving conversation, laughing, and close interaction among individuals, as well as their guests and employees.

83. Given the number of infected individuals, it is a virtual certainty that infected individuals, both symptomatic and asymptomatic, were present in and at Grand America's premises on a daily basis even prior to the issuance of the governmental orders and would have been present daily in Grand America's premises in an ever-increasing number in the absence of the issuance of those orders.

84. Exhalation by these infected individuals when coughing, sneezing, talking, laughing, and even simply breathing created respiratory droplets and aerosolized particles containing the SARS-CoV-2 virus that were inhaled into the noses, mouths, and lungs of other individuals and deposited on surfaces in Grand America's premises where later contact by uninfected individuals undoubtedly resulted in transmission of SARS-CoV-2 to those individuals.

85. Each visit by an individual, whether symptomatic or asymptomatic, infected with SARS-CoV-2 resulted in either the actual or an imminent threat of deposition and transmission of the SARS-CoV-2 into the air and onto the surfaces within Grand America's premises.

86. For the reasons described above, COVID-19 and the governmental orders caused a total or partial prohibition of access to Grand America's premises as well as partial or total interruption of Grand America's business operations. The direct physical loss of or damage to property (or both) caused by COVID-19 and/or the orders and the further direct physical loss of or damage to property (or both) threatened by COVID-19 have combined to devastate Grand America's business operations.

**IV. GRAND AMERICA SUFFERED AND CONTINUES TO SUFFER COVERED LOSSES**

87. The SARS-CoV-2 virus is a covered cause of loss, because it is a risk of physical loss or damage, and not otherwise excluded under the All Risk Policy.

88. The issuance of the above-referenced closure orders by state, county, and city officials is a covered cause of loss because it is a risk of physical loss or damage, and not otherwise excluded under the All Risk Policy.

89. Whether the SARS-CoV-2 virus and/or the above-referenced orders caused Grand America's losses and expenses, and in what sequence in each covered location, presents a factual question that is inappropriate for resolution at the motion to dismiss stage.

90. The SARS-CoV-2 virus and/or the above-referenced orders issued by state, county, and city officials have directly impacted Grand America's location. The damage and far-reaching restrictions and prohibitions on the activities that can be conducted at Grand America's location, and restoration efforts necessary to rid the premises of COVID-19, have been catastrophic for Grand America's premises – interrupting its operations so pervasively as to effectively force the business to close, undergo renovations, and reopen in modified form, thereby enduring a prolonged curtailment of earnings and additional expenses that are covered by the All-Risk Policy.

91. Grand America's operations were suspended to allow Grand America to repair the insured properties, including restoration efforts to rid the premises of and attempt to protect against further physical loss of and/or damage SARS-CoV-2. Until the premises could be repaired and restored and resulting government orders lifted, Grand America suffered a loss of use of its business premises and they were unfit for use for their intended purposes.

92. As a result of the physical loss or damage and threatened or actual communicable disease, Grand America acted to mitigate the effects on its business in numerous ways.

93. Prior to business closures in March 2020, Grand America's properties were frequented by hundreds of individuals a day, including patrons, employees, vendors, and other individuals carrying SARS-CoV-2 and COVID-19. In addition to breathing SARS-CoV-2 and COVID-19 into the air, these individuals touched countless surfaces in Grand America's insured premises, including lobbies, convention areas, meeting rooms, guest rooms, corridors, elevators, walls, beds, furniture, doors, tables, rest rooms, surfaces on the floors, and other areas on the premises.

94. These individuals that frequent Grand America's premises daily, ranging from guests, their visitors, to vendors, are carrying or otherwise exposed to SARS-CoV-2 and COVID-

19 and would have been in contact with each other, as well as lobby areas, convention areas, meeting rooms, guest rooms, corridors, elevators, walls, beds, furniture, doors, tables, rest rooms, surfaces on the floors, and other areas on the premises.

95. Grand America has thus been forced to pay costs covered under the All Risk Policy to repair the physical damage caused by COVID-19. It became clear that Grand America's insured properties were (and continue to be) inoperable and unusable without the alterations necessary to protect the safety of its visitors, guests, and employees. These covered decontamination costs also were necessary to comply with the emergency directives, laws, and/or ordinances promulgated by governmental authorities and the CDC, among others. None of these costs would have been incurred but for the impacts of the COVID-19 pandemic and the resulting closure orders.

96. In addition to these costs, Grand America has incurred significant losses and extra expense in nearly all aspects of its business, including to re-open the business in modified form. Again, none of these expenses would have been incurred but for the impacts of the COVID-19 pandemic, physical impacts on Grand America, and the resulting closure orders.

97. The SARS-CoV-2 virus and/or the above-referenced closure orders issued by state, county, and city officials have caused physical loss or damage to properties Grand America depends on to attract business to its insured locations, which are within one mile of the insured locations.

98. Grand America's premises are within five miles of many other attracting businesses, stores, restaurants, cafes, bars, and parks, which have also suffered and continue to suffer physical damage due to the SARS-CoV-2 virus and/or closure orders. Many of these stores, restaurants, cafes, bars, and parks almost certainly suffered alteration of their premises and contents as a result of the virtually certain and ubiquitous presence of SARS-CoV-2 due to

gathering of people affected by COVID-19, whether symptomatic or asymptomatic. Due to the impacts on these properties, Grand America's hotel business suffered resulting losses of business income.

99. The above-referenced orders, issued as a direct result of the physical damage described above, have operated to prohibit access to Grand America's location and the immediate surrounding businesses, properties, and areas.

100. The SARS-CoV-2 virus and/or the above-referenced closure orders have also caused Grand America to suffer interruption of business operations resulting from Grand America taking reasonable and necessary action for the temporary protection and preservation of its insured properties, to prevent immediately impending insured physical loss or damage to its insured locations.

101. The SARS-CoV-2 virus and/or the above-referenced closure orders have further caused Grand America to suffer loss of earnings directly resulting from physical loss or damage to property at the premises of Grand America's suppliers, customers, and/or contract service providers.

**V. THE INSURANCE POLICY STRATHMORE SOLD TO POLICYHOLDER**

102. To protect it in the event of property loss and business interruption, Grand America purchased a commercial property insurance policy from Strathmore effective June 1, 2019 to June 1, 2020. *See* Policy No. 8131M26759, attached as **Exhibit A**.

103. Plaintiff is a Named Insured under the All Risk Policy.

104. In combination with the extensive underwriting investigation Strathmore performed (or had the opportunity to perform) into the risks associated with Grand America's operations, Strathmore has (or should have) unique insight into the risks faced by hotels generally and Grand America specifically.

105. The Policy insures against all risks of loss of or damage to property and ensuing business interruption and extra expense, unless specifically excluded or limited in the Policy.

106. The Policy covers “direct physical loss of or damage to Covered Property...caused by or resulting from any Covered Cause of Loss.” *See id.* at *passim*.

107. The word “or” separates the terms “loss of” and “damage” to signify that the terms should be interpreted in the disjunctive.

108. Coverage may be triggered by “direct physical loss of” property.

109. Coverage may be triggered by “damage” to property.

110. The Policy covers “the actual loss of Business Income you sustain due to the necessary ‘suspension’ of your ‘operations’ during the ‘period of restoration’.”

111. The Policy also covers “Extra Expense (other than the expense to repair or replace property) to: (1) [a]void or minimize the ‘suspension’ of business... [and] (2)[m]inimize the ‘suspension’ of business if you cannot continue ‘operations’.”

112. The Policy defines “suspension,” in part, as “[t]he slowdown or cessation of your business activities.”

113. The Policy defines “operations,” in part, as “[y]our business activities occurring at the described premises.”

114. The Policy contains additional coverage for loss of Business Income and Extra Expense caused by action of a civil authority.

115. The Policy also contains additional coverage for Extended Business Income losses after operations are resumed.

116. The Policy contains a coverage extension for loss of Business Income sustained due to a suspension of operations caused by direct physical loss or damage to “dependent properties.”

117. The coverage for “dependent properties” is found in a special section called “*HOSPITALITY PROGRAM ENHANCED PROPERTY COVERAGE ENDORSEMENT*,” which clearly demonstrates an intent to provide even broader coverage to Grand America.

118. The Policy does not exclude or limit losses caused by viruses or by pandemics.

119. In fact, based on Strathmore’s regulatory filings, the Policy explicitly covers virus-related losses.

120. Regardless of any court rulings subsequent to the pandemic regarding the meaning of “direct physical loss of or damage to property,” Strathmore stated prior to the pandemic that it intends its policy to respond to business interruptions caused by government orders closing hotel and restaurant businesses due to virus or disease, including a pandemic.

121. More specifically, Strathmore explained that it would include a virus exclusion where it intended to exclude this risk, but it would remove the virus exclusion where it intended to insure this risk. Where Strathmore chose to insure losses caused by the risk of virus and resulting governmental orders, these statements of specific intent by the insurance company must be honored.

122. In 2006, the Insurance Services Office (“ISO”), an insurance industry organization that develops standardized insurance policy programs and forms for use by insurers, including Strathmore, drafted a form exclusion for losses “due to disease-causing agents such as viruses and bacteria.”



123. In presenting the exclusion to state insurance regulators around the country, ISO explained:

Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses. **Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria**, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case. (Emphasis added.)

124. Subsequently, Strathmore, via its parent company Greater New York Mutual Insurance Company (“GNY”), did seek – and was granted – regulatory permission from the New York Department of Financial Services to **remove or delete** the ISO virus exclusion endorsement in policies Strathmore issued to certain insureds.

125. In this filing, GNY explained how it expected the exclusion to apply to Strathmore’s insureds:

The ISO initial filing of this endorsement indicated that the exclusion was appropriate due to “pandemic” exposure to loss which was not anticipated in the standard coverage forms or in development of the loss costs for Commercial Property. **Therefore, we assume that this Exclusion is deleting coverage** across the entire NY Commercial Fire and Allied book written by the ISO member companies that utilize the ISO product, unless modified by such a Company exception. **Because the application of this Exclusion is to Commercial Property, we anticipate losses to fall largely in Business Personal Property (“stock”) and Business Interruption/Time Element coverage segments.**

See GNY Filing, Explanatory Memorandum—Response to Objection 1 Dated 4-30-2010, attached as **Exhibit B** (emphasis added).

126. Although GNY contemplated the possibility “that some type of disease (airborne Legionnaires Disease, for example) could spread through a HVAC system” in insured properties

and the “contagious disease hazard” present in restaurants, it explained that it would apply the exclusion to a hotel or restaurant policyholder “only if the risk presented with claim history indicative of recent incident and loss control with little remediation.” *See id.*

127. GNY explained the risk characteristics underwriting would consider in deciding whether or not to include the ISO virus exclusion endorsement on an insured’s policy. In the description, GNY acknowledged that losses involving disease or infection can result in an “action or order of a civil authority to close the insured’s operation in order to limit public exposure to such contagion, sickness and death” or an “action of the insured to close the insured’s operation in order to limit public exposure to such contagion, sickness and death due to the insured’s prudent expectation that such an event is likely to occur.” *See* Ex. B at Exhibit RT-1 – Side by Side Comparison.

128. Strathmore provided a credit to insureds whose policies did not have the exclusion. *See id.*

129. GNY stated that it did not anticipate hotel and restaurant insureds would request the exclusion be added to their policies “because they feel that such an event is well within the realm of possible fortuitous occurrences and should be covered should such an event arise.” *See* Ex. B at Explanatory Memorandum.

130. In other words, GNY and Strathmore predicted, anticipated, and understood that, in the absence of a virus exclusion, its hotel and restaurant insureds would believe that virus losses would be covered under their Strathmore policies for business interruption and resulting civil authority losses.

131. Strathmore did not include this exclusion in the Policy it issued to Grand America. In other words, Strathmore specifically intended to provide the broad pandemic coverage that it described in its regulatory filings, and which Grand America seeks here.

132. Strathmore explained this specific issue to New York's state insurance regulator after the regulator objected that Strathmore's proposal for an "optional" virus exclusion could conceivably lead to rate discrimination. The potential for discrimination that concerned the regulator arose because ISO had not accounted for any rate reduction when introducing its new ISO Virus Exclusion and had instead falsely asserted that the exclusion would not reduce existing coverage.

133. In Strathmore's supplemental explanation proposing a method for rating and charging coverage for virus-related perils, Strathmore pointed out that this coverage is simply provided by omission of the ISO Virus Exclusion. Strathmore's "Explanatory Memorandum" to the New York regulator expressly acknowledged the coverage that exists for "this type of loss ('pandemic')" in the absence of a virus exclusion.

134. In the Explanatory Memorandum, Strathmore anticipated that viruses could result in potential covered losses "in Business Personal Property ('stock') and Business Interruption/Time Element coverage segments." Strathmore also gave specific examples of communicable diseases spreading in indoor, highly trafficked spaces like the plaintiff's hotels that may create covered losses.

135. Strathmore went so far as to acknowledge that a "pandemic" loss from "contagious disease" could involve a wide variety of vectors, including disease "transmitted to third parties via ingestion," exposure due to a "Typhoid Mary" or via "direct contact to an insured's products," or "spread through a HVAC system" in a building.

136. Although Strathmore expressed its optimism that a virus might not spread from building to building throughout a large city like New York, it recognized this was part of the “pandemic” type of loss it was insuring:

While it is possible that some type of disease (airborne Legionnaires Disease, for example) could spread through a HVAC system in any selected Apartment or Condo Building, it is highly unlikely that it would spread throughout a vast proportion of the apartments and condominiums across NYC that we insure.

Ex. B at Explanatory Memorandum.

137. Strathmore further **admitted** their hotel-owning policyholders, like the policyholder Grand America here, reasonably expected this coverage and would never willingly part with it without a reduction in rates/premiums:

[W]e do not anticipate that any of our insureds will voluntarily request this [virus] exclusion; some (habitational risks) [*i.e., hotels*] because it would never enter their minds as a problem for which they would voluntarily reduce coverage; others (restaurants) because they feel that such an event is well within the realm of possible fortuitous occurrences and should be covered should such an event arise.

*Id.*

138. The Strathmore filings demonstrate that it understood the meaning of “direct physical loss of or damage” to property includes the impact of disease-causing agents on the operation and profitability of a business. The Strathmore filings show that the insurance company **specifically expected** that removing the virus exclusion from its all-risk property insurance policies would restore the expected coverage for virus-caused losses that existed before the introduction of ISO’s virus exclusion.

139. Because Strathmore’s true understanding of the coverage is set forth at length and admitted in these regulatory filings, that understanding must be accepted as true as a factual matter when the Court engages in the interpretative task of construing the scope of coverage.

140. This evidence not only establishes that the policyholder's interpretation is reasonable but also **correct** and **subjectively intended** by Strathmore when selling the All-Risk Policy at issue.

**POLICYHOLDER'S CLAIM, STRATHMORE'S "INVESTIGATION," AND ITS  
WRONGFUL DENIAL OF COVERAGE**

141. Strathmore conducted virtually no claim investigation whatsoever.

142. Grand America provided timely notice.

143. Strathmore denied coverage for Grand America's claim with no actual investigation into the facts of Grand America's claim.

**THE CONTROVERSY**

144. Grand America now seeks a declaratory judgment from this Court finding that Strathmore must provide insurance proceeds to Grand America for its Claim for losses due to the direct physical impact on its hotel properties and resulting loss of business, as well as a finding that Strathmore's coverage positions constitute a breach of the Policy and that it has committed other breaches of the Policy, and that Grand America is entitled to recover direct and consequential damages for Strathmore's breach. Grand America also seeks direct, consequential and punitive damages for Strathmore's intentional interference with the Policy.

**COUNT I  
(DECLARATORY JUDGMENT AGAINST STRATHMORE)**

145. Grand America repeats and realleges the allegations in paragraphs 1 through 144 as if the same were set forth at length herein.

146. Strathmore has denied coverage for Grand America under the Policy.

147. Strathmore has breached and continues to breach its contractual obligations, as set forth in the Policy, as well as its duties of good faith and fair dealing to Grand America, by failing and refusing to honor the terms of the Policy.

148. An actual and justifiable controversy exists between Grand America and Strathmore regarding the interpretation of the Policy.

149. Accordingly, Grand America is entitled to declaratory judgment by this Court of the obligations of Strathmore under the Policy, and specifically, that Grand America is entitled to coverage under the Policy for all of its Claim for losses from the direct physical impact on its hotel properties, direct loss of property, resulting loss of business, extra expenses, and costs to modify and re-open the business to continue operations.

150. Declaratory relief from this Court will resolve outstanding issues between Grand America and Strathmore regarding the obligations of Strathmore under the Policy.

**COUNT II  
(BREACH OF CONTRACT AGAINST STRATHMORE)**

151. Grand America repeats and realleges the allegations in paragraphs 1 through 150 as if the same were set forth at length herein.

152. As set forth above, Strathmore breached the Policy by refusing to honor the express terms of the Policy and refusing to pay amounts due to Grand America under the terms of the Policy.

153. As a direct and proximate result of Strathmore's breaches of its obligations under the Policy, Grand America has suffered, and continues to suffer, substantial direct monetary damages in an amount to be established at trial, including consequential damages, and is also entitled to pre-judgment and post-judgment interest, reasonable attorneys' fees, and costs incurred by Grand America in bringing this action against Strathmore.

154. These damages are foreseeable damages incurred by Grand America as a direct result of Strathmore's wrongful conduct, which were contemplated by the parties when they

negotiated and executed the Policy, and should be awarded so that Grand America is adequately compensated for Strathmore's wrongful conduct.

**JURY DEMAND**

155. Grand America hereby demands a trial by jury on all causes of action.

**REQUEST FOR RELIEF**

WHEREFORE, Grand America is entitled to (i) a declaration pursuant to CPLR § 3001 by this Court that Strathmore is obligated to pay Grand America the benefits owed to it under the Policy; (ii) an award against Strathmore of compensatory, direct and consequential damages in the amount established by the evidence; (iii) an award of actual, consequential and punitive damages for Strathmore's intentional interference with the Policy; (iv) costs of suit, reasonable attorneys' fees, pre-judgment and post-judgment interest; and (v) such additional relief as the Court deems just and appropriate.

Dated: March 11, 2022  
New York, New York

REED SMITH LLP

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