

RETURN DATE: APRIL 12, 2022 : **SUPERIOR COURT**
ELEMENT DENTAL PARTNERS : **J.D. OF HARTFORD**
HOLDCO, LLC (formerly known as :
MID-ATLANTIC HOLDCO, LLC) :
VS. : **AT HARTFORD**
ASPEN AMERICAN INSURANCE : **MARCH 4, 2022**
COMPANY

COMPLAINT

Plaintiff, Element Dental Partners HoldCo, LLC (formerly known as Mid-Atlantic HoldCo, LLC) (“Plaintiff”) files this Complaint for damages and declaratory judgment against Defendant Aspen American Insurance Company (“Aspen” or “Defendant”) alleging the following:

I. INTRODUCTION

1. This action arises from Defendant’s failure to provide insurance coverage for the losses sustained and expenses incurred by Plaintiff—one of the nation’s largest dental support organizations, with approximately 230 affiliated offices across 17 states—due to the ongoing Coronavirus pandemic (“COVID-19 Pandemic”).¹

2. Federal, state, and local officials have recognized the acute risks associated with COVID-19. According to top infectious disease specialists and the Centers for Disease Control and Prevention (the “CDC”), COVID-19 is a highly transmittable respiratory virus that is spread most often by close contact with an infected person. The spread and presence of COVID-19 in the United States is pervasive. Epidemiologically, COVID-19 has been detected in every major city

¹ The COVID-19 Pandemic means the ongoing pandemic of the novel SARS-CoV-2 coronavirus, and all attenuated effects thereof, including but not limited to, the physical presence of the virus on property, all resultant declarations of public health emergencies / national emergencies / disasters, closure orders, state and local governmental COVID-19 guidance / orders restricting operations of businesses, etc.

in the U.S. Over 900,000 people have died from COVID-19 in the U.S. Millions more have been hospitalized, treated for, or infected with the virus. During the early months of the COVID-19 Pandemic, the U.S. was reporting over 100,000 cases of COVID-19 each day. In the past several months, the U.S. was reporting over 500,000 new cases each day. While states and healthcare workers have worked to vaccinate Americans over the past months, the CDC continues to encourage individuals to socially distance, wear a mask, wash their hands frequently, and stay home as much as possible due to the dangerous conditions created by COVID-19. Moreover, COVID-19 has continued to mutate into numerous variants—some of which spread more easily and quickly than other variants and, according to the CDC, may lead to more cases of COVID-19. *See Exhibit 1*, attached hereto (information published by the CDC regarding COVID-19 variants). In fact, experts recently detected the new COVID-19 Omicron variant, which the European Center for Disease Prevention and Control recently classified as a Variant of Concern due to concerns “regarding immune escape and potentially increased transmissibility compared to the Delta variant.” *See Exhibit 2*, attached hereto (CDC science brief regarding the Omicron variant). Due to the recent Omicron variant, COVID-19 infection rates rose to all-time highs.

3. The COVID-19 Pandemic has caused extreme financial turmoil among many businesses, with tens of thousands forced out of business in the past year. The dental practice industry has suffered staggering losses and has proven to be one of the hardest hit industries; between COVID-19’s physical presence in dental offices, and government stay at home and/or closure orders (“Closure Order(s)”), the pandemic has physically and materially altered business properties, including Plaintiff’s covered properties, and stripped business owners like Plaintiff of their ability to fully employ properties for their intended income generating purposes.

4. Before the COVID-19 Pandemic, Plaintiff's affiliated dental practices treated hundreds of thousands of patients each year. Plaintiff's covered properties are located in busy urban areas that have been hotbeds for COVID-19 spread such as Texas, Illinois, and Pennsylvania. However, beginning in early March 2020, Plaintiff's affiliated dental offices experienced a significant drop in patient encounters due to mandatory Closure Orders and COVID-19's uncontrolled spread and physical presence of the virus at, on, in, and around Plaintiff's covered properties. Practice income fell approximately 90% across all Plaintiff's affiliated dental offices. Consequently, Plaintiff's affiliated offices treated only a fraction of the number of patients compared to pre-pandemic operations.

5. Additionally, in March of 2020, many of Plaintiff's offices closed completely in order to comply with Closure Orders and due to the physical presence of the virus at, on, in, and around Plaintiff's properties. These closures have been devastating to Plaintiff's business income. Plaintiff has lost tens of millions of dollars to date—losses that will continue to accrue for years due to the impact the COVID-19 Pandemic has had—and continues to have—on the dental practice industry.²

6. Thus, as explained more fully below, the verifiable physical presence of the virus at, on, in, and around Plaintiff's covered properties and the Closure Orders (1) materially and physically altered Plaintiff's properties and (2) prevented Plaintiff and its, staff, suppliers and supported offices' patients from fully accessing and occupying Plaintiff's properties for their

² Importantly, however, Plaintiff's losses are not the result of an economic downturn or loss of market. For example, many businesses have thrived during the COVID-19 Pandemic (*i.e.*, cleaning services, delivery services (such as Amazon), meal prep delivery services (such as HelloFresh and Blue Apron), fitness equipment manufacturers, furniture manufacturers and retailers, landscaping businesses, homebuilders / construction companies / remodeling companies, and home health care companies).

intended income-generating purposes (and otherwise dispossessed Plaintiff of its properties)—both of which caused direct physical partial or total loss of or damage to Plaintiff’s properties, thereby triggering Plaintiff’s coverage under the Policy.

7. In anticipation of a peril of this nature, Plaintiff purchased a broad, “all risks” commercial insurance policy (the “Policy”) from Defendant. Plaintiff dutifully paid the hundreds of thousands of dollars in premiums for this coverage. Unlike most business interruption policies, Plaintiff chose a Policy that provides very broad coverage requiring Defendant to afford Plaintiff protection from “direct physical damage to covered property,” unless expressly excluded, where “damage” is defined as “partial or total loss of or damage to [Plaintiff’s] covered property.” Specifically, the Policy provides protection to Plaintiff for loss of business income and extra expenses that flow therefrom, in addition to business income losses due to civil authority Closure Orders that prohibit full access to Plaintiff’s properties.

8. Although well before the COVID-19 Pandemic, it was common for insurance companies to include an exclusion for viruses, the Policy contains no exclusion for loss and/or damage caused by communicable diseases, viruses, pandemics, or any other cause of loss that would apply to Plaintiff’s losses. No other exclusion excuses coverage under the Policy. Despite this, Defendant refuses to provide coverage for the losses Plaintiff has sustained due to the verifiable physical presence of the virus at, on, in, and around Plaintiff’s properties and the Closure Orders—both of which physically and materially altered Plaintiff’s properties.

9. Accordingly, Plaintiff seeks a declaration from the Court that the losses it has sustained during the COVID-19 Pandemic fall squarely within the Policy’s protection. Plaintiff also seeks damages due to Defendant’s breach of the Policy.

II. PARTIES

10. Plaintiff Element Dental Partners HoldCo, LLC (formerly known as Mid-Atlantic HoldCo, LLC) is a Delaware limited liability company with its principal place of business in Texas.

11. Aspen American Insurance Company is an insurance company organized under Texas law with its principal place of business in Connecticut. Aspen can be served by delivering two (2) copies of this Complaint and summons, together with the statutory fee of \$50.00, to the Connecticut Insurance Commissioner, Andrew N. Mais, 153 Market St., Hartford, CT 06103, who shall then immediately send by registered or certified mail one copy of the process to Aspen at the following address: Timothy P. Lynch, Aspen American Insurance Company, 175 Capital Blvd., Suite 300, Rocky Hill, CT 06067 (*see* C.G.S. § 38a-26). Aspen is a wholly owned subsidiary of Aspen U.S. Holdings, Inc.

III. JURISDICTION AND VENUE

12. Subject matter jurisdiction is proper pursuant to Connecticut General Statute § 51-164s.

13. This Court has personal jurisdiction over Defendant because Defendant resides in and transacts business in Connecticut.

14. Venue is proper in the Judicial District of Hartford County under Connecticut General Statute § 51-345.

IV. FACTUAL BACKGROUND

15. Plaintiff is of the nation's largest dental support organizations, supporting more than 230 affiliated dental practices and doctors in 17 states.

A. **The Policy**

16. On or before the effective date of the Policy, Defendant issued the “all risks” commercial insurance Policy to Plaintiff, which covers a term from October 28, 2019 to October 28, 2020. The Policy is attached hereto as **Exhibit 3**.

17. In total, Plaintiff paid hundreds of thousands of dollars in premiums under the Policy for the 2019-2020 policy year.

18. The Policy, which Defendant exclusively drafted, provides the following coverage:

We will pay for all direct physical **damage** to covered property at the premises described on the Declarations caused by or resulting from any **covered cause of loss**.

Policy (Ex. 3), Form ASPDTPR001 0219 at Page 4 of 29 (emphasis in original).

19. The Policy defines “Covered Causes of Loss” to mean “ALL RISK OF DIRECT PHYSICAL LOSS except as excluded or limited in Section II. of this Coverage Part.” The Policy defines “damage” to mean “partial or total loss of or damage to your covered property.” The Policy does not further define “partial or total loss of or damage to.”

20. The Policy further provides for “Business Income” coverage (“BI Coverage”). Generally speaking, BI Coverage provides an insured with coverage for the loss of income when it experiences certain events or disasters that require it to suspend normal business operations. Importantly, BI Coverage differs from property casualty insurance, which addresses damage to the covered property itself.

21. Here, the Policy’s BI Coverage states Defendant will pay for:

[T]he actual loss of **practice income you** sustain, or the Valued Daily Limit, as described under Limits of Insurance provision III.E.6., due to the necessary suspension of your practice during the **period of restoration**. The suspension must be caused by direct physical **damage** to the **building** or **blanket dental practice personal property** at the described premises caused by or resulting from a **covered cause of loss** or power failure as described under Paragraph I.B.8.

Policy (Ex. 3), Form ASPDTPR001 0219 at Page 6 of 29 (emphasis in original).³

22. The Policy further provides for BI Coverage if Plaintiff is prohibited access by action of civil authority:

We will pay for the actual loss of **practice income** and **rents you** sustain caused by action of civil authority that prohibits access to the described premises due to the direct physical **damage** to property, other than at the described premises, caused by or resulting from any **covered cause of loss**.

Policy (Ex. 3), Form ASPDTPR001 0219 at Page 10 of 29 (emphasis in original).

23. The Policy also states that Defendant will pay for:

[E]xtra expenses necessarily incurred by **you** during the **period of restoration** to continue normal services and operations which are interrupted due to **damage** by a covered cause of loss to the premises described, or power failure as described under Paragraph I.B.8.

Policy (Ex. 3), Form ASPDTPR001 0219 at Page 7 of 29 (emphasis in original).

24. Depending on the particular property at issue, Policy contains delineated limits for business interruption, civil authority and extra expense coverages.

25. The Policy contains no exclusion for viruses, contagions, or pandemics. After the SARS epidemic of 2003, the Insurance Services Office (“ISO”) promulgated CP 01 40 07 06 (the “Form Virus Exclusion”) for use in commercial property policies. The Form Virus Exclusion states: “We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” Defendant did not include the Form Virus Exclusion, or any iteration thereof, in the Policy.

³ The Policy also provides the following “Extended Practice Income” coverage: “We will pay for the actual loss of **practice income you** incur during the period that: a. begins on the date property, except **finished stock**, is actually repaired, rebuilt or replaced and your practice is resumed; and b. ends on the earlier of: 1) the date **you** could restore **your** practice with reasonable speed, to the condition that would have existed if no direct physical **damage** happened; or 2) 12 consecutive months after the date determined in (1) above.” Policy (Ex. 3), Form ASPDTPR001 0219 at Page 7 of 29 (emphasis in original).

Defendant also did not include a pandemic exclusion or any other exclusion that would apply to Plaintiff's losses. As a direct result, all of Plaintiff's losses complained of herein are related to the COVID-19 Pandemic and are covered under the Policy.

B. The COVID-19 Pandemic

26. COVID-19 is a highly communicable disease that has battered the healthcare industry.

27. By March 17, 2020, all fifty states had reported cases of the virus, and by the end of that month (March 2020), the U.S. had more reported COVID-19 cases than any other country in the world.

28. Research on COVID-19 demonstrates the virus is transmitted by symptomatic and asymptomatic people who come into close, or even moderately close, contact with others. The virus spreads through respiratory droplets that are common when an individual talks, sneezes, coughs, sings, or breathes heavily. The CDC has found the virus can also spread through "airborne transmission" (*i.e.*, through small respiratory droplets that linger in the air and by contact with objects and surfaces). Aerosolized droplets exhaled by normal breathing can travel significant distances and stay suspended in air and infective for sixteen hours, until gravity ultimately forces them to the nearest surface.⁴ Because of this tendency for the droplets to linger in the air, scientists have likened aerosolized virus droplets to smoke—which has an obvious physical presence.⁵ These droplets physically and materially alter the air and airspace in which they are present and the surfaces to which they attach. In fact, recent scientific studies confirm that COVID-19 exposure

⁴ See Leslie Tate, *Virus Survives In Air For Hours*, TULANIAN (Fall 2020), <https://tulanian.tulane.edu/fall-2020/virus-survives-in-air-for-hours> (last visited Dec. 3, 2021).

⁵ See "Airborne Transmission of SARS-CoV-2," *Science* (Oct. 16, 2020), available at <https://www.science.org/doi/10.1126/science.abf0521> (last visited Dec. 3, 2021).

causes tangible physical alteration and damage to property by, *inter alia*, adhering to cells of surfaces through surface proteins and turning them into vectors of infection, which scientists call “fomites.”⁶ Moreover, COVID-19 can live on hard surfaces for days, physically and materially altering property and also rendering property unusable for its intended purpose and function. The physical presence of the virus on property also requires further physical and material alterations to property, such as the installation of physical barriers restricting the movement and spread of COVID-19. Additionally, scientists have recently confirmed that cleaning and/or disinfection is not necessarily effective in eradicating COVID-19 from physical surfaces, further showing that the virus can, and does, physically and materially alter property—*i.e.*, cause direct physical loss and damage to property.⁷ See **Exhibit 4**, attached hereto (June 2020 Journal of Medical Virology article regarding environmental and decontamination issues for human coronavirus and their potential surrogates) (“While there are considerable viral reductions, some assessments do not necessarily find complete inactivation especially when the initial starting point is a high titer.”).

29. Experts state COVID-19 is of particular concern in indoor areas due to poorer air ventilation; thus, businesses that operate indoors can (and are likely to) create a dangerous environment for COVID-19 spread. This is especially true for dental practices like Plaintiff’s where patients and staff interact with one another in confined indoor spaces.

⁶ Scientists have also gained a better understanding of the manner in which COVID-19 attaches and thus damages covered property. A January 2021 study published by the Royal Society Publishing titled “Surface interactions and viability of coronaviruses” notes that “[t]he physico-chemical adherence and the persistence of SARS-CoV-2 differ with the characteristics of the inanimate surfaces and the virus outer surface proteins, as well as on the surrounding environmental conditions, such as air temperature, relative humidity (RH) and sunlight.”

⁷ In any event COVID-19 was continually reintroduced to Plaintiff’s properties due to, *inter alia*, constant foot traffic in and out of the buildings. Thus, any attempt to prevent or remedy the virus from causing direct physical partial or total loss of or damage to Plaintiff’s properties would have been unsuccessful.

30. Because COVID-19 is widespread in the U.S., particularly in busy urban areas where Plaintiff's properties are located, it is often impossible for an individual to identify how or when they contracted the virus.

31. To date, over 78 million Americans have been infected with COVID-19 and over 900,000 Americans have died. In recent months, the U.S. was reporting hundreds of thousands of new cases each day due to the Omicron variant. At the virus's prior peak in 2020, the U.S. was also reporting hundreds of thousands of cases each day.

32. The exceptional infection and death rate is due, in part, to the year-long absence of a preventative medicinal treatment (vaccine) for COVID-19; per the CDC, before the development of a COVID-19 vaccine, the only countermeasures to slow the virus's spread were to stay home, avoid crowds and poorly ventilated spaces, social distance, hand wash, sanitize and clean surfaces, and wear face masks.

33. The first COVID-19 vaccines became available to the public in December 2020. To date, less than two thirds of Americans have been fully vaccinated. Although a vaccine is now available, it does not account for the period of time when the vaccine was not available. Moreover, experts are unsure whether the current vaccines fully protect against new variants.

C. The Impact of COVID-19 on Plaintiff.

34. Prior to the COVID-19 Pandemic, Plaintiff's properties saw hundreds, if not thousands, of patients daily. Plaintiff's covered properties are located in Maryland, Pennsylvania, Delaware, New Jersey, Colorado, New Mexico, Arizona, North Carolina, Ohio, Tennessee, Illinois, Wisconsin, Texas, South Carolina, Kentucky, Indiana and Michigan.

35. The CDC has made clear that bustling locations like the urban locations where Plaintiff's properties are located are breeding grounds for COVID-19 spread, especially in the early days of the pandemic before face coverings and social distancing became commonplace. For

example, Plaintiff's covered properties are located in states that have been hotbeds for COVID-19 spread such as Texas, Illinois and Pennsylvania. As of the filing of this Complaint, Texas, Illinois and Pennsylvania rank as the nation's second, fifth and sixth U.S. states with the highest COVID-19 infection rates, respectively. Texas, Illinois and Pennsylvania also lag in vaccination progress. And the three states combined make up over 12 million confirmed COVID-19 diagnoses.

36. In order to combat the risks associated with COVID-19 spread in these and similar cities/states, and due to the direct physical partial or total loss of or damage to property that COVID-19 has caused, local and state authorities issued states of emergency and myriad Closure Orders. For example, on March 6, 2020, officials in Travis County, Texas (where some of Plaintiff's properties are located) issued a Declaration of Disaster Due to Public Health Emergency. A week later, on March 13, 2020, Texas Governor Greg Abbott declared a State of Disaster, and shortly thereafter, on March 19, issued an executive order prohibiting people from gathering in groups larger than ten people and closed restaurant dining rooms and gyms. Under Governor Abbott's mandate, essential businesses were allowed to operate with social distancing requirements. On March 21, 2020, Travis County officials prohibited people from gathering in groups larger than ten people. Also on March 21, 2020 Austin Mayor Steve Adler issued a similar order limiting social gatherings to no more than 10 people and further closing on-premises dining at bars and restaurants. On March 22, 2020, Governor Abbott ordered all dentists licensed in Texas to postpone elective procedures. On March 24, Mayor Steve Adler issued an order requiring residents to stay at home, and all non-essential businesses and operations to cease operations, subject to certain exceptions. The City of Austin and Travis County Judge, Sarah Eckhardt issued similar orders on March 25.

37. Similar Closure Orders were issued in all states in which Plaintiff's properties are located. For example, on March 23, 2020, Colorado Governor Jared Polis suspended all voluntary or elective dental surgeries and procedures. Also on March 23, Denver Mayor Michael B. Hancock announced a public health order with an explicit stay at home directive for the City and County of Denver that went into effect on March 24. Under the order, all individuals were required to shelter in place (*i.e.*, stay at home) except for certain essential activities and work to provide essential business and government services or perform essential public infrastructure construction. Businesses with facilities in Denver, except essential businesses, were also required to cease all activities at their Denver facilities. Essential businesses were encouraged to remain open and practice physical distancing requirements. All public or private gatherings of any number occurring outside a single household or living unit were prohibited, except for essential activities. All travel, except for essential activities, was also prohibited. A state-wide stay-at-home order followed on March 26, 2020.

38. Subsequent local, county, and state Closure Orders followed in all states in which Plaintiff operated, including in Texas and Colorado, discussed above. And the foregoing Texas and Colorado Closure Orders are merely examples. All of Plaintiff's covered properties across the country have been impacted by a Closure Order to some degree. Generally speaking, the Closure Orders (as exemplified by those listed above) either required a particular location to close or to operate on a limited capacity, thereby severely and negatively impacting business at all Plaintiff's locations.

39. All Closure Orders that affected Plaintiff's covered properties resulted from direct physical partial or total loss of or damage to (1) Plaintiff's properties; and (2) other properties surrounding Plaintiff's properties. Just like the virus was physically present at, in, on and around

Plaintiff's properties, the virus was also present at, in, on and around on the properties surrounding Plaintiff's properties. All Closure Orders that affected Plaintiff's covered properties also prohibited access to (1) Plaintiff's properties; and (2) other properties surrounding Plaintiff's properties.

40. Due to the Closure Orders and the physical presence of COVID-19 at, in, on, and around Plaintiff's properties other surrounding properties, Plaintiff necessarily closed more than 50% of its affiliated practices. Further, the Closure Orders—which were issued due to the physical presence of COVID-19 at, on, in, and around Plaintiff's and other surrounding properties—prohibited access to Plaintiff's properties.

41. The physical presence of the virus at, in, on, and around Plaintiff's properties, as well as the closures and capacity restrictions themselves constitute and caused direct physical partial or total loss of or damage to Plaintiff's properties under the Policy. The Closure Orders impose a *physical limit*: Plaintiff and its patients and staff were physically unable to occupy the clinics for their intended income-generating purposes.

42. The Closure Orders that affected Plaintiff's properties (and surrounding properties) were issued due to the fact COVID-19 causes direct physical partial or total loss of or damage to property. For example, numerous governmental bodies across the country specifically found COVID-19 physically impacts and/or causes physical loss or damage to property when issuing states of emergency and Closure Orders, including governmental bodies in Colorado, Texas and North Carolina (*i.e.*, states where Plaintiff's covered properties are located). *See, e.g.*, City of Oakland Park Fla. Local Public Emergency Action Directive, at 2 (Mar. 19, 2020) (**Exhibit 5**, attached hereto) (“This Order is given because of the propensity of the virus to spread person to person and also because the virus physically is causing property damage due to its proclivity to

attach to surfaces for prolonged periods of time.”); Panama City Fla. Resolution No. 20200318.1 (Mar. 18, 2020) (**Exhibit 6**, attached hereto) (“conditions continue to exist requiring the extension of the initial Declaration because of the propensity of the virus to spread person to person and also because the virus physically is causing property damage due to its proclivity to attach to surfaces for prolonged periods of time”); Exec. Order of the Hillsborough Cty. Fla. Emergency Policy Group, at 2 (Mar. 27, 2020) (**Exhibit 7**, attached hereto) (“COVID-19 is spread amongst the population by various means of exposure, including the propensity to spread person to person and the propensity to attach to surfaces for prolonged periods of time thereby creating a dangerous physical condition spreading from surface to person and causing increased infections to persons, and also creating property or business income loss and damage in certain circumstances”); City of Key West Fla. State of Local Emergency Directive 2020-03, at 2 (Mar. 21, 2020) (**Exhibit 8**, attached hereto) (“COVID-19 is spread amongst the population by various means of exposure, including the propensity to spread person to person and the propensity to attach to surfaces for prolonged periods of time, thereby spreading from surface to person and causing property loss and damage in certain circumstances”); Harris Cty. Tex. Office of Homeland Security & Emergency Mgmt., Order of Cty. J. Lina Hidalgo, at 2 (Mar. 24, 2020) (**Exhibit 9**, attached hereto) (“the COVID-19 virus causes property loss or damage due to its ability to attach to surfaces for prolonged periods of time”); City of Durham, NC, Second Amendment to Declaration of State of Emergency, at 8 (effective Mar. 26, 2020) (**Exhibit 10**, attached hereto) (recognizing “the virus’s propensity to physically impact surfaces and personal property”); Napa Cty. Cal. Health & Human Service Agency, Order of the Napa Cty. Health Officer (Mar. 18, 2020) (**Exhibit 11**, attached hereto) (“This Order is issued based on evidence of increasing occurrence of COVID-19 throughout the Bay Area, increasing likelihood of occurrence of COVID-19 within the County,

and the physical damage to property caused by the virus.”); Colorado Dep’t of Pub. Health & Env’t, Updated Public Health Order No. 20-24, at 1 (Mar. 26, 2020) (**Exhibit 12**, attached hereto) (“COVID-19 also physically contributes to property loss ... and damage due to its propensity to attach to surfaces for prolonged periods of time.”); Sixth Supp. to San Francisco Mayoral Proclamation Declaring the Existence of a Local Emergency, 26 (Mar. 27, 2020) (**Exhibit 13**, attached hereto) (“This order and the previous orders issued during this emergency have all been issued because of the propensity of the virus to spread person to person and also because the virus physically is causing property loss or damage due to its proclivity to attach to surfaces for prolonged periods of time”); Indiana Exec. Order No. 20-22, at 8 (April 20, 2020) (**Exhibit 14**, attached hereto) (recognizing “the virus’s propensity to physically impact surfaces and personal property”); New Orleans Mayoral Proclamation No 2020-02602, at 2 (Mar. 16, 2020) (**Exhibit 15**, attached hereto) (“COVID-19 may be spread amongst the population by various means of exposure, including the propensity to spread person to person and the propensity to attach to surfaces for prolonged periods of time, thereby spreading from surface to person and causing property loss and damage in certain circumstances”); Los Angeles Mayoral Public Order, at 1-2 (April 27, 2020) (**Exhibit 16**, attached hereto) (“This Order is given because, among other reasons, the COVID-19 virus can spread easily from person to person and it is physically causing property loss or damage due to its tendency to attach to surfaces for prolonged periods of time.”); and N.Y.C. Emergency Exec. Order No. 100, at 2 (Mar. 16, 2020) (**Exhibit 17**, attached hereto) (“this order is 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”).

43. In addition to Closure Orders, top health officials urged Americans to stay home and avoid non-essential activities due to uncontrolled community spread. Given COVID-19’s

rampant contagion level and epidemiological evidence demonstrating how COVID-19 can be spread (including asymptomatic and airborne transmission), COVID-19 widely infiltrated and was physically present at, on, in, and around Plaintiff's properties. This is particularly true considering Plaintiff's properties are located in states that were once virus hotspots (*e.g.*, Texas, Illinois and Pennsylvania). According to CDC data, Texas, Illinois and Pennsylvania rank as the nation's second, fifth and sixth U.S. states with the highest COVID-19 infection rates, respectively. And the three states combined make up over 12 million confirmed COVID-19 diagnoses.

44. Further, the CDC reports individuals with COVID-19 who are "asymptomatic" can spread the virus, even if they are not showing any symptoms. Thus, it is a demonstrable certainty (provable through epidemiological evidence) that patients and staff entered (a) Plaintiff's properties and (b) other surrounding properties, both before the Closures Orders and following the full reopening of clinics, while they were actively shedding and spreading the virus onto surfaces and into the air, even if they did not later develop symptoms of, or test positive for, COVID-19.

45. The pervasive spread of the virus, and its physical presence at, in, on, and around the Plaintiff's properties and other business properties within one statute mile of such properties (a presence which physically and materially altered property by attaching to surfaces and lingering in the air), including those properties referenced above, constitutes and caused direct physical loss and damage to property under the Policy and interrupted Plaintiff's businesses. The virus and its physical presence at, in, on, and around Plaintiff's properties caused physical loss and damage to Plaintiff's properties in the very same way the virus damages and causes physical loss and damage to the human immune, respiratory, cardiovascular, musculoskeletal systems and the brain. *See Exhibit 18*, attached hereto (June 2020 Sports Medicine and Health Science article regarding the COVID-19 pandemic and physical activity) (recognizing that "[t]he foremost damage of the virus

is on human health, including direct injury to the respiratory system, compromise of the immune system, exacerbation of the underlying medical conditions, and eventually systematic failure and death.” Also noting that “[e]vidence is accumulating that SARS-CoV-2 invades and damage[s] multiple organs, such as the respiratory system, cardiovascular system, central nervous system, kidneys, and liver.”⁸

46. As a result, in much of 2020 and still today, Plaintiff has served far fewer patients it prior to the Closure Orders and the physical presence of COVID-19 on property. On top of this, Plaintiff has incurred expense by, but not limited to, maintaining employees on payroll who could not work, implementing increased cleaning of high touch points, and the installation of sanitation stations and physical barriers.

47. These are the exact types of business losses for which Plaintiff purchased the Policy.

D. Despite Incurring Direct Physical Partial or Total Loss of or Damage to Property under the Policy, Defendant Denied Plaintiff’s Claim

48. On March 27, 2020, in accordance with the duties of the insured under the Policy, Plaintiff noticed a claim (the “Claim”) under the Policy for direct physical partial or total loss of or damage to its covered property caused by the COVID-19 Pandemic.

49. At all relevant times, Plaintiff mitigated its damages and performed all reasonable mitigation measures.

50. Despite this and the broad coverage afforded by the Policy, on June 1, 2020, Defendant issued notice of its denial of Plaintiff’s Claim for coverage (the “Denial”).

51. In the Denial, Defendant stated that:

⁸ Also available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7261095/> (last visited Feb. 17, 2022).

Our investigation indicates that neither your building nor practice personal property sustained direct physical damage. Instead, the inability to continue your practice, in whole or part, is due to a directive or guideline from the above-referenced sources.

52. Defendant did not assert that an applicable Policy exclusion barred Plaintiff's claim.

53. Defendant (like other insurers across the country) is systematically denying COVID-19 claims despite the fact the Closure Orders and COVID-19's physical presence in, on and around Plaintiff's covered properties constitutes "direct physical partial or total loss of or damage to" under the Policy.

V. CAUSES OF ACTION

Count I

(Request for Declaratory Judgment)

54. Plaintiff incorporates the above allegations as if fully set forth herein.

55. An actual controversy exists between the parties.

56. Plaintiff has a legally protectable interest in this dispute.

57. Defendant has an opposing interest in this dispute.

58. The issue in controversy is ripe for determination.

59. Accordingly, pursuant to the Wisconsin Uniform Declaratory Judgments Act, Plaintiff seeks a declaration from the Court that, under the Policy, Defendant is obligated to reimburse Plaintiff for the losses and expenses it has incurred arising from "direct physical partial or total loss of or damage to" its covered property due to (1) the governmental Closure Orders and/or (2) the physical presence of COVID-19 (or risks thereof) at, in, on, and around (a) Plaintiff's covered properties and (b) other surrounding properties, which physically and materially altered such properties.

Count II

(Breach of Contract – At Law)

60. Plaintiff incorporates the above allegations as if fully set forth herein.

61. The Policy is a valid and enforceable contract between the parties.

62. Plaintiff has fully performed under the terms of the Policy, including paying significant premiums in exchange for the coverage afforded under the Policy, putting Defendant on notice of its losses, and fully performing all “duties” assigned to Plaintiff under the Policy.

63. Under the Policy, Defendant promised to reimburse Plaintiff for losses arising from direct physical partial or total loss of or damage to covered property. This coverage extended to direct physical partial or total loss of or damage to the property due to Plaintiff’s (1) general business interruption, (2) business interruption due to access prohibited by civil authorities and (3) extra expenses incurred.

64. Plaintiff has suffered losses arising from “direct physical partial or total loss of or damage to” its covered properties due to (1) the governmental Closure Orders and/or (2) the physical presence (or risks thereof) of COVID-19 at, in, on, and around (a) Plaintiff’s covered properties and (b) other surrounding properties, which physically and materially altered Plaintiff’s properties.

65. By refusing to reimburse for these losses and expenses, Defendant has breached the Policy.

66. As a result of this breach, Plaintiff has suffered millions of dollars in damages, as well as damages resulting from Defendant’s improper withholding of insurance benefits that are due and owing under the Policy, and attorneys’ fees in this action.

VI. DEMAND FOR JURY TRIAL

67. Plaintiff hereby demands a trial by jury on all matters so triable.

VII. PRAYER

WHEREFORE, Plaintiff Element Dental Partners HoldCo, LLC (formerly known as Mid-Atlantic HoldCo, LLC) respectfully requests the Court enter judgment in its favor and against Defendant Aspen American Insurance Company

- a. For a judgment against Defendant for the causes of action alleged against it;
- b. For compensatory damages in an amount to be proven at trial;
- c. For a declaration that Defendant's conduct as alleged herein is unlawful and in material breach of the Policy;
- d. For a declaration that Defendant is obligated to reimburse Plaintiff for the losses and expenses it has incurred arising from direct physical partial or total loss of or damage to its covered properties due to the physical presence (or risk thereof) of COVID-19 at, in, on and around its properties and due to governmental Closure Orders, both of which physically and materially altered Plaintiff's properties;
- e. For pre-judgment and post-judgment interest at the maximum rate permitted by law;
- f. For Plaintiff's attorneys' fees and costs incurred; and
- g. For all such other and further relief as the Court deems just and proper.

Dated: March 21, 2022

Respectfully Submitted,
/s/

BY:

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ATTORNEYS FOR PLAINTIFF

RETURN DATE: APRIL 12, 2022 : SUPERIOR COURT
ELEMENT DENTAL PARTNERS : J.D. OF HARTFORD
HOLDCO, LLC (*formerly known as* :
MID-ATLANTIC HOLDCO, LLC) :
VS. : AT HARTFORD
ASPEN AMERICAN INSURANCE : MARCH 4, 2022
COMPANY :

AMOUNT IN DEMAND

The amount in demand, exclusive of interest and costs, is not less than Fifteen Thousand (\$15,000.00) dollars.

THE PLAINTIFF,

BY: _____
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