

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

USF S&H TOPCO LLC; USF S&H
VIRGINIA, LLC; USF WV, LLC;
USF PROPCO, LLC; WINVA
BUILDING LLC; AF REAL ESTATE
HOLDINGS, LLC; AFV INVESTMENTS LLC.

Plaintiffs.

v.

Case No. CL21-6270

HARTFORD FIRE INSURANCE COMPANY.

Serve: VIA PRIVATE PROCESS SERVER:
CT Corporation System,
Registered Agent
4701 Cox Rd., Ste 285
Glen Allen, Virginia 23060

Defendant.

COMPLAINT

NOW COME Plaintiffs, USF S&H Topco LLC, USF S&H Virginia, LLC, USF WV, LLC, USF Propco, LLC, Winva Building LLC, AF Real Estate Holdings, LLC, and AFV Investments LLC, (collectively "Plaintiffs") and bring this suit against Defendant, Hartford Fire Insurance Company ("Hartford"), for denying Plaintiffs' business interruption insurance claims for business income losses and additional expenses caused by Plaintiffs' compliance with government orders and sound business practices regarding the COVID-19 pandemic.

INTRODUCTION

1. Civil authorities' orders issued in response to COVID-19 directly damaged Plaintiffs by causing lost income and additional expenditures and physical loss and damage to their insured properties and to properties in the immediate area of those properties that totaled millions of dollars. For example, Plaintiffs complied with civil authorities' orders that prohibited access to

Plaintiffs' properties and limited the operation of their facilities which resulted in substantial lost income and additional expenses required to comply with those laws.

2. At all times material to this action, Plaintiff, USF S&H Topco LLC, maintained at a cost of millions of dollars over several years a Property Choice Policy (number 22UUNNL2386) ("the Policy") issued by Hartford. (See **Ex. 1** to this Complaint) All claims stated in this Complaint arise out of the Policy.

3. The Policy included business interruption and "civil authority" coverage for lost business income, extra expenses, and payroll.

4. The Policy named as insureds USF S&H Topco LLC;¹ USF S&H Virginia, LLC; USF WV, LLC; USF Propco, LLC; Winva Building LLC; AF Real Estate Holdings, LLC; and AFV Investments LLC.

5. The Policy was purchased through SIA Group, a broker in Blacksburg, Virginia.

6. The Policy was delivered to USF S&H Topco LLC at its headquarters in McLean, Virginia and was paid for by USF S&H Topco LLC.

7. The Policy included coverage for multiple properties in Virginia, including one located in Norfolk, Virginia, which were identified in the Policy by the property's physical address in Virginia. (See **Ex. 1** to this Complaint).

8. Hartford has represented on its website that civil authority coverage insures lost income "if you have to close down because a government agency prevents access to your business."²

¹ Due to an apparent typographical error, the Policy lists USF S&H Topco, LLC as "USF SH Topco, LLC." (See **Ex. 1** to this Complaint at p. 6)

² See The Hartford Insurance, What Is Business Interruption Insurance? *available at* <https://www.thehartford.com/business-insurance/business-interruption-insurance> (last visited August 25, 2020).

9. Plaintiffs reasonably understood and expected that the Policy provided comprehensive coverage for their business based in part on the Policy and coverage titles and descriptions that Hartford included in the Policy.

10. On March 25, 2020, Plaintiffs filed claims with Hartford pursuant to the Policy through the SIA Group, the broker in Blacksburg, Virginia, in connection with the losses at business locations in the District of Columbia, Georgia, Maryland, Missouri, and Virginia. (*See Exs. 2, 3, 4, 5, and 6* to this Complaint). On July 23, 2020, Plaintiffs filed a claim with Hartford pursuant to the Policy through the SIA Group in connection with losses at its West Virginia business location. (*See Ex. 7* to this Complaint).

11. On May 11, 2020, Hartford denied Plaintiffs' claims, stating that Hartford had determined COVID-19 did not cause property damage at Plaintiffs' places of business or in the immediate area of those businesses, by way of correspondence to USF S&H Topco LLC, addressed to its headquarters in McLean, Virginia. That denial did not include a detailed analysis or explanation regarding the basis for Hartford's decision. (*See Ex. 8* to this Complaint).

PARTIES

12. USF S&H Topco LLC, a Delaware limited liability company that indirectly owns US Fitness Holdings, LLC, USF S&H Virginia, LLC and USF WV, LLC.

13. USF S&H Virginia, LLC is a Virginia limited liability company.

14. USF WV, LLC is a West Virginia limited liability company.

15. USF Propeco, LLC, a Delaware limited liability company, wholly owns Winva Building LLC.

16. Winva Building LLC, a Virginia limited liability company, is the landlord for the gym known as Onelife Winchester located in Winchester, Virginia.

17. AF Real Estate Holdings, LLC, a Georgia limited liability company, is the landlord for the gym known as Onelife Newnan located in Newnan, Georgia.

18. AFV Investments LLC, a Georgia limited liability company, is the landlord for the gym known as Onelife Vickery located in Cumming, Georgia.

19. For federal diversity jurisdiction purposes, LLCs named as Plaintiffs are citizens of the State of Connecticut because members of those entities are citizens of that state.

20. Hartford is a corporation organized under the laws of Connecticut, with its principal place of business located at One Hartford Plaza, Hartford, Connecticut.

21. Hartford is registered to do business, has a registered agent, is licensed to sell insurance, and sells insurance in the Commonwealth of Virginia.

JURISDICTION

22. This Court has subject matter jurisdiction over the claims made by Plaintiffs herein pursuant to Va. Code Ann. §17.1-513 (2020).

23. This Court has personal jurisdiction over Hartford under Va. Code Ann. §8.01-328.1 (2020), in that Hartford transacted business in Virginia and contracted to insure property located within Virginia at the time of contracting. Plaintiffs' claims arise out of Hartford: (a) conducting, engaging in, and/or carrying on business in Virginia; (b) breaching a contract covering Plaintiffs' properties in Virginia; and (c) contracting to insure that property in Virginia. Hartford also purposefully availed themselves of the opportunity of conducting activities in Virginia by marketing insurance policies and services, and intentionally developing relationships with brokers, agents, and customers to insure property within Virginia, which resulted in the issuance of the Policy.

24. Venue is appropriate in this Court pursuant to Va. Code Ann. §8.01-262 because the Policy insured property situated in the City of Norfolk at the time the Policy was issued.

PLAINTIFFS PURCHASED THE POLICY

25. The Policy provides coverage for 53 premises owned and/or operated by Plaintiff's that are listed on **Ex. 1** to this Complaint.³

26. Plaintiff's timely paid Hartford all premiums due for the Policy, with an advance premium of \$224,786.59.

27. Hartford made it difficult for insureds, including Plaintiff's, to understand the terms of the Policy that consists of a total of 171 pages comprised of the underlying contract and several endorsements which purportedly modify and limit the Policy terms and coverage.

28. In order to try to understand the coverage provided by the Policy, including the endorsements, parts of that complex document must be placed side by side and the reader must substitute the Policy endorsements for terms stated in the underlying contract.

29. The operative language of the Property Choice--Business Income and Extra Expense Coverage Form (Business Interruption) states:

We will pay...for the actual loss of business income you sustain...due to direct physical loss of or direct physical damage to property caused by or resulting from a Covered Cause of Loss at [Plaintiff's'] premises.

30. The Policy defines "Covered Causes of Loss" as "direct physical loss or direct physical damage . . . unless the loss or damage is excluded or limited in this policy." When that language is substituted for the term "Covered Cause of Loss" in the Coverage provision, the language reads:

We will pay...for the actual loss of business income you sustain...due to direct physical loss of or direct physical damage to property caused by or

³ KMO Fitness LLC was also identified as an insured but is not named as a Plaintiff.

resulting from direct physical loss or direct physical damage . . . unless the loss or damage is excluded or limited in this policy.

31. Notwithstanding that the definition of “Covered Cause of Loss” appears to be redundant of the language in the Coverage provision, coverage exists under that provision because Plaintiffs’ loss of business income is due to the direct physical loss and/or damage caused by civil authorities’ orders, issued in response to COVID-19, which caused closures of their properties.

32. The Policy fails to define the terms “direct physical loss” or “direct physical damage” and the use of the disjunctive shows that those terms are not to be understood as meaning the same. For that reason, the Policy as drafted by Hartford suffers from an ambiguity regarding the nature and scope of coverage for business income losses sustained by Plaintiffs and can reasonably be interpreted to cover the losses sustained by Plaintiffs due to the authorities’ orders, issued in response to the COVID-19 pandemic.

33. The Policy contains an endorsement titled “Property Choice Business Income and Extra Expense Coverage Form--Additional Coverages” that provides coverage in addition to those included in its “Business Income and Extra Expense Coverage Form.”

34. One coverage included in the “Property Choice Business Income and Extra Expense Coverage Form--Additional Coverages” is Civil Authority coverage described as follows:

This insurance is extended to apply to the actual loss of Business Income you sustain and the actual, necessary and reasonable Extra Expense you incur when access to your “Scheduled Premises” is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your “Scheduled Premises.”

35. That endorsement provides coverage for losses incurred as the result of orders issued by various civil authorities in response to the COVID-19 pandemic that prohibited the public from accessing Plaintiffs’ premises as the result of direct physical loss and/or direct physical

damage caused by the coronavirus to Plaintiffs' properties and to properties in the immediate area of those facilities.

36. Those orders warned that individuals using Plaintiffs' facilities could contract COVID-19 either from contact with surfaces contaminated by the virus or from infected individuals who entered those properties.

37. Another coverage included in the "Property Choice Business Income and Extra Expense Coverage Form--Additional Coverages" is the following Extended Income coverage:

If the necessary suspension of your operations (applies to all operations except educational institutional operations) produces a Business Income loss payable under this policy, we will pay for the actual loss of Business Income you incur. . . . (Policy, p. 96)

38. The remainder of that Policy provision describes the conditions and period when the Extended Income Additional Coverage applies to business income lost because Plaintiffs limit or suspend operations as required by public health orders.

39. The "Property Choice Business Income and Extra Expense Coverage Form--Additional Coverages" covers lost Future Earnings as follows:

In the event of a covered Business Income loss at "Scheduled Premises," we will pay for the actual loss of Business Income you subsequently and necessarily sustain after the Period of Restoration and the Extended Income period ends and that [sic] the actual loss in Business Income is directly attributable to the Covered Cause of Loss occurrence. (Policy, p. 97)

40. That paragraph provides coverage if Plaintiffs have suffered a loss of business income at facilities scheduled under the Policy and will continue to incur such a loss after a Period of Restoration ends.

41. The portion of the quoted sentence that continues after the phrase "Extended Income period ends" is meaningless because no antecedent exists for the phrase "that the actual loss in Business Income is directly attributable to the Covered Cause of Loss occurrence."

42. That assessment applies regardless of whether the phrase is a product of a typographical error or an inadvertent omission of certain language needed to make it meaningful OR is the product of intentionally drafting very poor contract language.

43. Plaintiffs purchased coverage for damages caused by a virus as described by the “Fungus, Wet Rot, Dry Rot, Bacteria and Virus” endorsement. (Policy, pp.71-72)

44. Plaintiffs purchased “Ingress or Egress” coverage for business income lost when “ingress or egress” to their properties is prohibited due to a loss at adjoining properties. (Policy, pp. 97-98)

THE COVID PANDEMIC CAUSED PLAINTIFFS TO SUSTAIN LOSSES INSURED BY THE POLICY

45. On January 31, 2020, the United States Health and Human Services Department declared a public health emergency due to the COVID-19 pandemic.

46. Published studies confirm that COVID-19 is transmitted from asymptomatic and symptomatic people to others through respiratory droplets and direct contact with infected persons and contaminated surfaces.⁴

47. The CDC has confirmed that COVID-19 also spreads when people are within six feet of each other.⁵

⁴ See WHO, Coronavirus disease 2019 (COVID-19) Situation Report – 73 (Apr. 2, 2020) *available at* https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_6 (“Data from clinical and virologic studies that have collected repeated biological samples from confirmed patients provide evidence that shedding of the COVID-19 virus is highest in upper respiratory tract (nose and throat) early in the course of the disease. That is, within the first 3 days from onset of symptoms. Preliminary data suggests that people may be more contagious around the time of symptom onset as compared to later on in the disease”).

⁵ See CDC, How COVID-19 Spreads (June 16, 2020) *available at* <https://www.cdc.gov/coronavirus/2019-nCoV/prevent-getting-sick/how-COVID-spreads.html>; CDC, What you should know about COVID-19 to protect yourself and others (June 1, 2020), *available at*

48. According to The New England Journal of Medicine, COVID-19 is detectable in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard, and up to two to three days on plastic and stainless steel.⁶

49. Civil authorities in the District of Columbia, Maryland, Virginia, Georgia, Missouri, and West Virginia issued orders that required Plaintiffs to close and substantially limit the operation of their health and fitness facilities and to incur substantial additional expenses.

A. District of Columbia

50. On March 16, 2020, the District of Columbia (“DC”) issued Order 2020-048 that declared a COVID-19 Public Health Emergency and suspended the operations of gyms, health clubs, health spas, and fitness centers in DC through March 31, 2020. Violators of that order were subject to criminal, civil and administrative penalties, including summary suspension of licenses.

51. On March 20, 2020, DC issued Order 2020-51 that extended through April 24, 2020: (a) the Public Health Emergency; and (b) the prohibition of gatherings of more than 50 persons, which effectively meant that gyms, health clubs, health spas, and fitness centers must remain closed. Violators were subject to the same penalties imposed by Order 2020-048.

52. On March 24, 2020, DC issued Order 2020-053 that mandated closing all on-site operations of nonessential businesses and specifically excluded fitness facilities, exercise gyms,

<https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>.

⁶ See U.S. Dept. of Health and Human Services, National Institutes of Health, New Release, New coronavirus stable for hours on surfaces (March 17, 2020) *available at* <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces>. See also WHO, Modes of transmission of virus causing COVID-19: implications for IPC precaution recommendations (March 29, 2020) *available at* <https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations>.

spas, massage parlors, or similar facilities from the list of permissible “Health Care Operation” activities that could still be conducted.

53. DC Order 2020-053 implemented requirements for DC residents such as “washing hands with soap and water for at least 20 seconds or using hand sanitizer frequently, or after contact with potentially-infected surfaces, to the greatest extent feasible,” and “[r]egularly cleaning high-touch surfaces.”

54. On March 30, 2020, DC issued Order 2020-054 that required DC residents to stay in their homes, except to perform essential activities, engage in essential business, provide or obtain essential government services, or engage in certain authorized recreational activities that did not involve close contact with other persons.

55. That order instructed as follows: “Individuals shall not linger in common areas of apartment buildings and shall not use buildings’ facilities, such as gyms because such spaces are unlikely to be disinfected often and could otherwise expose individuals to the COVID-19 virus.”

56. On April 15, 2020, DC issued Order 2020-063, which extended Order 2020-053, the Stay-At-Home Order, and the Public Health Emergency from April 17 until May 15, 2020. Violators were subject to penalties imposed by the previous orders.

57. On May 13, 2020, DC issued Order 2020-066 that extended the Public Health Emergency through June 8, 2020 and specified that gyms must remain closed.

58. On May 27, 2020, DC issued Order 2020-067 that extended the Public Health Emergency until July 24, 2020 and permitted the reopening of certain essential businesses on May 29, 2020 which did not include the type of facilities operated by Plaintiffs. A knowing violation of the order was subject to the same penalties imposed by the previous orders.

59. On June 22, 2020, DC issued Order 2020-75 that allowed gyms and workout studios to reopen with limited access (five people per 1,000 square feet of space) and to conduct classes if a 10-foot distance between participants could be maintained.⁷

60. On July 22, DC issued Order 2020-79 that extended the Public Emergency and Public Health Emergency through October 9, 2020 and continued the restrictions on Plaintiffs' operations.

61. On November 23, 2020, DC issued Order 2020-119 which required that (1) "gyms, private trainers, and other businesses and recreation centers must suspend all indoor group exercise classes" and (2) "gyms, private trainers, and other businesses and recreation centers must suspend all outdoor group exercise classes of twenty-five (25) or more persons." That order was effective through December 31, 2020.

62. On December 7, 2020, DC issued Order 2020-123 that added the following restrictions effective through December 31, 2020 to those imposed by Order 2020-119: (1) recreation centers and sports clubs were ordered to suspend sports and organized athletic recreation activities, such as yoga and Zumba; and (2) prohibited high-contact sports such as martial arts.

63. On December 16, 2020, DC issued Order 2020-126 modified Order 2020-075 to clarify and amend that gyms, recreation centers, climbing gyms, and squash or racquet courts were limited to having the lesser of 25% of the rated capacity on its Certificate of Occupancy indoors or no more than 250 at the facility at any one time. The order was effective until December 31, 2020.

⁷ See DC Health, Phase Two Guidance, Coronavirus 2019 (COVID-19): Guidance for Gyms and Workout Studios (June 18, 2020), *available at* https://coronavirus.dc.gov/sites/default/files/dc/sites/coronavirus/page_content/attachments/06182020-DC_Health_Guidance_for_Gyms_and_Workout_Studios.pdf.

64. On December 18, 2020, DC issued Order 2020-127, which extended the Public Emergency and Public Health Emergency until January 15, 2021.

B. Maryland

65. On March 5, 2020, Maryland declared a State of Emergency and Existence of Catastrophic Health Emergency due to COVID-19.

66. On March 12, 2020, Maryland issued an order that prohibited gatherings of more than 250 persons.

67. On March 16, 2020, Maryland amended the March 12, 2020 prohibition to include the closure of fitness centers.

68. On March 30, 2020, Maryland issued Executive Order (“EO”) 20-03-30-01 that required Maryland residents to stay at home, except to participate in essential activities which did not include gyms or fitness centers.

69. On May 6, 2020, Maryland renewed the proclamation declaring a catastrophic health emergency because COVID-19 is highly infectious, spreads easily, physically contaminates physical surfaces for long periods, and can result in serious and fatal illness.

70. On May 13, 2020, Maryland issued EO 20-05-13-01 that allowed some businesses, but not gyms and fitness centers, to reopen.

71. On June 10, 2020, Maryland issued EO 20-06-10-01 that permitted gyms and fitness centers to open on June 19, 2020, subject to a limit of 50% of the facility’s maximum capacity.

72. Maryland has repeatedly renewed the declaration of a catastrophic health emergency and limited the reopening of gyms and fitness centers to 50% of maximum capacity under applicable codes, laws, and permits.⁸

C. Virginia

73. On March 12, 2020, Virginia issued EO 51: Declaration of a State of Emergency due to Novel Coronavirus (COVID-19) that was effective until June 10, 2020.

74. On March 17, 2020, Virginia issued Order of Public Health Emergency One that restricted the number of patrons allowed in fitness centers to a total of 10. A violation of that order could result in immediate suspension of operation permits, punishment as a misdemeanor, and injunctive relief.

75. On March 23, 2020, Virginia issued EO 53 that closed fitness centers and gyms until April 23, 2020 and that classified violations as Class 1 misdemeanors.

76. On April 15, 2020, EO 53 was amended to extend the closure of gyms and fitness centers until May 7, 2020.

77. On May 4, 2020, EO 53 was again amended to extend the closure of gyms and fitness centers until May 14, 2020.

78. On March 30, 2020, Virginia issued EO 55 that required Virginians until June 10, 2020 to remain in their residences with very limited exceptions not applicable to Plaintiffs' businesses.

79. On May 8, 2020, Virginia issued EO 61 and Order of Public Health Emergency Three that permitted fitness centers and gyms to reopen for only certain outdoor activities where

⁸ Maryland renewed that declaration on June 3, July 1, July 31, August 10, September 8, October 6, October 30, November 25, and December 23, 2020.

participants had to remain at least ten feet apart. The order required: (1) employees working in customer-facing areas to always wear face masks; (2) outdoor swimming pools may be open for lap swimming only and must be limited to one person per lane; (3) group outdoor activities could not have more than 10 participants who must remain at least 10 feet apart; (4) hot tubs, spas, splash pads, spray pools, and interactive play features to be closed; and (4) businesses to clean and disinfect exercise equipment after each use and comply with other burdensome restrictions.

80. On May 12, 2020, Virginia issued EO-62 and Order of Public Health Emergency Four that required businesses in Northern Virginia to continue until May 28, 2020 to comply with EO-53 and EO-55 which had closed fitness centers and gyms.⁹

81. On May 14, 2020, EO 62 was amended to require Richmond and Accomack County to comply with the same restrictions until May 28, 2020.

82. On May 19, 2020, EO 61 was amended to extend those restrictions on fitness centers and gyms until June 10, 2020.

83. On June 2, 2020, EO 61 was amended again to require businesses in Northern Virginia and Richmond to continue complying with the restrictions imposed by EO 61.

84. On June 2, 2020, Virginia issued EO 65 and Order of Public Health Emergency Six that eased some COVID-19 restrictions for areas outside Northern Virginia and Richmond. Gyms and fitness centers in those areas could reopen for indoor and outdoor activities only if they complied with guidelines such as:

⁹ Northern Virginia includes Arlington, Fairfax, Loudoun, and Prince William Counties, and the Cities of Alexandria, Fairfax, Falls Church, Manassas, Manassas Park, as well as the Towns of Dumfries, Herndon, Leesburg, and Vienna. The Policy provided business interruption insurance for 28 of the 31 covered properties in Virginia with 17 properties located in Northern Virginia and 11 located outside that area.

- a. Patrons, members, and guests must remain at least 10 feet apart during all activities.
- b. Instructors and all participants of group exercise and fitness classes must maintain at least 10 feet of physical distancing between each other at all times.
- c. The number of persons involved in group fitness classes could not exceed the lesser of 30% of the minimum occupancy specified by certificates of occupancy or 50 patrons.
- d. Hot tubs, spas, splash pads, spray pools, and interactive play features must be closed.
- e. Employees working in customer-facing areas must always wear face masks.
- f. Businesses must ensure equipment was cleaned and disinfected after each use.
- g. Facilities must prohibit use of equipment that cannot be thoroughly disinfected between uses (*e.g.*, climbing rope, exercise bands, *etc.*).

85. On June 9, 2020, Virginia amended EO 66 to permit Northern Virginia and Richmond to operate in accordance with EO 65.

86. On June 30, 2020, Virginia issued EO 67 which imposed the following restrictions on gyms and fitness centers: (1) instructors and participants in activities, other than swim classes, who were not family members must remain at least 10 feet apart, except where necessary for an individual's safety; (2) occupancy must be limited to no more than 75% of the lowest occupancy load on the certificate of occupancy; (3) hot tubs, spas, splash pads, spray pools, and interactive play features must be closed; (4) swimming pools may be open, provided occupancy is limited to

no more than 75% of the lowest occupancy load on the certificate of occupancy and all swimmers maintain at least ten feet of physical distance from others who are not family members; (5) employees working in customer-facing areas must always wear masks; (6) businesses must ensure cleaning and disinfection of shared equipment after each use; (7) facilities must prohibit use of any equipment that cannot be thoroughly disinfected between uses (*e.g.*, climbing rope, exercise bands, etc.); and (8) businesses must supply hand sanitizer or hand washing stations. Business that could not adhere to those requirements must remain closed.

87. On November 13, 2020, Virginia issued Sixth Amended EO 67 and Order of Public Health Emergency Seven which required gyms and fitness centers to limit occupancy to 75% of the lowest load on the certificate of occupancy and the total number of occupants, including participants and instructor, in group exercise and fitness classes to the lesser of 75% of the minimum occupancy load or 25 persons.

88. On December 10, 2020, Virginia issued EO 72 and Order of Public Health Emergency Nine that limited the number of persons, including participants and instructors, in all group exercise and fitness classes to the lesser of 75% of the minimum occupancy on the certificate of occupancy or 10 persons.

D. Georgia

89. On March 14, 2020, Georgia issued a Declaration of Public Health State of Emergency, Order 03.14.20.01 that was to terminate on April 13, 2020.

90. On March 23, 2020, Georgia issued EO 03.23.20.01 that, through April 6, 2020, closed bars, established social distancing requirements, and limited the number of customers in a single location. The penalty for a violation was closure of a business.

91. On April 2, Georgia issued EO 04.02.20.01 that closed all gyms and fitness centers and required persons to shelter in place, with limited exception, through April 13, 2020. A violation of the order was a misdemeanor.

92. On April 8, 2020, EO 04.08.20.02 extended the Public Health State of Emergency until April 30, 2020.

93. On April 20, 2020, Georgia issued EO 04.20.20.01 that allowed gyms and fitness centers to begin in-person Minimum Basic which included activities necessary to maintain the value of a business and being open to the public subject to restrictions, such as social distancing and limitations on the number of customers.

94. On April 23, 2020, Georgia issued EO 04.23.20.02 that extended EO 04.08.20.02 to May 13, 2020 and required persons to socially distance and encouraged them and visitors to wear masks when they could not. That order permitted gyms to reopen as long as they did not provide group classes and they closed areas where groups congregate, screened patrons, and complied with sanitation requirements.

95. On April 30, 2020, Georgia issued EO 04.27.20.0 that extended the Public Health State of Emergency until June 12, 2020.

96. On May 12, 2020, Georgia issued EO 05.12.20.02 that reinforced the cleaning and social distancing requirements for gyms and fitness centers.

97. On May 28, 2020, Georgia issued EO 05.28.20.01 that extended the Public Health State of Emergency until July 12, 2020 and EO 05.28.20.02 that permitted gyms and fitness centers to offer group fitness classes, provided they met social distancing and cleaning requirements.

98. A Georgia government's website regarding COVID-19 encourages persons to disinfect surfaces daily and frequently wash their hands.¹⁰

99. Georgia's EO 06.11.20.01, EO 06.29.02, and EO 07.15.20.01 reiterated the limits on the use and cleaning of gyms and fitness centers imposed by EO 05.28.20.01.

E. Missouri

100. On March 13, 2020, Missouri issued EO 20-02 that declared a State of Emergency and activated the State Emergency Operations Plan in response to COVID-19 cases. That order was effective until May 15, 2020.

101. On March 21, 2020, Kansas City issued the Second Amended Order 20-01 that required persons to stay at home except for "essential activities" which specifically excluded fitness and exercise gyms and similar facilities. Violations of the order constituted an imminent threat and immediate menace to public health.

102. On April 3, 2020, Missouri issued a stay-at-home order for the entire state that: (1) closed schools and prohibited eating at restaurants; and (2) permitted individuals to leave home only to perform essential work, obtain necessities, engage in outdoor activity, and attend worship if they practiced social distancing and gathering limitations. The order was effective until April 24, 2020.

103. On April 16, 2020, Missouri announced extension of the stay-at-home order until May 3, 2020 and Kansas City issued a similar order through May 15, 2020.

104. On April 24, 2020, Missouri issued EO 20-09 that extended the State of Emergency until June 15, 2020.

¹⁰ See State of Georgia Government, Clean and disinfect surfaces daily, *available at* <https://Georgia.gov/covid-19-coronavirus-georgia/covid-19-state-services-georgia/covid-19-clean-and-disinfect-surfaces>.

105. On May 4, 2020, Missouri began lifting requirements that closed gyms and other businesses if they limited gatherings to no more than 10 people. More stringent restrictions remained in place for localities, including Kansas City.

106. On May 11, 2020, Kansas City announced guidelines for reopening non-essential businesses, such as gyms and fitness centers, that were permitted to open on May 18 with gatherings limited to the larger of 10 people or 10 percent of building occupancy.

107. On May 28, 2020, Kansas City issued the Seventh Amended Order 20-01 that permitted businesses, including gyms and fitness centers, to continue in person operations if they limited occupants to no more than 50 percent of building occupancy, maintained social distancing of 6 feet between areas of service, and mandated that all service providers and customers wear masks to the extent possible. Those restrictions effectively precluded full capacity operations of gyms and fitness centers.

F. West Virginia

108. On March 4, 2020, West Virginia issued a Proclamation declaring a State of Preparedness which stated that COVID-19 posed a severe threat to the health, safety, welfare, and property of the citizens.¹¹

109. On March 18, 2020, West Virginia issued EO No. 3-20 that closed all fitness centers, gymnasiums, recreation centers, and similar businesses where people tend to congregate.¹²

¹¹ State of West Virginia Executive Department, Proclamation by the Governor, March 4, 2020, *available at* https://governor.wv.gov/Documents/SKM_C45820030417010.pdf.

¹² *See* State of West Virginia Executive Dept., Executive Order No. 3-20 by the Governor, *available at* <https://governor.wv.gov/Documents/2020%20Executive%20Orders/Executive-Order-March-19-2020.pdf>.

110. On March 23, 2020, West Virginia issued a Stay-at-Home Order for all of West Virginia that noted the necessity of the measures “because of the propensity of the COVID-19 virus to spread via personal interactions and because of physical contamination of property due to its ability to remain on surfaces for prolonged periods of time.”¹³

111. On April 27, 2020, West Virginia announced a comprehensive plan to reopen businesses, including fitness centers, gymnasiums, and recreation centers, over a six-week period starting May 18, 2020, provided the number of COVID-19 cases remained low. The plan included guidance that directed businesses to: “Reduce touch points to the maximum extent possible; Increase cleaning frequency and the availability of hand sanitizer, disinfectant wipes, and other DIY cleaning products to ensure touch points and exercise machines and equipment are properly sanitized between each use by customers.” The plan limited the capacity of group classes and imposed social distance requirements.¹⁴

112. On May 14, 2020, West Virginia announced that fitness centers, gyms, and recreation centers could resume operations on May 18, 2020, subject to limitations.¹⁵

¹³ See State of West Virginia Executive Dept., Executive Order No. 9-20, available at <https://governor.wv.gov/Documents/2020%20Executive%20Orders/STAY-AT-HOME-ORDER-MARCH-23-2020.pdf>.

¹⁴ See Office of the Governor, Press Release, COVID-19 Update: Gov. Justice unveils plan to reopen state: “West Virginia Strong—The Comeback” (April 27, 2020), available at <https://governor.wv.gov/News/press-releases/2020/Pages/COVID-19-UPDATE-Gov.-Justice-unveils-plan-to-reopen-state-%E2%80%9CWest-Virginia-Strong-%E2%80%93The-Comeback%E2%80%9D.aspx>. See also West Virginia Strong, The Comeback, Guidance for Fitness Centers, Gymnasiums, and Recreation Centers, *available at* <https://governor.wv.gov/Documents/Covid%20Week%204/2020.05.14%20Guidance%20for%20Gyms.pdf>.

¹⁵ See Office of the Governor, Press Release, COVID-19 Update: Gov. Justice schedules reopenings for gyms other recreational activities; announces plan to test vulnerable and minority populations, May 14, 2020, available at <https://governor.wv.gov/News/press-releases/2020/Pages/COVID-19-UPDATE-Gov.-Justice-announces-additional-reopenings.aspx>.

113. On May 15, 2020, West Virginia issued EO No. 37-20 which allowed gyms and fitness centers to reopen on May 18, 2020, subject to social distancing and hygiene practices that precluded full capacity use.

114. West Virginia's Guidance for Fitness Centers, Gymnasiums, and Recreation Centers, last updated November 17, 2020,¹⁶ limits facility occupancy to 40% of the capacity dictated by fire codes and requires social distancing, physical barriers, and extensive cleaning of facilities and equipment. The Guidance also limits on Group Classes as follows: "Group exercise classes should be conducted outdoors, limited, or canceled to the greatest extent possible. In the event group classes are held, such classes may only be held if they can be completed in accordance with social distancing recommendations (including but not limited to the restriction of 40% capacity, with more than 6 feet of distance maintained between participants at all times; no shared equipment during the class; sufficiently adjusted class schedules to allow for deep cleaning between classes; and martial arts and other contact activities should be completed without any person-to-person contact)."

PLAINTIFFS' BUSINESS

115. Plaintiffs operate health and fitness clubs in the DC, Georgia, Maryland, Missouri, Virginia, and West Virginia under the Sport & Health, Onelife Fitness, and Crunch Fitness brands.

116. Each of Plaintiffs' clubs serves approximately 6,000 individuals.

117. As a necessary and essential aspect of operating these businesses, employees and customers come into frequent contact with the physical premises and personal property located

¹⁶See <https://governor.wv.gov/Documents/Covid%20Week%204/2020.05.14%20Guidance%20for%20Gyms.pdf>.

there, including cardio equipment, weights, squash courts, swimming pools, hot tubs, spas, massage tables, and locker facilities.

118. Activities in indoor spaces, such as Plaintiffs' facilities, have been considered a potentially higher risk for customers and employees to contract COVID-19.

119. Plaintiffs have experienced direct physical loss and/or direct physical damage to their property as a result of the civil authorities' orders, issued in response to the COVID-19 pandemic.

120. Plaintiffs have lost access to and the use and functionality of their properties due to the effects of the COVID-19 pandemic, orders of civil authorities, and a combination of the two.

121. Plaintiffs' businesses have been totally closed and have limited operations as required by sound business practices and civil authorities' orders that, among other things, prohibited access to Plaintiffs' businesses because of physical loss and/or damage to property in the immediate area of their properties.

122. Even after the civil authorities lifted COVID-19 orders or reduced restrictions on Plaintiffs' business operations, Plaintiffs have continued and are likely to continue to lose substantial income from membership dues, personal training services, tennis court rental and lessons, and fees from guests, classes, and swim and squash lessons.

123. Plaintiffs have suspended membership dues and have issued credits for periods when clubs were not open and could not provide services due to the COVID-19 pandemic.

124. Plaintiffs incurred and will continue to incur additional expenses, such as cleaning and sanitizing equipment and building spaces, as required by government orders and good business practices.

125. On March 25 and July 23, 2020, USF S&H Topco LLC filed Property Loss Notices for its properties covered by the Policy that are **Exhibits 2, 3, 4, 5, 6, and 7** to this Complaint.

126. Hartford denied Plaintiffs' claims for business insurance coverage in a boilerplate letter dated May 11, 2020 which merely stated that Hartford had "completed a review of your loss and ha[d] determined that since COVID-19 did not cause property damage at your place of business or in the immediate area, this business income loss is not covered." That letter, which is **Exhibit 8** to this Complaint, did not contain a detailed analysis or explanation specific to Plaintiffs' claims.

COUNT I DECLARATORY JUDGMENT

127. Plaintiffs incorporate in this paragraph all allegations in the prior paragraphs.

128. Plaintiffs purchased the Policy from Hartford which provided comprehensive business coverage for 53 of their facilities.

129. Plaintiffs paid all premiums required to maintain the Policy.

130. Plaintiffs lost the use of their business properties, lost substantial business income, and incurred extra expenses as a result of the COVID-19 pandemic.

131. Those losses and expenses are insured by the Policy, including the following provisions:

- a. Property Choice--Business Income and Extra Expense Coverage Form;
- b. Civil Authority Additional Coverage;
- c. Extended Income Additional Coverage;
- d. Future Earnings Additional Coverage;
- e. Fungus, Wet Rot, Dry Rot, Bacteria and Virus; and
- f. Ingress or Egress.

132. No enforceable Policy exclusions or definitions preclude coverage for Plaintiffs' losses and expenses under the facts set forth in this Complaint.

133. WHEREFORE, Plaintiffs seek a declaration that the Policy covers all of their losses and expenses.

COUNT II BREACH OF CONTRACT

134. Plaintiffs incorporate in this paragraph all allegations in the prior paragraphs.

135. Plaintiffs purchased the Policy to insure against a comprehensive set of risks that their businesses might face and that Hartford agreed to cover.

136. Plaintiffs met all or substantially all of their contractual obligations under the Policy, including paying premiums and surcharges.

137. As detailed above, DC issued orders that closed and limited the full operation of Plaintiffs' facilities during certain periods.

138. As detailed above, Georgia issued orders that closed and limited the full operation of Plaintiffs' facilities during certain periods.

139. As detailed above, Maryland issued orders that closed and limited the full operation of Plaintiffs' facilities during certain periods.

140. As detailed above, Missouri and Kansas City issued orders that closed and limited the full operation of Plaintiffs' facilities during certain periods.

141. As detailed above, Virginia issued orders that closed and limited the full operation of Plaintiffs' facilities during certain periods.

142. As detailed above, West Virginia issued orders that closed and limited the full operation of Plaintiffs' facilities during certain periods.

143. Plaintiffs complied with those orders and with sound business practices regarding the operation of their facilities in response to the COVID-19 pandemic.

144. No enforceable exclusions or definitions in the Policy preclude coverage in connection with the closure and limitation of Plaintiffs' business operations pursuant to those civil authorities' orders.

145. Hartford breached the Policy by denying coverage for Plaintiffs' claims.

146. Plaintiffs have suffered damages as a direct and proximate result of Hartford's breach of the Policy.

147. WHEREFORE, Plaintiffs seek a judgment against Hartford for the damages caused by that breach of contract.

**COUNT III:
BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING**

148. Plaintiffs incorporate in this paragraph all allegations in the prior paragraphs.

149. Plaintiffs contracted with Hartford for insurance coverage in accordance with terms of the Policy.

150. The Policy was subject to the implied covenant of good faith and fair dealing that required Hartford to act in good faith and with reasonable efforts to perform its contractual duties and to refrain from impairing Plaintiffs' right to receive the rights, benefits, and reasonable expectations under the Policy.

151. Hartford breached the implied covenant of good faith and fair dealing that inhered in the Policy by:

- a. Selling the Policy that appeared to cover Plaintiffs' lost business income, extra expenses, and payroll expenses knowing that Hartford would interpret the Policy to deny coverage under circumstances foreseen by Hartford;

- b. Denying coverage of Plaintiffs' lost business income, extra expenses, and payroll expenses by invoking undefined, ambiguous, and contradictory Policy terms that are inconsistent with the plain terms and purpose of the Policy and Hartford's publicly made representations; and
- c. Arbitrarily and capriciously denying Plaintiffs' claims without an adequate objective investigation, inquiry, and analysis and/or with knowledge that the denial lacked a reasonable basis under the Policy.

152. Plaintiffs met all or substantially all of their obligations under the Policy, including paying premiums required by Hartford.

153. Hartford's failure to act in good faith by providing the coverage for Plaintiffs' claims denied Plaintiffs the full benefit of their bargain under the Policy.

154. Plaintiffs have been injured as a result of Hartford's breach of the covenant of good faith and fair dealing and are entitled to damages in an amount to be proven at trial.

155. WHEREFORE, Plaintiffs seek a judgment that Hartford has breached the covenant of good faith and fair dealing implied in the Policy and the damages caused by that breach.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs seek the following relief:

- a. A declaration that Plaintiffs' claims are covered by the Policy;
- b. An award of damages totaling \$45,000,000;
- c. An order requiring Hartford to pay both pre- and post-judgment interest on all amounts awarded;
- d. An award of attorneys' fees and costs pursuant to Va. Code Ann. §38.2-209; and


- e. Other relief deemed appropriate by the Court.

JURY TRIAL DEMAND

Plaintiffs demand trial by jury of all issues so triable.

June 9, 2021

USF S&H TOPCO LLC; USF S&H
VIRGINIA, LLC; USF WV, LLC; USF
PROPCO, LLC; WINVA BUILDING LLC;
AF REAL ESTATE HOLDINGS, LLC;
AFV INVESTMENTS LLC

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