

STATE OF RHODE ISLAND  
PROVIDENCE, SC.

SUPERIOR COURT

WINDSOR CAPITAL GROUP, INC; §  
ALPHARETTA PROPCO, LLC; ARCADIA §  
PROPCO, LLC; ASHEVILLE PROPCO, LLC; §  
BREA PROPCO, LLC; LAS VEGAS PROPCO §  
LLC; LOMPOC PROPCO, LLC; SLO PROPCO, §  
LLC; SANTA ANA PROPCO, LLC; §  
TEMECULA PROPCO, LLC; WALNUT §  
CREEK PROPCO, LLC; CITADEL CROSSING §  
ASSOCIATES, LLC, CARPINTERIA §  
VALLEY FARMS, LTD. §

C.A. NO. \_\_\_\_\_

*Plaintiffs,*

v.

AFFILIATED FM INSURANCE §  
COMPANY, §

*Defendant.*

**PLAINTIFFS' ORIGINAL COMPLAINT**

WINDSOR CAPITAL GROUP, INC., (hereinafter "Windsor") ALPHARETTA PROPCO, LLC, ARCADIA PROPCO, LLC, ASHEVILLE PROPCO, LLC, BREA PROPCO, LLC, LAS VEGAS PROPCO, LLC, LOMPOC PROPCO, LLC, SANTA ANA PROPCO, LLC, SLO PROPCO, LLC, TEMECULA PROPCO, LLC, WALNUT CREEK PROPCO, LLC, CITADEL CROSSING ASSOCIATES, LLC, and CARPINTERIA VALLEY FARMS, LTD. (hereinafter collectively "Plaintiffs") hereby files this Original Complaint against Defendant AFFILIATED FM INSURANCE COMPANY ("AFM" or "Defendant") and alleges as follows:

**I.**  
**INTRODUCTION**

1. This action for declaratory judgment arises out of Plaintiffs' claim for insurance coverage under an "all risk" property insurance policy sold by AFM.

2. Plaintiff operates a series of Hotels and retail properties in California, Georgia, Nevada, North Carolina, and Colorado (“the insured properties”).

3. Plaintiffs’ ordinary business operations have been interrupted - through no fault of their own -- by the spread of the novel COVID-19 virus and by related orders of local, state and national officials that were issued due to the actual presence of the virus and the risks of physical loss or damage posed by the virus. Since on or about March 18, 2020, Plaintiffs have had to close the hotel facilities and hotel due to the presence of the COVID-19 virus at surrounding businesses and by order of Nevada Governor Steve Sisolak issued under a series of Emergency Directives to facilitate the state’s response to the COVID-19 pandemic. As a result, Plaintiff suffered losses that fell within the coverage terms of their insurance policies sold by AFM.

4. Despite having promised that the insurance policy it sold to Plaintiff was "broad," "comprehensive," and "certain," and would provide coverage against "all *risks* of physical loss or damage," AFM has conducted an improper investigation of Plaintiffs’ claim and has wrongly failed to provide the promised coverage.

## **II.** **PARTIES**

5. Plaintiff WINDSOR CAPITAL GROUP, INC. is a corporation, formed under the laws of the State of Delaware, with its principal place of business at 3250 Ocean Park Blvd, Santa Monica, CA 90405. At all relevant times Plaintiff was the management company for the insured properties made the subject of this complaint.

6. Plaintiff ALPHARETTA PROPCO, LLC is a domestic limited liability company, formed under the laws of the State of Delaware, with its principal place of business at 3250 Ocean Park Blvd, Santa Monica, CA 90405. At all relevant times, ALPHARETTA PROPCO, LLC was the assignee of the leasehold rights and operator of the hotel property located at 5955 North Point

Parkway, Alpharetta, GA, 30022. Windsor was engaged by ALPHARETTA PROPCO, LLC to manage the property, including obtaining commercial property insurance coverage.

7. ARCADIA PROPCO, is a domestic limited liability company, formed under the laws of the State of Delaware, with its principal place of business at 3250 Ocean Park Blvd, Santa Monica, CA 90405. At all relevant times, ARCADIA PROPCO, LLC was the assignee of the leasehold rights and operator of the hotel property located at 211 East Huntington Drive, Arcadia, CA, 91006. Windsor was engaged by ARCADIA PROPCO, LLC to manage the property, including obtaining commercial property insurance coverage.

8. ASHEVILLE PROPCO, LLC is a domestic limited liability company, formed under the laws of the State of Delaware, with its principal place of business at 3250 Ocean Park Blvd, Santa Monica, CA 90405. At all relevant times, ASHEVILLE PROPCO, LLC was the assignee of the leasehold rights and operator of the hotel property located at 31 Woodfin Street (aka One Thomas Wolfe Plaza), Asheville, NC, 28801. Windsor was engaged by ASHEVILLE PROPCO, LLC to manage the property, including obtaining commercial property insurance coverage.

9. BREA PROPCO, LLC is a domestic limited liability company, formed under the laws of the State of Delaware, with its principal place of business at 3250 Ocean Park Blvd, Santa Monica, CA 90405. At all relevant times, BREA PROPCO, LLC was the assignee of the leasehold rights and operator of the hotel property located at 900 East Birch Street, Brea, CA, 92821-5812. Windsor was engaged by BREA PROPCO, LLC to manage the property, including obtaining commercial property insurance coverage.

10. LAS VEGAS PROPCO, LLC is a domestic limited liability company, formed under the laws of the State of Delaware, with its principal place of business at 3250 Ocean Park

Blvd, Santa Monica, CA 90405. At all relevant times, LAS VEGAS PROPCO, LLC was the assignee of the leasehold rights and operator of the hotel property located at 3600 Paradise Road, Las Vegas, NV, 89169-3613. Windsor was engaged by LAS VEGAS PROPCO, LLC to manage the property, including obtaining commercial property insurance coverage.

11. LOMPOC PROPCO, LLC is a domestic limited liability company, formed under the laws of the State of Delaware, with its principal place of business at 3250 Ocean Park Blvd, Santa Monica, CA 90405. At all relevant times, LOMPOC PROPCO, LLC was the assignee of the leasehold rights and operator of the hotel property located at 1117 North H Street, Lompoc, CA, 93436. Windsor was engaged by LOMPOC PROPCO, LLC to manage the property, including obtaining commercial property insurance coverage.

12. SANTA ANA PROPCO, LLC is a domestic limited liability company, formed under the laws of the State of Delaware, with its principal place of business at 3250 Ocean Park Blvd, Santa Monica, CA 90405. At all relevant times, SANTA ANA PROPCO, LLC was the assignee of the leasehold rights and operator of the hotel property located at 1325 East Dyer Road, Santa Ana, CA, 92705. Windsor was engaged by SANTA ANA PROPCO, LLC to manage the property, including obtaining commercial property insurance coverage.

13. SLO PROPCO, LLC is a domestic limited liability company, formed under the laws of the State of Delaware, with its principal place of business at 3250 Ocean Park Blvd, Santa Monica, CA 90405. At all relevant times, SLO PROPCO, LLC was the assignee of the leasehold rights and operator of the hotel property located at 333 Madonna Road, San Luis Obispo, CA, 93405. Windsor was engaged by SLO PROPCO, LLC to manage the property, including obtaining commercial property insurance coverage.

14. TEMECULA PROPCO, LLC is a domestic limited liability company, formed under the laws of the State of Delaware, with its principal place of business at 3250 Ocean Park Blvd, Santa Monica, CA 90405. At all relevant times, TEMECULA PROPCO, LLC was the assignee of the leasehold rights and was the operator of the hotel property at 29345 Rancho California Road, Temecula, CA, 92591. Windsor was engaged by TEMECULA PROPCO, LLC to manage the property, including obtaining commercial property insurance coverage.

15. WALNUT CREEK PROPCO, LLC is a domestic limited liability company, formed under the laws of the State of Delaware, with its principal place of business at 3250 Ocean Park Blvd, Santa Monica, CA 90405. At all relevant times, WALNUT CREEK PROPCO, LLC was the assignee of the leasehold rights and operator of the hotel property located at 2355 North Main Street, Walnut Creek, CA, 94596. Windsor was engaged by WALNUT CREEK PROPCO, LLC to manage the property, including obtaining commercial property insurance coverage.

16. CITADEL CROSSING ASSOCIATES, LLC is a domestic limited liability company, formed under the laws of the State of Delaware. At all relevant times, CITADEL CROSSING ASSOCIATES, LLC was the owner of the Citadel Crossing retail property located at 501 - 975 North Academy Road, Colorado Springs, CO, 80909, and which is insured under the subject insurance policy.

17. CARPINTERIA VALLEY FARMS, LTD. is a domestic limited liability company, formed under the laws of the State of Delaware. At all relevant times, CARPINTERIA VALLEY FARMS, LTD. was the owner of the Carpinteria Valley Farms located at 2800 Via Real, Carpinteria, CA 93013 and 110 Montecito Ranch Lane, Carpinteria, CA 93103, and which is insured under the subject insurance policy.

18. Defendant AFFILIATED FM INSURANCE COMPANY ("AFM") is incorporated under the laws of Rhode Island, with a principal place of business at 270 Central Avenue, Johnston, Rhode Island 02919. AFM is authorized to do business and issue insurance policies in the State of New York. AFM may be served with process at 270 Central Avenue, Johnston, Rhode Island 02919.

### **III.** **JURISDICTION AND VENUE**

19. This Court has jurisdiction over this action because AFM is incorporated under the laws of Rhode Island, with a principal place of business at 270 Central Avenue, Johnston, Rhode Island 02919, and under Rhode Island General Laws § 8-2-14 because the amount in controversy exceeds the sum of ten thousand dollars (\$10,000).

20. Venue is proper in this Court, pursuant to Rhode Island General Laws § 9-4-4, because AFM is located in Providence County.

21. All conditions precedent to recovery by Plaintiffs have been performed or occurred.

22. To the extent any facts or claims alleged herein are inconsistent, they are respectfully asserted in the alternative.

### **IV.** **FACTS**

#### **A. Plaintiffs' Insured Properties.**

23. At all relevant times, Plaintiff owned and operated the following Hotels:

24. AFM issued Windsor commercial property policy No. SS807 ("the Policy") with a policy period of August 21, 2019 to August 21, 2020. *Attached as Exhibit A and incorporated herein by reference.*

25. The Policy provided coverage to the insured properties for, among other things, Business Interruption, Extra Expense, Attraction Property, Civil or Military Authority, Expediting Costs, Extended Period of Liability, Communicable Disease-Business Interruption, and Ingress/Egress.

26. In exchange for AFM's agreement to take on Plaintiffs' risk of loss, Plaintiff paid AFM significant annual premiums.

**B. The Hotels**

27. Each covered property, described below, suffered direct physical loss of or damage to its property, and associated Business Interruption, Extra Expense and other losses as a result of COVID-19 and the attendant government shutdown orders.

- a) Embassy Suites Alpharetta ("ES Alpharetta") is a 150-guest room hotel in Alpharetta, Georgia, just outside of Atlanta and two (2) miles from the Verizon Wireless Amphitheater. Amenities include an on-site restaurant, staffed bar, indoor pool, hot tub, gym, gift shop, and business center, and nightly cocktail reception with complimentary drinks. The hotel serves complimentary breakfast and includes 3,165 sq. ft. of meeting space.
- b) ES Alpharetta is operated by Alpharetta PropCo, LLC and managed by Windsor.
- c) Embassy Suites Arcadia ("ES Arcadia") is a 191-guest room hotel located about twenty (20) miles west of downtown Los Angeles. Amenities include an on-site restaurant, staffed bar, indoor pool, hot tub, gym, gift shop, and business center, nightly cocktail reception with complimentary drinks, and complimentary seven-mile area shuttles, plus 7,568 sq. ft. of meeting space.
- d) ES Arcadia is operated by Arcadia PropCo, LLC and managed by Windsor.

- e) The Renaissance Hotel Asheville (“RH Asheville”) is a 278-guest room hotel set in downtown Asheville. RH Asheville is a 7-minute walk from downtown Asheville and its attractions, including the Asheville Art Museum and Biltmore Village just over two (2) miles away. Hotel amenities include an on-site restaurant, staffed bar, indoor pool, hot tub, gym, gift shop, and business center, and conference facilities.
- f) RH Asheville is operated Asheville PropCo, LLC and is managed by Windsor.
- g) Embassy Suites Brea (“ES Brea”) is a 228-guest room hotel located in Brea, California about 15 minutes from the Disneyland Resort. Amenities include an on-site restaurant, staffed bar, indoor pool, hot tub, gym, gift shop, business center, nightly cocktail reception with complimentary drinks, and on-site convenience store.
- h) ES Brea is operated by Brea PropCo, LLC and is managed by Windsor.
- i) Embassy Suites Las Vegas (“ES Las Vegas”) is a 220-guest room hotel located only a few hundred yards from the Las Vegas Convention Center and is about two (2) miles from the Las Vegas Strip and one (1) mile from McCarran International Airport. includes meeting spaces perfect for convention overflow and breakout room business. The hotel offers a host of amenities, including an on-site restaurant, staffed bar, pool, hot tub, gym, gift shop, and business center, and nightly cocktail reception with complimentary drinks.
- j) ES Las Vegas is operated by Las Vegas Propco, LLC and is managed by Windsor.
- k) Embassy Suites Lompoc (“ES Lompoc”) is a 155-guest room hotel in the heart of Lompoc, California. The hotel is located less than three (3) miles from the Santa

Rita Hills Wine Center and two (2) miles from Vandenburg Air Force Base. Amenities include an on-site restaurant, staffed bar, pool, hot tub, gym, gift shop, and business center, and nightly cocktail reception with complimentary drinks. ES Lompoc services teams of engineers, scientists, observers and employees for third-party space companies testing and launching rockets. The hotel also serves visitors and guests to the federal prison located nearby.

- l) ES Lompoc is operated by Lompoc Propco, LLC and is managed by Windsor.
- m) Embassy Suites San Luis Obispo (“ES-SLO”) is a 195-guest room hotel off of Highway 101 in San Luis Obispo, California. The hotel has a range of amenities including an on-site restaurant, staffed bar, indoor pool, hot tub, gym, gift shop, and business center, and nightly cocktail reception with complimentary drinks. The hotel is located two (2) miles from the Fremont Theater and twelve (12) miles from Dinosaur Caves Park.
- n) ES-SLO is operated by SLO Propco, LLC and is managed by Windsor.
- o) Embassy Suites Santa Ana (“ES-SA”) is a 301-guest room hotel located less than 2.5 miles from John Wayne Airport in Santa Ana, California. The hotel has a range of amenities, including an on-site restaurant, staffed bar, indoor pool, hot tub, gym, gift shop, and business center, nightly cocktail reception with complimentary drinks, and 8,000 sq. ft. of meeting space. The hotel is located only 11 miles from Disneyland.
- p) ES-SA is operated by Santa Ana Propco, LLC and is managed by Windsor.
- q) Embassy Suites Temecula (“ES Temecula”) is a 176-guest room hotel set off Interstate 15 in Temecula, California. There are over a dozen wineries within 15-

minutes, including the Wilson Creek Winery and Vindemia Vineyard & Winery. Amenities include an on-site restaurant, staffed bar, pool, hot tub, gym, gift shop, and business center, and nightly cocktail reception with complimentary drinks.

- r) ES Temecula is operated by Temecula Propco, LLC and managed by Windsor.
- s) Marriott Walnut Creek (“Marriott WC”) is located near Mount Diablo in Walnut Creek, California. The hotel has a range of amenities, including an on-site restaurant, staffed bar, pool, gym, gift shop, and business center, a nightly cocktail reception with complimentary drinks and an on-site Starbucks.
- t) The Marriott WC is operated by Walnut Creek Propco, LLC and managed by Windsor.
- u) Citadel Crossing retail center is operated by Citadel Crossing Associates, LLC and managed by Windsor.

28. Windsor and all operating entities named above are insureds under the subject insurance policy.

29. In addition to the losses suffered by the hotels, Windsor suffered business income and extra expense losses based on its revenue and management fee agreements with the properties.

30. The policy also insures a retail location in Colorado called Citadel Crossing Shopping Center which is located at 501 - 975 North Academy Road, Colorado Springs, CO, 80909.

31. Tenants of Citadel include Guitar Center, Office Depot, Rent-A-Center, FastSigns and Plato’s Closet, among others.

32. Finally, the policy also insures the Carpinteria Valley Farms. This is a large property utilized for black-tie events, polo tournaments, unveilings and other gatherings.

Carpinteria suffered business income losses based on events which had to be cancelled where groups were not allowed to gather due to the government orders issued in mid-March of 2020.

**C. The COVID-19 Pandemic.**

33. COVID-19 is a deadly communicable disease that has infected nearly thirty million people in the United States and caused over 550,000 deaths in the United States.<sup>1</sup> The World Health Organization has declared the COVID-19 outbreak a pandemic. Former President Donald Trump declared a nationwide emergency due to the public health crisis caused by the COVID-19 outbreak in the United States.

34. Governors and Mayors around the country issued a series of government orders regarding business closures and “stay-at-home” orders for citizens starting in mid-March, 2020.

**California Government Orders**

35. On March 19, 2020, Governor Gavin Newsom declared a state of emergency and issued the nation’s first statewide stay-at-home order, closing all nonessential businesses and restaurant dining. *Relevant California Orders are attached as Exhibit B and incorporated herein by reference.*

36. On March 16, 2020 the California Department of Public Health put out guidelines which included recommendations to shutdown indoor dining for restaurants and bars. On March 19, 2020, Governor Gavin Newsome of California issued Executive Order N-33-20 identifying critical infrastructure and ordering all individuals living in California to stay at home, except where part of the critical infrastructure.

37. On March 15, 2020 the San Mateo County Health Officer issued an order restricting gatherings to less than 10 people.

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<sup>1</sup> See U.S. Centers for Disease Control and Prevention, *United States COVID-19 Cases and Deaths by State*, <https://covid.cdc.gov/covid-data-tracker/#cases> (last visited April 12, 2021).

38. On March 16, 2020, the Health Officer of the County of Riverside issued an order cancelling all gatherings over 10 individuals.

39. On March 16, 2020 the San Mateo County Health Officer issued an order directing all individuals living in the county to shelter in place.

40. On May 4, 2020, Governor Newsom issued Executive Order-60-20 which directed residents to comply with State public health directives as the state started moving towards allowing reopening of “lower-risk businesses and spaces.”

41. On November 19, 2020, The California Department of Public Health issued a “Limited Stay at Home Order” reverting to a stay-at-home order between 10 p.m. and 5 a.m.

42. On November 20, 2020, the Health Officer of the County of Sacramento reissued an order restricting restaurants to outdoor dining and reaffirmed a 10 p.m. to 5 a.m. restriction on gatherings.

43. On December 3, 2020, the Limited Stay at Home Order was modified to a Regional Stay at Home Order, which continued to prohibit indoor dining and sale of beverages at restaurants and bars.

44. As of this date, California still has certain restrictions through Civil Authority orders.

#### **Nevada Government Orders**

45. On March 12, 2020 Nevada Governor Steve Sisolak issued an Order declaring a State of Emergency. *Relevant Nevada Orders are attached as Exhibit C and incorporated herein by reference.*

46. Just prior to the Emergency Declaration, another Casino on the Las Vegas strip, The Mirage Hotel and Casino Resorts International released a statement announcing that the

Southern Nevada Health District had confirmed that one of their guests staying at The Mirage had tested positive for COVID-19.

47. On March 18, 2020, Governor Sisolak signed Emergency Directive 002 which included a command that “[t]he Nevada general public shall cease gathering at gaming establishments, and all gaming devices, machines, tables, games and any equipment related to gaming activity shall cease operations effective March 17, 2020 at 11:59 p.m., for the duration that this Directive shall be in effect.”<sup>2</sup>

48. Emergency Directive 002 also established that gaming facilities with hotels could remain open only if needed to avoid displacement of guests or for “essential or emergency purposes.”

49. On or about March 18, 2020, in compliance with the government orders and mitigation efforts the ES Las Vegas shut down both the food and beverage and hotel facilities.

50. On March 20, 2020, the Nevada Health Response COVID-19 Risk Mitigation Initiative put out a guidance document based on Governor Sisolak’s March 17, 2020 Press Conference.<sup>3</sup>

51. The March 20 guidance stated, among other things, that the implementation of the “aggressive strategies” therein would “[p]rotect those most likely to experience severe symptoms, such as older Nevadans and those with underlying chronic conditions.

52. The guidance also stated that “all gatherings should be postponed or canceled” and identified non-essential services and sectors including “entertainment & hospitality, including but not limited to . . . casinos, concert venues, . . . large conference rooms, meeting halls and cafeterias.” Restaurants and bars were also instructed to close their dine-in facilities.

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<sup>2</sup> Nevada Government Orders are attached as *Exhibit C* and incorporated fully herein.

<sup>3</sup> *Id.* (Nevada Health Response COVID-19 Risk Mitigation Initiative) at p.7.

53. On March 20, 2020, Governor Sisolak issued Emergency Directive 003, which echoed information in the guidance initiative, and clearly commanded that non-essential businesses “shall close” as of March 20, 2020 at 11:59 p.m.<sup>4</sup>

54. On April 1, 2020, Governor Sisolak issued a “Stay at Home directive” in which he noted that the directive “strengthens the imperative that Nevadans must not leave their homes for nonessential activities. . .” and extended such restrictions through April 30, 2020. A document put out by the Nevada Health Response that same day, which sought to make clear what businesses were considered Essential and Non-essential, clearly delineated Casinos, Dine-in Restaurants, Live entertainment venues, and bars as non-essential businesses.

55. On April 29, 2020, Governor Sisolak signed Emergency Directive 16 which identified significant basis for the Directives to that point, stating that “the ability of the novel coronavirus that causes COVID-19 to survive on surfaces for indeterminate periods of time renders some property unusable and contributes to contamination, damage, and property loss. . .” and that “the propensity of the COVID-19 disease to spread via interpersonal contact precipitated the widespread closure of certain businesses and the imposition of limitations on other businesses. . .”

56. On May 7, 2020, Governor Sisolak signed Emergency Directive 018 which, among other things, defined “vulnerable persons” as “those who are at heightened risk of complications from COVID-19 disease” to include those 65 years or older; those with serious hearth conditions and asthma, and those who are immunocompromised.

57. Directive 018 continued to encourage Nevadans to stay in their residences and continued to ban gatherings of groups 10 or larger, commanded that businesses adopt measures to

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<sup>4</sup> *Id.* (Governor Sisolak Declaration of Emergency for COVID-19 – Directive 003).

minimize the risk of spread of COVID-19, including encouraging employees to work from home, to wear protective gear and to return to work in phases.

58. Directive 018 amended the prohibition on on-site dining to 50% capacity. Bars, entertainment venues, spas and gaming operations were to remain closed.

59. On May 10, 2020 Governor Sisolak signed a Declaration of Fiscal Emergency which noted that “the propensity of COVID-19 disease to spread via interpersonal contact precipitated the widespread closure of certain businesses and the imposition on other businesses. . . .” The accompanying remarks by Governor Sisolak revealed that he believed clearly states that “the closure of Nevada businesses, including the gaming industry, [] was necessary to protect the health of Nevadans. . . .” furthering the comments made in Directive 018.

60. On May 28, 2020, Governor Sisolak signed Emergency Directive 021 which included a “Phase Two Reopening Plan” with certain businesses being allowed to partially reopen starting June 4, 2020.

61. ES Las Vegas was able to partially re-open, subject to significant limitations and mitigation measures including no convention or meeting business, social distancing, hand sanitizer stations, plexi-glass shields, additional signage and reconfiguration of certain spaces at the property.

62. On July 10, 2020, the Nevada Health Response “Guidance on Directive 027” stated that restaurants, bars and other food service was ordered to close again on that day, with a reevaluation on July 24, 2020.

63. On October 1, 2020, Emergency Directive 033 increased event gathering sizes to 250 attendees, but no greater than 50% capacity, 10% or 250 attendee capacity for live music and entertainment and sports venues.

64. As of March of 2021, Nevada continued with certain capacity and social distancing restrictions for entertainment venues, as well as, restaurants, bars, and large gatherings or conferences.

### **Georgia Government Orders**

65. On March 14, 2020, the Governor of Georgia issued an Executive Order No. 03.14.20.01 declaring a state of emergency. *Relevant Georgia Orders are attached as Exhibit D and incorporated herein by reference.*

66. That EO specifically cited the risk of COVID-19 “spreading throughout communities” and that the CDC “has determined that older adults, people of any age who have serious underlying medical conditions and certain other people groups” were at higher risk of serious complications.

67. On March 23, 2020, the Governor issued an Executive Order No. 03.23.20.01 which shut down all bars and ordered nursing home and other elderly or at-risk people to shelter in place. The order prohibited any gatherings over ten (10) people who could not adhere to six (6) foot social distancing. Indeed, the EO encouraged businesses to “limit the number of persons within their place of business.”

68. On April 2, 2020, the Governor issued an Executive Order which replaced EO No. 03.23.20.01 and commanded that no more than ten (10) people could gather at a single location without six (6) foot social distancing. The EO commanded that all persons “shelter in place” within their homes or place of residence. The EO commanded that all dine-in services were prohibited. Finally, the EO stated that no regular visitors would be allowed at nursing homes, long-term care facilities, hospice, assisted living and community living arrangements and such policy would be strictly enforced.

69. The Public Health State of Emergency was continually renewed through the August 15, 2020 EO which asserted that “no business, establishment, corporation, non-profit corporation, [or] organization . . .” could allow “Gatherings of people” and that a set of “at risk” residents were required to “shelter in place.” Regarding restaurants, “dining rooms” and banquet facilities, significant and stringent protocols were commanded to allow such establishments to remain open, including significant cleaning and quarantine requirements. Conventions were given a significant number of requirements to adhere to, including signage, cleaning, quarantining, social distancing, and directives such as “to the extent practicable, eliminat[e] the need for patrons to touch surfaces....”

#### **North Carolina Government Orders**

70. On March 14, 2020, the Governor of North Carolina issued Executive Order No. 117 which prohibited mass gatherings of one hundred (100) people or more.<sup>5</sup> *Relevant North Carolina Orders are attached as Exhibit D and incorporated herein by reference.*

71. On March 17, 2020, EO No. 118 limited restaurant and bar operations to delivery, take-out and outdoor dining only.<sup>6</sup>

72. On March 23, 2020, EO No. 120, mass gatherings of 50 or more—which would include medium-sized business conventions of the type catered to by Windsor, were prohibited, along with indoor/outdoor pools, and indoor gyms, amongst other business types. Further, all visitors to Long Term Care facilities, other than essential health care personnel were banned.

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<sup>5</sup> <https://files.nc.gov/governor/documents/files/EO117-COVID-19-Prohibiting-Mass-Gathering-and-K12-School-Closure.pdf>

<sup>6</sup> <https://files.nc.gov/governor/documents/files/EO118.pdf>

73. Subsequent Executive Orders and other government actions continued to prevent Plaintiff from operating its hotel through closures, suspension of business segments and limitations on the use of the property once re-opened.

**COVID-19 was present at Locations Near the Insured Properties.**

74. COVID-19 was prevalent in or around the properties made the basis of this complaint in mid-March of 2020, and the spread of the communicable disease amongst vulnerable senior citizens at nursing and long-term care homes was a major cause of the ever-increasing government orders. Following are a non-exhaustive set of examples of such facilities

75. Insured properties are located within 5 statute miles of long-term care facilities, assisted living facilities, nursing homes and/or memory care facilities that housed older, more vulnerable residents and suffered COVID-19 outbreaks in March and April of 2020.

76. For example, ManorCare Health Services-Tice Valley, a mere three (3) miles from Windsor's Walnut Creek Marriott property suffered early and alarming COVID-19 spread and deaths. In a news article published July 20, 2020, NBC Bay Area reported the coronavirus pandemic had hit ManorCare Health Services Tice Valley in Walnut Creek hard with state records show there had been 130 positive cases between staff and residents.

77. Governor Newsom had indicated that groups of people, including those in nursing homes, being together in close proximity would be dangers to "high-risk residents" which he stated had "been a priority since day one."<sup>7</sup>

78. Governor Newsom also tweeted that "[t]hose that are 65 and older or vulnerable to #COVID-19 must practice home isolation. Bars, night clubs, wineries, and breweries should close in CA. . . ."<sup>8</sup>

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<sup>7</sup> <https://twitter.com/CAgovernor/status/1248697084145881088>

<sup>8</sup> <https://twitter.com/GavinNewsom/status/1239309418497363968>

79. It is clear that Governor Newsom enacted the Civil Authority Orders which decimated the California-based insured properties in order to attempt to prevent disasters as nursing homes, long term care facilities and other locations where vulnerable adults were in close proximity.

80. The Embassy Suites in Brea, which is in Orange County, California, was the subject of early and serious deaths within nursing homes and similar facilities.<sup>9</sup>

81. Multiple nursing facilities exist in close proximity to Embassy Suites Lompoc including the Lompoc Skilled Nursing and Rehabilitation Center which is less than one (1) mile away and had a significant early outbreak which left at least 43 staff and patients infected and 3 dead.<sup>10</sup>

82. Nevada officials expressed significant concern over the safety of the elderly, vulnerable population occupying assisted living facilities and nursing homes in March of 2020 at or before the time that Civil Authority orders restricting gatherings, closing restaurants and bars, closing gaming facilities, and ordering people to stay at home, were instituted.

83. Several facilities with early COVID-19 outbreaks were located within 5 statute miles of insured properties. For example, by April 15, 2020, Horizon Health and Rehabilitation, located less than 4 miles from ES Las Vegas, had reported at least 38 positive cases.<sup>11</sup>

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<sup>9</sup> See Kurt Snibbe, Coronavirus: Another higher day for confirmed cases in Orange County as of Friday, May 15, THE ORANGE COUNTY REGISTER (May 15, 2020), <https://web.archive.org/web/20200524195234/https://www.oregister.com/2020/05/15/coronavirus-another-higher-day-for-confirmed-cases-in-orange-county-as-of-friday-may-15/> (“finding 21 early deaths and over 430 of the county’s cases in skilled nursing facilities.”).

<sup>10</sup> [https://lompocrecord.com/news/local/country-oaks-care-center-cleared-by-county-after-covid-19-outbreak-other-investigations-continue/article\\_b943e421-e97b-5630-b42f-72d9b34e3237.html](https://lompocrecord.com/news/local/country-oaks-care-center-cleared-by-county-after-covid-19-outbreak-other-investigations-continue/article_b943e421-e97b-5630-b42f-72d9b34e3237.html)

<sup>11</sup> Haas, Greg, 33 new COVID-19 cases pop up at rehab hospital in Las Vegas, 8NEWSNOW.COM, (May 28, 2020), <https://www.8newsnow.com/news/local-news/33-new-covid-19-cases-pop-up-at-rehab-hospital-in-las-vegas/> (last visited April 12, 2021).

84. By May 28, 2020, Silver Ridge Health Care Center, which is about 5 statute miles from ES Las Vegas, had reported over 100 coronavirus cases with multiple deaths.<sup>12</sup> These two facilities represent a partial list of affected locations.

85. Nevada recognized the necessity to enact measures related to closures, stay at home orders and social distancing because of the threat to vulnerable populations from the beginning of the COVID-19 declared state of emergency. One Nevada Health Response report, reflecting on Nevada's response to COVID-19, stated that:

Nevadans have made enormous sacrifices in order to slow the spread of COVID-19. The necessity to protect hospital patients **and the vulnerable populations in nursing homes was identified early in the pandemic.** . . .<sup>13</sup>

86. The visitation restrictions, social distancing, shelter-in-place, and PPE restrictions enacted in the beginning for nursing and long-term care facilities quickly expanded to the broader orders relevant to all of Nevada as losses, damage and death spiked through COVID-19 outbreaks at these homes, care centers, and then in the larger population.<sup>14</sup>

**COVID-19 has caused physical loss and damage to properties.**

87. The COVID-19 virus is a tangible, physical object that has caused: (a) physical damage at multiple locations within 5 statute miles of the insured properties, (b) physical loss of use and functionality of the insured properties, (c) physical damage to surfaces and the air and (c) a *risk* of physical loss or damage at the insured properties and the surrounding high-risk locations.

88. The World Health Organization ("WHO") has confirmed that COVID-19 can exist on objects or surfaces and that the transmission of COVID-19 can occur by indirect contact with

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<sup>12</sup> *Id.*

<sup>13</sup> *Exhibit D*, Nevada Health Response: Guidance on Hospital and Skilled Nursing Facility Visitation – October 2020. (emphasis added).

<sup>14</sup> *Exhibit D*, March 16, 2020 Nevada Department of Health and Human Services Technical Bulletin describing March 13, 2020 CMS measures for nursing homes.

surfaces in the immediate environment or with objects that were touched by an infected person hours before.<sup>15</sup> The persistent physical presence of the COVID-19 virus has been affirmed by a study documented in *The New England Journal of Medicine* establishing that COVID-19 can remain present in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard, and up to three days on plastic and stainless steel.<sup>16</sup> The study's results further confirmed that individuals can become infected with COVID-19 through indirect contact with surfaces or objects contacted by an infected person - whether or not the infected person was symptomatic.<sup>17</sup>

89. In addition to changing surfaces by rendering them unfit and unsafe through the persistence of COVID-19 on such surfaces, the CDC is clear that COVID-19 spreads via airborne transmission when an uninfected person inhales droplets of the saliva or nasal discharge of any infected person. These droplets can last in aerosol form in the air for hours or more, physical altering (damaging) the air.<sup>18</sup>

90. The AFM Policy recognizes that the presence of communicable disease causes physical loss or damage to properties because the Policy covers the costs of "cleanup, removal and

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<sup>15</sup> See <https://www.who.int/publications/i/item/cleaning-and-disinfection-of-environmental-surfaces-inthe-context-of-covid-19>

<sup>16</sup> van Doremalen, N., Bushmaker, T., Morris, D.H., Holbrook, M.G., Gamble, A., Williamson, B.N., et al., 2020. Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1. *N Engl J Med* 382, 1564–1567. (<https://doi.org/10.1056/NEJMc2004973>), accessed 6 May 2020.

According to the World Health Organization ("WHO"): "People can catch COVID-19 from others who have the virus. The disease can spread from person to person through small droplets from the nose or mouth, which are spread when a person with COVID-19 coughs or simply exhales. These droplets land on objects and surfaces all around the person. Other people then catch COVID-19 by touching these objects or surfaces, then touching their eyes, nose or mouth. People also catch COVID-19 if they breathe in droplets from an infected person who coughs out or exhales droplets." The time from exposure (infection) to the development of COVID-19 symptoms - the incubation period - can be up to fourteen days. During this period (the "pre-symptomatic" period), those infected can be contagious and transmit the disease before they show any symptoms or have any reason to believe they are sick.<sup>17</sup>

<sup>18</sup> <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>

disposal of such presence of communicable disease..." See Exhibit A, All Risk Coverage Form, at p. 7. Further, if it did not produce "physical loss or damage," then the coverage would be illusory.

91. The presence of the COVID-19 virus in proximity to the insured properties, caused a physical loss or damage at such properties through the spread of COVID-19, sickness and death amongst residents and employees, and deprived the facilities of their functionality and rendered them unusable for their intended purpose of safely providing nursing home, hospice and/or senior and vulnerable adult care.

92. Because of the restrictions imposed by civil authority orders issued due to the presence and spread of the virus, Plaintiff suffered a physical loss or damage to the insured properties. Plaintiff was required to cease operation at most of the insured properties. More specifically, customers were directly prohibited from accessing the Restaurants, Bars and other amenities on the hotel premises. Additionally, Plaintiffs lost the use and function of the properties when the virus and civil authority orders rendered the hotels, meeting spaces, spas and other amenities unusable for their full, intended purposes.

93. The AFM Policy does not clearly and unambiguously require physical *deformation* or *structural alteration* of properties for there to be physical loss or damage that comes within the coverage terms. The operative phrase "physical loss of or damage to" is subject to more than a single reasonable interpretation as reflected in the multitude of Court decisions around the country reaching conflicting results with regard to the meaning of that phrase.

**Actions and Orders of Civil Authorities.**

94. COVID-19 is widespread in every state in which a subject property is located.

95. The widespread physical presence of the virus in Las Vegas and Clark County -- including in proximity to the insured properties -- and the virus' propensity to cause physical loss

or damage and to present a *risk* of physical loss or damage, caused civil authorities to prohibit access to the subject hotels, in whole or in part, where the virus was presumed to exist and to pose a risk of transmission, illness and even death, if access to the public were permitted.

96. The Government Orders caused Plaintiff to completely close and later suspend or severely limit their businesses at Plaintiffs' insured properties and/or rendered the properties unusable for its intended purpose.

97. In addition, Nevada and many other cities and states issued orders that discouraged travel to and from their respective states, including imposing quarantine restrictions on travelers returning from their respective destinations.<sup>19</sup>

98. Quarantine requirements or recommendations have also been in effect in other states. To avoid the quarantine requirements, travelers were advised by government officials to cancel or postpone travel to impacted states.

99. As businesses that rely upon customers, locally, from across the country and around the world, Plaintiffs' insured properties are directly affected by the Government Orders and by similar orders issued by other counties, states, and countries.

100. Plaintiffs' insured properties lost functionality and has been impaired by the risk of COVID-19 and the resultant Government Orders.

101. Plaintiff suffered physical loss or damage at the insured properties based on the Civil Authority orders which increasingly tightened restrictions on Plaintiffs' core business – hospitality – in response to the unfolding communicable disease disaster at nursing homes in close proximity to insured properties.

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<sup>19</sup> *See Ex. B-E* Government Orders.

102. The Government Orders, and the properties loss and property damage caused by both the actual presence and spread of COVID-19 at the nursing homes and the risk of COVID-19 spreading uncontrollably beyond the nursing homes, has had a devastating impact on Plaintiffs' businesses.

103. The presence of COVID-19 in and around the subject properties caused physical loss, damage, and required significant mitigation and alteration to the functioning of the Plaintiffs' business.

**D. Coverage Under the AFM Policies.**

104. The Policy issued to Plaintiff was AFM's ProVision 4100 "all risks" policy. As an all risks policy, the perils insured against are defined by the Policy's exclusions and limitations -- not by positive grants of coverage for damage due to particular perils as is provided by a "named peril" policy. All risk policies cover all losses to the covered properties unless the loss is excluded elsewhere within the policy.

105. The Policy contains numerous different coverage parts, each with an applicable limit or sublimit of liability. The majority of the coverage parts are not mutually exclusive. Thus, a policyholder's loss may trigger several different coverage parts.

106. The Policy was drafted by AFM.

**The Policy's Basic Insuring Provision**

107. The Policy's basic insuring provision states as follows:

**INSURANCE PROVIDED:**

**This Policy covers property, as described in this Policy, against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded, while located as described in this Policy.**

*See Ex. A, Pro AR 4100 (01/17) All Risk Coverage Form, p. 1 of 44.*

108. The Policy's basic insuring provision differs from many business insurance policies. While many policies define coverage in terms of "direct physical loss or damage," the AFM Policy provides coverage against "all *risks* of physical loss or damage." In so doing, the Policy expands coverage beyond actual physical loss and damage to "all risks" of physical loss and damage. In addition, the Policy omits the requirement that the physical loss or damage be "direct."

109. The Policy expressly recognizes that property is physically damaged by the presence of communicable disease. Under a heading titled "Communicable Disease Response," the Policy expressly states that it covers, among other things "the reasonable and necessary costs incurred by the Insured at such **location** with the actual not suspected presence of **communicable disease** for the: 1) cleanup, removal and disposal of the actual not suspected presence of **communicable disease** from insured property." *See Ex. A*, p. 24. Accordingly, because the Policy specifically covers cleanup, removal and disposal of the damage caused by the "actual not suspected presence of communicable disease" is "physical damage of the type insured" under the Policy.

#### **Business Interruption Coverage**

110. The Policy affords coverage for Plaintiffs' business interruption losses. The Policy includes a Business Interruption provision which states:

##### **A. LOSS INSURED**

**This Policy insures Business Interruption loss, as provided in the Business Interruption Coverage, as a direct result of physical loss or damage of the type insured:**

**1. To property as described elsewhere in this Policy and not otherwise excluded by this Policy.**

*See Ex. A, p. 19.*

111. COVID-19 has caused Plaintiff to suffer business interruption loss as a direct result of physical loss and damage of the type insured under the Policy. It will also cause Plaintiff to incur extra expenses in the event it is able to reopen to even limited operations, that are beyond those expenses that would have normally been incurred in conduct business absent the presence of COVID-19. These losses and expenses trigger coverage under the Policy's Business Interruption provisions including, but not limited to, coverage for Business Interruption Gross Earnings or Gross Profits for a 12-month period, as well as, Extra Expense loss.

**Attraction Property Coverage Extension**

112. In addition to the general Business Insurance Coverage Provision, the Policy provides certain Additional Coverages or Coverage Extensions. These additional coverages and coverage extensions, for which Plaintiff paid an increased premium, do not reduce other coverages available under the Policy. They are additive. The sublimits applicable to any particular coverage provision do not limit the amount of coverage available under the Policy through other provisions that might also apply.

113. The Policy's "Attraction Property" endorsement provides coverage for losses directly resulting from physical loss, damage, or destruction (of the type insured by the insured's property policy) to property not owned or operated by the insured that attracts business to the

insured. To come within the coverage terms, the Attraction Property must be located within one mile of the insured's property. Specifically, the Policy states:

**1. Attraction Property**

**This Policy covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability directly resulting from physical loss or damage of the type insured to property of the type insured that attracts business to a described location and is within one (1) statute mile of the described location.**

*See Ex. A, p. 24.*

114. COVID-19 has caused, and is continuing to cause, physical loss and damage to properties that attract business to Plaintiffs' property, located within 1 mile, including but not limited to, the Las Vegas Convention Center, as well as, the restaurants and hotels within certain portions of the Las Vegas strip.

115. Plaintiffs have sustained, and will continue to sustain, business interruption loss as a direct result of physical loss and damage of the type insured under the Policy to properties within one statute mile of the Properties which attracted business to the Properties.

**Civil or Military Authority Coverage Extension**

116. The Policy's "Civil or Military Authority" extension provides coverage to an insured for the actual loss of business income it sustains during the length of time when access to its premises is prohibited by order of civil authority as a direct result of physical damage—as insured against in the policy—to properties of the type insured. Specifically, the Policy provides:

## 2. Civil or Military Authority

**This Policy covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability if an order of civil or military authority prohibits access to a location provided such order is the direct result of physical damage of the type insured at a location or within five (5) statute miles of it.**

*See Ex. A, p. 24.*

117. The Policy provides coverage where, as here, a Civil Authority has issued an order prohibiting customer access to the insured properties as a direct result of physical damage. The physical damage must be within five statute miles of the insured properties and must be "of the type insured" (which under the Policy is "*all risks* of physical loss or damage"). The Civil Authority Provision also applies a 30-day time limitation to the damages recoverable, extended to 365 days by the Extended Period of Coverage extension coverage in the policy.

118. As a direct and proximate result of the Government Orders, access to Plaintiffs' insured properties has been prohibited or limited. Plaintiffs were required by Civil Authority orders to close its doors to customers and cease certain businesses, particularly Hotels (conventions and meetings), restaurants, bars and retail. Restrictions on travel, gathering size, and "shelter-in-place" and "stay at home" orders effectively prohibited access to the hotels by eliminating the functions for which the Properties would be used and/or the guests' ability to use them.

119. The Government Shutdown Orders in the states containing the insured properties were issued as the direct result of the loss or damage and the *risk* of loss or damage posed by the COVID-19 virus' physical presence throughout those States and cities -- including at and near the insured properties.

120. Plaintiffs have sustained, and will continue to sustain, business interruption loss due to orders issued by civil authorities directly resulting from physical damage of the type insured under the Policy to properties within five statute miles of the insured properties.

**Communicable Disease-Property Damage Additional Coverage and Communicable Disease - Business Interruption Coverage Extension**

121. Under the policies, AFM must cover Plaintiff for the actual presence of "communicable disease", pursuant to two sections in the Policy: the "Communicable Disease - Property Damage" provision and the "Communicable Disease - Business Interruption" provision. The Policy includes the following provisions and definition relating to Communicable Disease:

**Communicable Disease - Business Interruption**

**If a described location owned, leased or rented by the Insured has the actual not suspected presence of communicable disease and access to such described location is limited, restricted or prohibited by:**

- a) An order of an authorized governmental agency regulating such presence of communicable disease; or**
- b) A decision of an Officer of the Insured as a result of such presence of communicable disease,**

*See Ex. A, p. 25.*

**Communicable Disease - Property Damage**

**If a described location owned, leased or rented by the Insured has the actual not suspected presence of communicable disease and access to such described location is limited, restricted or prohibited by:**

- a) An order of an authorized governmental agency regulating or as a result of such presence of communicable disease, or**
- (b) A decision of an Officer of the Insured as a result of such presence of communicable disease,**

*See Ex. A, p. 7.*

**Communicable disease means disease which is**

**1. Transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges.**

*See Ex. A, p. 42.*

122. The actual presence of COVID-19 at other businesses within a 5 statute mile radius of the insured properties caused physical loss and damage and led authorized governmental agencies to issue orders prohibiting, restricting or limiting access and use of area properties, including the insured properties, due to the presence of, or risk of, communicable disease.

123. The actual presence and spread of COVID-19 at Silver Ridge Healthcare Center, Horizon Health and Rehabilitation Center and other nursing homes, in particular, and the tremendous risk of explosive disease spread, loss, damage and death were a cause of the government shutdown orders which effectively closed Plaintiffs' business. As such, Plaintiff meets the requirements for Civil or Military Authority coverage under the policy.

**Ingress/Egress Coverage Extension**

124. The Policy's "Ingress/Egress" extension provides coverage for business interruption losses incurred when ingress to or egress from a location is totally or partially prevented as a direct result of physical loss or damage of the type insured whether or not at the described location. The Policy specifically states:

**8. Ingress/Egress**

**This Policy covers the Business Interruption Coverage loss incurred by the Insured due to the necessary interruption of the Insured's business when ingress to or egress from a described location(s) is physically prevented, either partially or totally, as a direct result of physical loss or damage of the type insured to property of the type insured whether or not at a described location.**

*See Ex. A, p. 27.*

125. Coverage is triggered under the Ingress/Egress provision because Plaintiff sustained business interruption losses when state and local officials mandated that access to portions of the Properties be totally or partially denied due to the presence of COVID-19.

**Protection and Preservation of Property - Business Interruption Coverage Extension**

126. The Policy includes a provision for Protection and Preservation of Property which states as follows:

**13. Protection and Preservation of Property - Business Interruption**

**This Policy covers the Business Interruption Coverage loss incurred by the Insured for a period of time not to exceed 48 hours prior to and 48 hours after the Insured first taking reasonable action for the temporary protection and preservation of property insured by the Policy provided that such action is necessary to prevent immediately impending insured physical loss or damage to such insured property.**

*See Ex. A, p. 30.*

127. In addition to the steps taken in compliance with civil authority orders, Plaintiff implemented reasonable restrictions regarding the physical use of and access to their Properties to prevent immediately impending physical loss or damage caused by the COVID-19 virus. These restrictions included, but are not limited to, closing the Properties for a period of time when the risk of COVID-19 exposure escalated in mid-March, 2020, even before full restaurant shutdown and resident “shelter-in-place” orders were in effect.

128. Plaintiffs’ preventative measures aligned with the spirit and intent of various civil authority directives and were also independently necessary. Plaintiffs’ actions were taken to protect and preserve Plaintiffs’ insured properties.

**Extended Period of Liability**

129. The Policy includes a provision for Extended Period of Liability which states as follows:

**7. Extended Period of Liability**

**The Gross Earnings and Rental Income coverage is extended to cover the reduction in sales resulting from:**

**a) The interruption of business as covered by Gross Earnings or Rental Income;**

**b) For such additional length of time as would be required with the exercise of due diligence and dispatch to restore the Insured's business to the condition that would have existed had no loss happened, ...**

*See Ex. A, pp. 26-27.*

130. This provision applies to extend the coverage available to Plaintiff to cover the business interruption and extra expense losses resulting from business interruptions for such additional length of time (up to 365 days) as is required to restore Plaintiffs' business to the condition that would have existed if no loss had happened.

**No Exclusion In the Policy Impacts Coverage**

131. No exclusion in the Policy applies to preclude or limit coverage for the actual presence of COVID-19 at or away from the Properties, the physical loss and damage to the Properties, and/or the business interruption losses that have, and will continue to, result from the physical loss and/or damage to properties. To the extent that AFM contends any exclusion(s) do apply, such exclusions are unenforceable.

132. The Policy has three types of exclusions: Group I, Group II and Group III. Group I excludes coverage for all business interruption losses caused by particular events (primarily nuclear reactions, war, terrorism, and theft). To accomplish this broad exclusion, the Policy's preface to the Group I exclusions states: "This Policy excludes loss or damage directly or indirectly

caused by or resulting from any of the following regardless of any other cause or event, whether or not insured under this Policy, contributing concurrently, or in any other sequence to the loss or damage." *See Ex. A*, p. 2. Group II and Group III exclusions, however, do not include prefatory language categorically excluding "loss" and do not include the causation expanding language, including anti-concurrent cause language, that applies to the Group I exclusions. *See Id.* at p. 3.

133. The Contamination exclusion is a Group III exclusion.

134. Thus, while the Policy excludes loss or damage both caused by and resulting from Group I exclusions, no such language exists for the Group III contamination exclusion -- demonstrating that only damage directly caused by contamination is subject to exclusion. There was no damage directly caused by on-premises "contamination" at the insured properties sufficient to animate the exclusion.

135. The Policy includes the following provision and definition regarding Contamination:

**GROUP III. THIS POLICY EXCLUDES:**

**8. CONTAMINATION**

**Contamination, and any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy. If contamination due only to the actual not suspected presence of contaminant(s) directly results from other physical damage not excluded by this Policy, then only physical damage caused by such contamination may be insured. This exclusion does not apply to radioactive contamination which is excluded elsewhere in this Policy.**

*See Ex. A*, pp. 4-5.

**“Contamination means any condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold or mildew.”**

*See Id.* at 42. (emphasis added).

136. In 2006, the Insurance Services Office ("ISO"), an entity charged with drafting standard form policy language for use by the insurance industry, developed a standard form and broadly worded "virus exclusion" numbered CP 01 40 0706 and titled "loss due to Virus or Bacteria." AFM did not include that exclusion in the Policy.

137. The "Contamination" exclusion AFM chose to use in the Policy does not, itself, exclude coverage for business interruption losses. It does not exclude coverage for costs and expenses incurred to protect or preserve insured properties from impending physical loss or damage.

138. The Policy expressly provides insurance coverage for loss and damage caused by Communicable Disease. Thus, the term "virus" as used in the Contamination exclusion is, at best, understood as describing something different than the “communicable disease” defined in the policy as “transmissible from human to human by direct or indirect contact. . . ,” or is ambiguous and contradictory in that it would render the communicable disease coverage illusory if it included COVID-19.

139. Most importantly, the Contamination exclusion does not exclude losses based on acts of civil authorities at the subject properties due to a communicable disease loss at another properties like Silver Ridge Healthcare Center, Horizon Health and Rehabilitation Center and other nursing homes and long-term care facilities.

140. To the extent that AFM contends that any of the Policy's provisions do not provide coverage or otherwise bar or limit coverage for the losses and damage alleged herein, the Policy is, at best, ambiguous and must therefore be construed in favor of coverage.

**E. AFM's Bad Faith Conduct**

141. AFM is a subsidiary of FM Global and is under its control. Based on information and belief, AFM and FM Global are, in fact, engaged in a calculated scheme to ensure that AFM's adjusters reached the same conclusion for all COVID-19 claims.

142. Claims personnel were instructed to follow AFM's internal memo entitled "Talking Points on the Novel 2019 Coronavirus." without regard to any individual investigation of each claim. Pursuant to the Talking Points, AFM instructed its claims personnel to deny coverage under several pertinent coverage provisions regardless of what the claims handler's investigation revealed. *See Exhibit E, "Talking Points."*

143. Upon information and belief, AFM follows AFM's Talking Points.

144. The Talking Points incorrectly and summarily state that the Policy coverages for Business Interruption, Civil or Military Authority, and the other relevant coverages do not apply because "[a] virus will typically not cause physical damage" and because "the presence of a communicable disease does not constitute physical damages and is not of the type insured against..." *See Ex. E.*

145. AFM's bad faith position that the virus does not cause physical damage is contrary to the Policy's acknowledgement that the presence of communicable disease causes physical damage to properties because it provides coverage for the resulting "cleanup, removal and disposal of...communicable disease."

146. The Talking Points document is an effort to maneuver and limit the investigation and impending decision on coverage to only the Communicable Disease coverages -- which have lower sublimits. Inclusion of only the Communicable Disease coverage in its Talking Points causes AFM's adjusters to request information tied only to Communicable Disease coverage.

147. Consistent with the approach set forth in the Talking Points, AFM conducted an inadequate and improper investigation of Plaintiffs' claim. AFM intentionally conducted a pretextual investigation. In response to Plaintiffs' request for loss, AFM cited only the communicable disease provisions of the policy and made informational requests calculated solely to relate to and support AFM's predetermined decision that only the sub-limited Communicable Disease provisions could possibly afford coverage. AFM failed to request or consider relevant facts relating to Plaintiffs' *entire* claim under the Policy language.

148. The Talking Points instruct claims adjusters, including AFM adjusters, to reach conclusions without considering the specific facts relating to an insured's particular claim, and without considering the applicable law which controls the insurance policy's interpretation.

149. AFM's actions, including but not limited to the Talking Points, are in direct opposition to the accepted practices of good faith insurance claims handling.

150. AFM's explicit practice and procedure on COVID-19-related claims constitute an unfair or deceptive act or practice and bad faith.

151. AFM's actions in using the Talking Points demonstrates an intentional, conscious disregard of Plaintiffs' rights under the Policy.

152. AFM has intentionally failed to apply its own Policy language in good faith.

153. AFM intentionally placed, and continues to place, arbitrary requirements on the coverage provided by Plaintiffs' Policy. AFM's intentional imposition of arbitrary requirements upon Plaintiffs' ability to recover under the Policy is unreasonable.

154. AFM has effectively denied Plaintiffs' claim and in so doing has knowingly or recklessly failed to conduct a reasonable investigation of Plaintiffs' entire claim and has issued a denial lacking a reasonable basis. Therefore, the basis for AFM's effective denial of the entire claim is unreasonable.

155. Plaintiffs have suffered and continues to suffer substantial damages due to AFM's wrongful denial and bad faith conduct.

**F. Plaintiffs' Losses.**

156. The continuous presence of the coronavirus around the insured properties has created the risk of, and actual, dangerous conditions and rendered the Properties unsafe and unfit for their intended use.

157. As a direct result of (1) the COVID-19 virus' actual presence in the state of Nevada and the area within 5 statute miles of the insured properties (2) the risk posed by the COVID-19 virus, and (3) Civil Authorities' issuance of Shutdown Orders that prohibited, limited, or otherwise interfered with Plaintiffs' businesses, Plaintiffs have suffered physical losses and/or damage.

158. Plaintiffs have also suffered loss and damage through instances in which employees tested positive for COVID-19 leading to costs associated with mitigation efforts and loss of productivity during the periods when partially open.

159. The COVID-19 virus and the Shutdown Orders have caused direct physical loss of Plaintiffs' insured properties in that the Properties has been rendered useless and/or uninhabitable

by the risk of virus and the related Shutdown Orders. The Properties' functionality for its ordinary and intended uses has been prevented.

160. As a result of COVID-19 and the Shutdown Orders, the insured properties have suffered direct physical loss and/or damage. Plaintiffs have been forced to suspend their operations resulting in substantial business interruption and losses of business revenue which are ongoing and continue to increase every day.

**V.**  
**CAUSES OF ACTION**

**COUNT ONE:**  
**DECLARATORY RELIEF**

161. Plaintiff repeats and re-alleges each and every allegation in this Complaint and incorporates each allegation into this Count, as if fully set forth herein.

162. Pursuant to Rhode Island Superior Court Rule of Civil Procedure 57 and the Rhode Island Uniform Declaratory Judgment Act, R.I.G.L. 1956 § 9-30-1, 90-30-2, a person interested under a written contract or other writing or whose rights, status or other legal relations are affected by a statute or ordinance may have determined any question of construction or validity arising under the contract or ordinance and obtain a declaration of the rights, status and other legal relations thereunder.

163. An actual and justiciable controversy has arisen between Plaintiff and AFM regarding the availability of coverage under the Policy for Plaintiffs' claims.

164. Accordingly, Plaintiff seeks a Declaratory Judgment to determine the following:

- (a) that the COVID-19 virus caused physical loss or damage to properties within 5 statute miles of the insured properties;

- (b) that the Shutdown Orders limited, restricted, or prohibited partial or total access to the Insured Properties as a direct result of physical damage of the type insured at a location, or locations within five statute miles of the insured properties;
- (c) that Business Interruption coverage exists for losses incurred due to *the risk* of physical loss or damage, and actual physical loss or damage, due to the presence of COVID-19 in the area around the insured properties;
- (d) that the loss of use of the insured properties for their intended purpose and the monetary and other losses and damages resulting therefrom, due to COVID-19 and government Shutdown Orders, constitutes physical loss or damage to the insured properties under the Policy;
- (e) that the Policy's coverage provisions are triggered by the facts set forth herein;
- (f) that no Policy exclusion applies to bar or limit coverage for Plaintiffs' claims;
- (g) that the Policy provides coverage for Plaintiffs' claims.

**COUNT TWO:**  
**BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING**

165. Plaintiff repeats and re-alleges each and every allegation in this Complaint and incorporate each allegation into this Count, as if fully set forth herein.

166. AFM has failed to pay Plaintiffs' claim for coverage under the Policy relating to its losses due to the risk posed by the COVID-19 virus and government orders put in place to address the spread of COVID-19.

167. AFM's effective denial of Plaintiffs' full claim lacks any reasonable basis.

168. AFM failed to conduct a reasonable investigation to determine whether the losses and damage being claimed by Plaintiff was covered under the Policy. AFM also failed to conduct a reasonable investigation to determine whether the losses and damage being claimed by Plaintiff

were subject to an exclusion under the Policy. Without having performed a reasonable investigation, AFM's basis for denying Plaintiffs' claim is unreasonable.

169. Upon information and belief, AFM employed a systematic, one-size-fits-all approach to denying coverage for all COVID-19 claims, including Plaintiffs' claim.

170. AFM knew, or was actually or implicitly aware, of the lack of any reasonable basis to deny coverage.

171. AFM acted with reckless disregard as to the reasonableness of its refusal to pay claims, such as those of the Plaintiffs in this case, that were within the coverage terms of the Policy AFM sold.

172. AFM breached its duty of good faith and fair dealing by failing to reasonably investigate Plaintiffs' entire claim and by failing to pay Plaintiffs' claim without a reasonable basis for doing so.

173. AFM's denial of full coverage under the Policy constitutes bad faith.

174. The physical loss and damage caused by the risk of COVID-19 and the civil authority orders put in place to address COVID-19 are ongoing and causing undue burden and hardship on Plaintiff. The failure of AFM to promptly accept Plaintiffs' entire claim under the Policy have caused (and will continue to cause) Plaintiffs to incur direct and consequential damages.

175. As a result of AFM's bad faith, Plaintiff has suffered, and continue to suffer, damage including but not limited to: (a) loss of rental income; (b) loss of use of property; (c) damage to property; (d) extra expenses incurred, (e) economic hardship, (f) reasonable and necessary attorney's fees, (g) consequential damages; and (h) reasonable and necessary costs.

**COUNT THREE:**  
**INSURER'S BAD FAITH REFUSAL TO PAY A CLAIM**

**PURSUANT TO R.I.G.L. 9-1-33**

176. Plaintiff repeats and re-alleges each and every allegation in this Complaint and incorporate each allegation into this Count, as if fully set forth herein.

177. The acts and omissions of AFM as set forth herein, and also yet to be discovered in this matter, constitute bad faith under R.I.G.L. § 9-1-33.

178. Plaintiff sustained physical loss and damage due to the ongoing threat of COVID-19 and the civil authority orders restricting Plaintiffs' business, but AFM has failed to comply with its obligation and has failed to compensate Plaintiff for their claim.

179. Plaintiff is entitled to compensatory damages and punitive damages as a result of AFM's bad faith.

180. Plaintiffs have been required to retain the services of attorneys to commence this action and are further entitled to attorney's fees and costs.

**VI.  
REQUESTED RELIEF**

**WHEREFORE**, Plaintiff respectfully requests that the Court enter judgment in its favor and against AFM as follows:

1. For a declaration from the Court that:
  - (a) that the COVID-19 virus caused physical loss or damage to properties within 5 statute miles of the insured properties;
  - (b) that the Shutdown Orders limited, restricted, or prohibited partial or total access to the Insured Properties as a direct result of physical damage of the type insured at a location, or locations within five statute miles of the insured properties;
  - (c) that Business Interruption coverage exists for losses incurred due to the risk of physical loss or damage, and actual physical loss or damage, due to the presence of COVID-19 in the area around the insured properties;
  - (d) that the loss of use of the insured properties for their intended purpose and the monetary and other losses and damages resulting therefrom, due to

- COVID-19 and government Shutdown Orders, constitutes physical loss or damage to the insured properties under the Policy;
- (e) that the Policy's coverage provisions are triggered by the facts set forth herein;
  - (f) that no Policy exclusion applies to bar or limit coverage for Plaintiffs' claims;
  - (g) that the Policy provides coverage for Plaintiffs' claims.
2. That AFM breached its duty of good faith, including refusing in bad faith to pay a claim;
  3. For all damages, including actual, compensatory, special, consequential and punitive damages against AFM in an amount to be proven at trial, in excess of \$10,000;
  4. For statutory damages, including pre- and post-judgment interest, as permitted by law;
  5. For an award of attorneys' fees and costs of suit incurred; and
  6. For any other and further relief, either in at law or in equity, to which Plaintiff may show itself to be justly entitled.

**VII.**  
**JURY DEMAND**

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

Respectfully Submitted,

MCINTYRE TATE LLP

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