

**STATE OF RHODE ISLAND
PROVIDENCE, S.C.**

SUPERIOR COURT

HOTEL MCINNIS MARIN LLC; EAST
THOMAS ROAD PHOENIX HOTEL LLC;
CENTURY BLVD NE ATLANTA HOTEL
LLC; HOTEL CROWN CP-ATL LLC;

Plaintiffs,

v.

AFFILIATED FM INSURANCE
COMPANY,

Defendant.

C.A. No.: PC - 2020 - _____

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs, Hotel McInnis Marin LLC; East Thomas Road Phoenix Hotel LLC; Century Blvd NE Atlanta Hotel LLC and Hotel Crown CP-ATL LLC (“Plaintiffs”) bring this Complaint against Defendant, Affiliated FM Insurance Company (“Defendant” or “Affiliated FM”) and allege as follows:

NATURE OF THE CASE

1. This is a civil action seeking declaratory relief arising from Plaintiffs’ contract of insurance with Defendant.
2. Plaintiffs are hotel owners with hotels located in California, Arizona and Georgia.
3. In light of the Coronavirus global pandemic and state and local orders mandating that all non-essential in-store businesses must shut down, and the suffering of physical harm and impact and damages occurring both within Plaintiffs’ business premises/hotels and/or within the immediate area surrounding and outside their business premises/hotels, Plaintiffs were forced to significantly reduce the operations of their hotels, including suspending making available to

potential guests and customers many of the usual and customary amenities that the hotels had made available and provided to guests and customers prior to the occurrence of the Coronavirus global pandemic. The amenities that the Hotels were not able to provide to potential guests and customers included, *inter alia*, the use of the hotel restaurants, bars, gyms, meeting spaces, etc.

4. Plaintiffs were forced to suspend providing the aforesaid usual amenities to potential guests and customers on March 19, 2020 at its California hotel, March 31, 2020 at its Arizona hotel, and April 2, 2020 at its Georgia hotels.

5. The viability of the hotel located in California was placed in serious question as a result of all of the limits placed upon the ability to operate the hotel in its usual and normal manner by the state and local orders and the presence of the Coronavirus in and about the premise of the hotel and the nearby and adjoining property, causing the hotel to operate in an extremely limited manner that resulted in significant economic losses sustained by the hotel. On April 9, 2020, as a Short-Term lodging facility located within Marin ("County") the hotel was directed to cease all operations and services except as necessary to provide: (a) lodging for the County's homeless population; (b) lodging for County residents who have been displaced and cannot return to their residence because there is a person residing at their residence that must isolate or quarantine or is at high risk of severe illness from COVID-19; (c) lodging for County residents who need to isolate or quarantine; (d) lodging to support Healthcare Operations, Essential Infrastructure, Essential Businesses, and Essential Governmental Functions as defined in the March 31 Order (e.g., lodging for traveling nurses or government contractors); (e) lodging for County residents facing immediate displacement from their primary residence due to safety, sanitation, or habitability issues (i.e., inhabitable living conditions, violence, or threats of violence); or Minimum basic operations as defined in the County's March 31, 2020 Order. On April 29, 2020, that April 9 Order was extended

to May 31, 2020. On May 29, 2020, the County entered another Order substantially the same as the order set to expire, that became effective on May 31, 2020 that was to remain in effect until it is extended, rescinded, superseded, or amended in writing by the [County] Health Officer. These limitations on use and occupancy of the hotel resulted in occupancy below 20% for a prolonged period of time. Beginning during the month of July 2020, the hotel began to house prison guards for San Quinton that were imported to the market to help deal with a Covid-19 outbreak at the prison at a reduced room rate. This occupancy with prison guards temporarily increased hotel occupancy to about 70-80%, but at a significantly reduced rate such that the hotel still is suffering business income loss and interruption. The use of the hotel by prison guards nevertheless is short term and has caused the hotel to bear additional expenses to assure its sanitation and cleanliness and to eliminate the presence of COVID-19 being within the hotel property and around the hotel property. The situation in California has remained fluid and unstable as a result of the surge of the Pandemic in that state. The California hotel has not been able to return to normal operations. A copy of the Short-Term Rental Restriction Order of May 29, 2020 is attached hereto as Exhibit 1.

6. The viability of the hotel located in Arizona was placed in serious question as a result of all of the limits placed upon the ability to operate the hotel in its usual and normal manner by the state and local orders, and the presence of the Coronavirus in and about the premise of the hotel and the nearby and adjoining property, causing the hotel to operate in an extremely limited manner that resulted in significant economic losses sustained by the hotel. The volatile situation in Arizona as one of the hot spots in the nation during the summer of 2020 for the Coronavirus and its spread has caused governmental officials to take steps to combat the spread of the Coronavirus that has contributed to the continuing suffering of business losses and interruption by the Arizona hotel.

7. The viability of the hotels located in Georgia were placed in serious question as a result of all of the limits placed upon the ability to operate the hotels in their usual and normal manner by the state and local orders, and the presence of the Coronavirus in and about the premises of the hotels and the nearby and adjoining property, causing the hotels to operate in an extremely limited manner that resulted in significant economic losses sustained by the hotel. These hotels are located in two different municipalities. They each were subject to state restrictions that prevented conventions from taking place through at least July 1, 2020. Convention business is a primary source of business for these hotels. As to the Hotel Crown CP-ATL LLC, located in DeKalb County, Georgia, bars and restaurants were closed for all services from March 20, 2020 to April 20, 2020 pursuant to orders entered by DeKalb County, and the swimming pool was closed from March 20, 2020 to June 20, 2020. The DeKalb County's Executive Order of March 23, 2020 supplemented the Orders of Governor Kemp. A copy of the DeKalb County Executive Order of March 23, 2020 is attached hereto as Exhibit 2. The Century Blvd NE Atlanta Hotel LLC was also subject to Orders entered by Governor Kemp, as well as the required mask order entered by the Mayor of Atlanta on June 13, 2020. The Governor's Orders can be found at a link through the Fulton County web page at : <https://www.fultoncountyga.gov/covid-19/orders-and-legislation> (last visited July 31, 2020). Meeting space revenue at both hotels has been dramatically impacted by the affects of the closure orders.

8. The "Shelter in Place" orders entered by the state and local governments of California, Arizona and Georgia coupled with the presence of the Coronavirus in and about the premises of the hotels and the nearby and adjoining property, resulted in a significant negative economic impact on the hotels and their business operations. These "Shelter in Place" orders limited the ability of cities and states to operate normally. The mandated closure of many

businesses in and around the communities of the hotels, significantly reduced or eliminated demand for hotel rooms and amenities. The mandated closures eliminated the holding of conventions and eliminated many business meetings that would normally create a need for hotel space thereby impacting occupancy and room rates for the hotels.

9. Plaintiffs' insurance Policy provides coverage for all non-excluded business losses and thus provides coverage here

10. As a result, Plaintiffs is entitled to declaratory relief that its business is covered for all business losses that have been suffered and sustained, which losses are in an amount greater than \$150,000.00.

JURISDICTION

11. This Court has subject matter jurisdiction over this action pursuant to R.I.G.L. §8-2-14.

12. This Court has personal jurisdiction over Defendant. At all relevant times Defendant has engaged in substantial business activities in the State of Rhode Island. At all relevant times Defendant transacted, solicited, and conducted business in Rhode Island through its employees, agents, and/or sales representatives, and derived substantial revenue from such business in Rhode Island.

13. Venue is proper in this district pursuant to R.I.G.L. §9-4-3 because Defendant is a corporation headquartered in Rhode Island and has substantial, systematic, and continuous contacts in Rhode Island.

PARTIES

14. Plaintiffs own and operate hotels in California, Arizona and Georgia, under ownership names of Hotel McInnis Marin LLC; East Thomas Road Phoenix Hotel LLC; Century

Blvd NE Atlanta Hotel LLC; and Hotel Crown CP-ATL LLC, entities which are noted as Plaintiffs in this Complaint.

15. At all relevant times, Plaintiffs, were authorized to do business and were doing business in California, Arizona and Georgia. Plaintiffs operate, manage and own hotels at 101 McInnis Parkway, San Rafael, CA, 94903; 10 East Thomas Road, Phoenix, AZ 85012; 2000 Century Blvd. NE, Atlanta, GA 30345; and 1030 Crown Pointe Parkway, Atlanta, GA, 30338 (“Insured Properties”). Plaintiffs’ LLC have numerous partner members, some of whom are citizens of Rhode Island, thus precluding federal court diversity of citizenship jurisdiction because as alleged hereinafter, Defendant has Rhode Island citizenship which is the same citizenship of some of the members of the Plaintiffs’ LLCs. Case law holds that for purposes of diversity jurisdiction, Plaintiffs, as limited liability companies “has the citizenship of its *members*.” *Pramco, LLC ex rel. CFSC Consortium, LLC v. San Juan Bay Marina, Inc.*, 435 F.3d 51, 54 (1st Cir. 2006) (emphasis added).

16. Defendant, Affiliated FM is an insurance carrier that provides business interruption insurance to Plaintiffs. Affiliated FM is headquartered at 270 Central Avenue, Johnston, RI 02919-4949. Affiliated FM is a citizen of Rhode Island.

17. At all relevant times, Defendant is a corporation doing business in the State of Rhode Island. Defendant issued an insurance policy with Policy Number IA246 to Plaintiffs for the period June 19, 2019 to June 19, 2020. *See* Policy Declaration, attached hereto as Exhibit 3 and referred to hereinafter as the “Policy.”

18. The Policy for Plaintiffs is currently in full effect, includes coverage for, among other things, business personal property, business income, business interruption, special business income, and professional business income.

19. Plaintiffs submitted a claim for a business loss pursuant to its Policy, seeking coverage under the Policy. Defendant issued a reservation of rights response and did not confirm coverage existed under the terms and conditions of the Policy. Defendant purportedly plans to investigate the claim, though it is fully aware of the pandemic, the various civil authority orders entered at the state and local levels, and the severe economic impact suffered by businesses, including Plaintiffs' hotels. Defendant's failure to acknowledge that coverage exists, subject to a determination of the amount of damages sustained, demonstrates that Defendant has no intention of providing coverage for the losses and damages that Plaintiffs have sustained and that coverage has been essentially denied.

20. The expected reasons why Defendant has or will reject Plaintiffs' losses and claim are invalid. Plaintiffs expect, as has been published in the public domain, that Defendant, like other insurance carriers, will deny or has essentially denied Plaintiffs' claim on the basis that allegedly Plaintiffs did not suffer physical damage to the properties and in reliance on the Virus Exclusion provision of the Policy and on mischaracterizations of the civil authority order provisions of the Policy. These are invalid reasons to deny the claim and in violation of the provisions of and proper and fair interpretation of the Policy. The Virus Exclusion does not exclude coverage for losses associated with this pandemic and Plaintiffs has suffered physical damage or loss and the civil authority orders has caused damages and losses to Plaintiffs.

FACTUAL BACKGROUND

I. Insurance Coverage

21. Defendant entered into a contract of insurance with Plaintiffs, whereby payments were made to Defendant in exchange for Defendant's promise to indemnify Plaintiffs for losses including, but not limited to, business income losses at Plaintiffs' Insured Properties.

22. Plaintiffs' Insured Properties are covered under the Policy issued by Defendant. *See* Ex. 3.

23. The Policy provides, among other things property, business personal property, business income and extra expense, business interruption, contamination coverage, and additional coverages.

24. Plaintiffs faithfully paid Policy premiums to Defendant, specifically to provide, among other things, additional coverages in the event of business interruption or closures for a variety of reasons, including by order of Civil Authority.

25. Under the Policy, business interruption insurance coverage is extended to apply to, *inter alia*, the actual loss of business income sustained, and the actual, necessary and reasonable extra expenses incurred.

26. The Policy is an all-risk Policy, insofar as it provides that covered causes of loss under the Policy means direct loss or damage unless the loss is specifically excluded or limited in the Policy.

27. An all-risk Policy such as that purchased by Plaintiffs is one that protects against catastrophic events, such as the one occurring now, involving the global COVID-19 Pandemic that has resulted in the widespread, omnipresent and persistent presence of COVID-19 in and around Plaintiffs' Insured Properties, including adjacent properties. Coverage under an all-risk Policy is to be broadly interpreted and provided.

28. Plaintiffs' all-risk Policy includes coverage for business interruption, which is standard in most all-risk commercial property insurance policies, along with coverage for extended expenses.

29. Plaintiffs purchased the Policy expecting to be insured against losses, including, but not limited to, business income losses at the hotels.

30. Plaintiffs purchased, among other coverages, business interruption coverage for closure by Order of Civil Authority.

31. Based upon information and belief, the Policy provided by Defendant included language that is essentially standardized language adopted from and/or developed by the ISO (“Insurance Service Office”). The ISO, founded in 1971, provides a broad range of services to the property and casualty insurance industry. In addition to form policies, ISO collects and manages databases containing large amounts of statistical, actuarial, underwriting, and claims information, fraud-identification tools, and other technical services. ISO describes itself as follows: “ISO provides advisory services and information to many insurance companies. ... ISO develops and publishes policy language that many insurance companies use as the basis for their products.” ISO General Questions, Verisk, <https://www.verisk.com/insurance/about/faq/> (last visited June 5, 2020); *see also* Insurance Services Office (ISO), Verisk, <https://www.verisk.com/insurance/brands/iso/> (last visited June 5, 2020).

32. The language in the Policy is language that is “adhesionary” in that Plaintiffs were not participants in negotiating or drafting its content and provisions.

33. Plaintiffs possessed no leverage or bargaining power to alter or negotiate the terms of the Policy, and more particularly, Plaintiffs had no ability to alter, change or modify standardized language derived from the ISO format.

34. Upon information and belief, the Virus Exclusion in the policy was developed by the ISO in response to the SARS situation that occurred in or around 2005-2006, which was not a

Pandemic and not a global Pandemic as is the present COVID-19 Pandemic situation, and therefore was never intended to exclude coverage for a circumstance as presented in this matter.

35. Upon information and belief, the Virus Exclusion in the Policy was developed by the ISO in response to the SARS situation that occurred in or around 2005-2006, which was not a Pandemic and not a global Pandemic as is the present COVID-19 Pandemic situation, and therefore was never intended to exclude coverage for a circumstance as presented in this matter.

36. Upon information and belief, the Virus Exclusion was first permitted by state insurance departments due to misleading and fraudulent statements by the ISO that property insurance policies do not and were not intended to cover losses caused by viruses, and so the Virus Exclusion offers mere clarification of existing law. To the contrary, before the ISO made such baseless assertions, courts considered contamination by a virus to be physical damage. Defendant's use of the Virus Exclusion to deny coverage here shows that the Virus Exclusion was fraudulently adopted, adhesionary, unconscionable and as an attempt to expand the limitations of coverage without proper disclosures. See <https://www.propertycasualty360.com/2020/04/07/here-we-go-again-virus-exclusion-for-covid-19-and-insurers/> (last visited June 12, 2020).

37. Upon information and belief, the Virus Exclusion was improperly added to policies by insurance carriers to expand the exclusions of coverage in their policies without disclosing to insurance commissioners/state insurance regulators that the provision was reducing coverage. The reason that insurance carriers did not disclose the actual effect of the Virus Exclusion clauses to reduce coverage was so that insurance carriers could maintain premium levels as though coverage levels was not being reduced.

38. Upon information and belief, the Virus Exclusion clause was promoted as being part and parcel of prior provisions that limited coverage without causing a change when in fact that was not the case.

39. Upon information and belief, the Virus Exclusion was marketed by insurance carriers to insurance regulators as being nothing more than a clarification of the microorganism or bacterium language in policies when in fact the Virus Exclusion was added to policies to constitute an expansion of exclusionary language without disclosure.

40. Upon information and belief, the Virus Exclusion attempts to make losses or damage suffered or caused by a virus to be on equal footing with damages suffered or caused by a bacterium or microorganism so as to enable insurance carriers to assert the virus exclusion as a defense in the same manner as asserting bacterium or microorganism as a defense when there was no disclosure of this subterfuge to insurance regulators.

41. Regulatory estoppel applies and Defendant should not be permitted to rely on the Virus Exclusion because of its conduct and any associated conduct of the ISO to inappropriately obtain the permission of state insurance commissioners or departments to include the language of the Virus Exclusion in its policies.

42. Even so, the Virus Exclusion applies only to “loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.”

43. The Policy does not have an exclusion for a Pandemic. As an all-risks policy, coverage is presumed unless clearly and unambiguously excluded. There is no such exclusion for a Pandemic or for action taken in response to a Pandemic such as the entry of Civil Authority Orders.

44. Plaintiffs purchased the Policy with an expectation that it was purchasing a Policy that would provide coverage in the event of business interruption and extended expenses, such as that suffered by Plaintiffs as a result of COVID-19.

45. At no time had Defendant, or its agents, notified Plaintiffs that the coverage that Plaintiffs had purchased pursuant to an all-risk Policy that included, among other coverages, business interruption coverage, had exclusions and provisions that purportedly undermined the very purpose of the coverage, of providing benefits in the occurrence of business interruption and business losses and incurring extended expenses.

46. The purported exclusions of the Policy that Defendant has or is expected to raise in defense of Plaintiffs' claim under the Civil Authority coverage of the Policy are contradictory to the provision of Civil Authority Order coverage and violates the public policies of California, Arizona, and Georgia, respectively, and other states, as a contract of adhesion and hence is not enforceable against Plaintiffs.

47. Access to Plaintiffs' businesses was severely limited and/or prohibited by Civil Authority Orders which precluded Plaintiffs from operating their insured properties in the manner intended, for which such insurance was purchased. For example, use of the hotels' restaurants, meeting spaces, bars and gyms was prohibited causing a significant economic impact on Plaintiffs' hotels. The Policy provides for coverage for actual loss of business sustained and actual expenses incurred as a covered loss caused by the prohibitions of the Civil Authority Orders in the area of Plaintiffs' Insured Properties, which applies to circumstances presented by the Plaintiffs.

48. The reasonable expectations of Plaintiffs, *i.e.*, an objectively reasonable interpretation by the average policyholder of the coverage that was being provided, was that the business interruption coverage included coverage when a civil authority forced closure of the

business (and amenities within a business) for an issue of public safety involving the COVID-19 pandemic in the immediate area surrounding the Insured Properties.

49. The Policy does not exclude the losses suffered by Plaintiffs and therefore, the Policy does provide coverage for the losses incurred by Plaintiffs.

50. Plaintiffs suffered direct loss or damage within the definitions of the Policy as loss of use of property as it was intended to be used, as here, constitutes loss or damage.

51. The virus and bacterium exclusions do not apply because Plaintiffs' losses were not solely caused by a virus, bacterium or other microorganism. Instead, Plaintiffs' losses were also caused by the entry of Civil Authority Order, particularly those by the governors of California, Arizona and Georgia and by the states' respective Departments of Health, and by local governments, to mitigate the spread of COVID-19. The Civil Authority Orders were issued in an attempt to limit the damage to individuals and property caused by COVID-19. The Civil Authority Orders were more than mere social distancing enactments but required closure in fact of the amenities of the hotels such as their restaurants, bars, gyms, pools, meeting spaces, etc.

52. Covid-19 is omnipresent, impacting the environment causing the entry of Civil Authority Orders for the protection of businesses and the population from physical contact by Covid-19.

53. The Civil Authority Orders prohibited access to certain of the amenity aspects of Plaintiffs' Insured Properties. The Civil Authority Orders significantly limited travel thereby limiting the demand for the use of the hotels and hotel spaces. The Civil Authority Orders were entered for the variety of reasons stated in this Complaint including in response to dangerous physical conditions described resulting from COVID-19.

54. As a result of the presence of COVID-19 and the Civil Authority Orders, Plaintiffs lost Business Income, suffered Business Interruption and incurred Extra Expenses.

55. Based on information and belief, Defendant has accepted the Policy premiums with no intention of providing any coverage for business losses or the Civil Authority extension due to a loss and shutdown from a pandemic. Plaintiffs has attempted to make a claim under the Policy and the Defendant has assigned a claims examiner who has issued a reservation of rights response. Based on information and belief, Defendant has no intention of paying the Claim. Defendant has alluded that it is proceeding with a reservation of rights because of provisions of the Policy that it purportedly will rely on for determining that coverage for the types of claims that Plaintiffs were making would not be covered. Essentially, Defendant's reservation of rights implies that there will be a rejection of Plaintiffs' business loss and business interruption claims and other claims, contending, *inter alia*, that Plaintiffs did not suffer physical damage to its property directly and stating other reasons why Plaintiffs is not purportedly entitled to coverage for the losses and damages claimed.

II. The Coronavirus Pandemic

56. The scientific community, and those personally affected by the virus, recognize COVID-19 as a cause of real physical loss and damage. It is clear that contamination of the Insured Properties is a direct physical loss requiring remediation to clean the surfaces of the hotels constituting the Insured Properties.

57. The virus that causes COVID-19 remains stable and transmittable 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. See <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last visited April 9, 2020).

58. The CDC has issued a guidance that gatherings of more than 10 people must not occur. People in congregate environments, which are places where people live, eat, and sleep in close proximity, face increased danger of contracting COVID-19.

59. On March 11, 2020 the World Health Organization (“WHO”) made the assessment that COVID-19 shall be characterized as a pandemic. *See* <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

60. The global Coronavirus pandemic is exacerbated by the fact that the deadly virus physically infects and stays on surfaces of objects or materials where it can “fomite.” Human coronaviruses can remain infectious on inanimate surfaces at room temperature for up to 9 days. At a temperature of 30 degrees Celsius (86 degrees F) or more the duration of persistence is shorter. *See* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7132493/> (last visited July 16, 2020).

61. A particular challenge with the novel coronavirus is that it is possible for a person to be infected with COVID-19 but be asymptomatic. Thus, seemingly healthy people unknowingly spread the virus via speaking, breathing, and touching objects.

62. While infected droplets and particles carrying COVID-19 may not be visible to the naked eye, they are physical objects which travel to other objects and cause harm. Habitable surfaces on which COVID-19 has been shown to survive include, but are not limited to, stainless steel, plastic, wood, paper, glass, ceramic, cardboard, and cloth.

63. The virus is thought to spread mainly from person-to-person; between people who are in close contact with one another (within about 6 feet) and through respiratory droplets produced when an infected person coughs, sneezes or talks. These droplets can land in the mouths or noses of people who are nearby or possibly can be inhaled into the lungs. Some recent studies

have suggested that COVID-19 may be spread by people who are not showing symptoms. *See* <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html#:~:text=The%20virus%20is%20thought%20to,are%20not%20showing%20symptoms.>

64. The CDC has said that the best way to prevent illness is to avoid being exposed to this virus and that steps can be taken to slow its spread: Maintain good social distance (about 6 feet). This is very important in preventing the spread of COVID-19; Wash your hands often with soap and water. If soap and water are not available, use a hand sanitizer that contains at least 60% alcohol; Routinely clean and disinfect frequently touched surfaces; and Cover your mouth and nose with a cloth face covering when around others.

65. The CDC has noted that the primary and most important mode of transmission for COVID-19 is through close contact from person-to-person. Based on data from lab studies on COVID-19 and what we [the CDC] know about similar respiratory diseases, it may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes, but this isn't thought to be the main way the virus spreads. <https://www.cdc.gov/media/releases/2020/s0522-cdc-updates-covid-transmission.html>(last edited May 23, 2020).

66. Compliance with the CDC recommendations, along with compliance with the Civil Authority Orders of California, Arizona and Georgia and local counties (see below), effectively made it impossible for Plaintiffs to operate their hotels in the usual and customary manner causing the hotels to suffer business losses and added expenses as provided for and covered under the Policy.

67. China, Italy, France, and Spain have implemented the cleaning and fumigating of public areas prior to allowing them to re-open publicly due to the intrusion of microbials.

68. A French Court has determined that business interruption coverage applies to the COVID-19 Pandemic. See <https://www.insurancejournal.com/news/international/2020/05/22/569710.htm>.

69. The determination by a Court of another country that coverage exists is consistent with public policy that in the presence of a worldwide Pandemic, such as COVID-19, businesses that possess business interruption insurance coverage should recover their losses from the insurance carriers.

III. Civil Authority

70. The Governor of California, Gavin Newsom, ordered a State of Emergency and a stay at home order on March 19, 2020. See Executive Order N-33-20, attached herein as Exhibit 4.

71. On May 7, 2020, Governor Newsom loosened restrictions, but only to curbside retail, childcare, manufacturing and logistics. See Order of the State of Public Health, attached herein as Exhibit 5, and <https://covid19.ca.gov/roadmap/> (last visited May 16, 2020).

72. On June 20, 2020, Governor Newsom permitted the reopening of low risk businesses in Stage 2. See Executive Order N-60-20, attached herein as Exhibit 6. However, this was short lived in light of the massive uptick in new Coronavirus cases and deaths in California over the weeks following June 20, 2020 to the present.

73. Therefore, effective July 13, 2020, the State of California updated its Orders, providing that effective that date:

All Counties must close indoor operations involving: Dine-in Restaurants; Wineries and tasting rooms; movie theatres; Family Entertainment Centers (such as bowling alleys, miniature golf; batting cages and arcades); zoos and museums; and cardrooms. In addition, bars, brewpubs, breweries and pubs were required to close all operations both indoor and outdoor statewide, unless they are offering sit-down dine-in meals. Alcohol can

only be sold in the same transaction as a meal. *See* <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-of-Closure-of-Sectors-in-Response-to-COVID-19.aspx> (last visited July 20, 2020) and <https://covid19.ca.gov/roadmap-counties/> (last visited July 20, 2020).

74. In Marin County, where Plaintiff's hotel is located, the phased reopening of hotels to tourists was postponed due to the uptick in cases in that county. <https://marinrecovers.com/hotels-motels-hospitality/> (last visited on July 20, 2020).

75. The events in California remain highly volatile as the Covid-19 virus surges in that state causing changes to state and local orders to be made on almost a daily basis, but with the primary consequence of these order being that Plaintiffs' hotel in California has not been able to operate normally.

76. March 11, 2020, Arizona Governor Doug Ducey declared a Public Health Emergency, the first formal recognition of an emergency situation in the State as a result of COVID-19. *See* Executive Order 2020-07, attached herein as Exhibit 7.

77. On March 19, 2020, Governor Ducey issued an Executive Order limiting the operation of certain businesses in the state. *See* Executive Order 2020-09, attached herein as Exhibit 8.

78. On March 30, 2020, Governor Ducey mandated that non-essential businesses cease in-person operations. Governor Ducey further ordered that "all individuals in the State of Arizona shall limit their time away from their place of residence or property," except for certain, life-sustaining activities such as purchasing food. *See* Executive Order 2020-18, attached herein as Exhibit 9.

79. On April 29, 2020, Governor Ducey amended his Stay Home, Stay Healthy, Stay Connected order, allowing non-essential businesses to reopen on May 8, 2020,

pursuant to restrictive guidelines designed to prevent the spread of the virus. *See* Executive Order 2020-33, attached herein as Exhibit 10.

80. On June 29, 2020, Governor Ducey paused the re-opening of bars, gyms, movies and water parks, and events of 50 or more persons to attend. *See* Executive Order 2020-43, attached herein as Exhibit 11.

81. On July 9, 2020, Governor Ducey ordered restaurants to be limited to 50% capacity and ordered buffets closed. *See* Executive Order 2020-47, attached herein as Exhibit 12.

82. The events in Arizona remain highly volatile as the Covid-19 virus surges in that state causing changes to state and local orders to be made on almost a daily basis, but with the primary consequence of these order being that Plaintiffs' hotel in Arizona has not been able to operate normally.

83. Similarly, in Georgia, Governor Brian Kemp declared a Public Health State of Emergency on March 14, 2020. *See* Executive Order of March 14, 2020, attached herein as Exhibit 13.

84. On April 2, 2020, Governor Kemp issued an Executive Order requiring people to shelter-in-place and limit leaving their homes unless they are conducting or participating in Essential Services. *See* Executive Order of April 2, 2020, attached herein as Exhibit 14.

85. On June 11, 2020, Governor Kemp lifted the shelter-in-place requirements. *See* Executive Order of June 11, 2020, attached herein as Exhibit 15.

86. While the state of Georgia has updated its rules it still includes a suggestion that masks be worn in public.

87. However, the Mayor of Atlanta where the hotels are located, has issued orders that are more restrictive. These orders provide for, among other things, a prohibition of gatherings of

more than 10 persons on city of Atlanta property; calls for all persons of age 10 or older within the territorial jurisdiction of the city of Atlanta (and the Hartsfield-Jackson International Airport) to wear a mask or a cloth face covering over their nose and mouth.

88. The events in Georgia remain highly volatile as the Covid-19 virus surges in that state causing changes to state and local orders to be made on almost a daily basis, but with the primary consequence of these order being that Plaintiffs' hotels in Georgia have not been able to operate normally.

89. Plaintiffs' businesses have been unable to operate in their normal and ordinary manners due to the stay-at-home orders for public safety issued by the Governors of California, Arizona, and Georgia and the States of California, Arizona, and Georgia generally.

90. The Civil Authority Orders in and around Plaintiffs' place of business also explicitly acknowledge that COVID-19 causes direct physical damage and loss to property. Civil Authority Orders entered in other states confirm this as well. For example, the City of New York Order explicitly stated that COVID-19 "is causing property loss and damage[.]" <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-101.pdf>. Similarly, the Pennsylvania Supreme Court recently clarified the Governor Wolf's Civil Authority Orders and supported Plaintiffs' position that physical loss and damage exists, resulting in coverage here. *See Friends of DeVito, et. al v. Wolf*, No. 68 MM 2020 (Pa. April 13, 2020).

91. Further, on April 10, 2020, President Trump, expressing the expectations of the average policyholder, supported insurance coverage for business loss like that suffered by the Plaintiffs:

REPORTER: Mr. President may I ask you about credit and debt as well. Many American individuals, families, have had to tap their credit cards during this period of time. And businesses have had to draw down their credit lines. Are you concerned Mr. President that that may hobble the U.S. economy, all of that debt number one? And number two, would you suggest to credit card companies to reduce their fees during this time?

PRESIDENT TRUMP: Well it's something that we've already suggested, we're talking to them. ***Business interruption insurance***, I'd like to see these insurance companies—you know you have people that have paid. When I was in private I had business interruption. When my business was interrupted through a hurricane or whatever it may be, I'd have business where I had it, I didn't always have it, sometimes I had it, sometimes, I had a lot of different companies. ***But if I had it I'd expect to be paid***. You have people. I speak mostly to the restaurateurs, where they have a restaurant, they've been paying for 25, 30, 35 years, business interruption. They've never needed it. All of a sudden they need it. And I'm very good at reading language. I did very well in these subjects, OK. And I don't see the word pandemic mentioned. Now in some cases it is, it's an exclusion. But in a lot of cases I don't see it. I don't see it referenced. And they don't want to pay up. I would like to see the insurance companies pay if they need to pay, if it's fair. And they know what's fair, and I know what's fair, I can tell you very quickly. But business interruption insurance, that's getting a lot money to a lot of people. And they've been paying for years, sometimes they just started paying, but you have people that have never asked for business interruption insurance, and they've been paying a lot of money for a lot of years for the privilege of having it, and then when they finally need it, the insurance company says 'we're not going to give it.' We can't let that happen.

<https://youtu.be/cMeG5C9TjU> (last visited on April 17, 2020) (emphasis added).

92. The President is articulating a few core points:
- a. Business interruption is a common type of insurance. It applies to a variety of business establishments.
 - b. Businesses pay in premiums for this coverage and should reasonably expect they'll receive the benefit of the coverage.
 - c. This pandemic should be covered unless there is a specific exclusion for pandemics.
 - d. If insurers deny coverage, they would be acting in bad faith.

- e. Public policy considerations support a finding that coverage exists and that a denial of coverage would be in violation of public policy.

93. These Civil Authority Orders and proclamations, as they relate to the closure of all “non-life- sustaining businesses,” evidence an awareness on the part of both state and local governments that COVID-19 causes damage to property. This is particularly true in places where business is conducted, such as Plaintiffs’ hotels and the amenities of the hotels, as the requisite contact and interaction that occurs at Plaintiffs’ hotels results in a heightened risk of the property becoming contaminated and required constant sanitation and cleaning to avoid spread of COVID-19.

94. Plaintiffs did not have the ability or right to ignore these Civil Authority Orders and proclamations as doing so could expose Plaintiffs to fines and sanctions. As a result of complying with the orders and proclamations, the Hotels closed restaurants, bars, gyms, pools, meeting spaces, etc.

95. Potential hotel guests did not become guests of the hotel because of the Orders that prohibited travel and/or because of the closure of the amenities at the hotels thereby eliminating reasons why potential guests would travel to the hotels. With the absence of amenities at the hotels and for public health safety reasons and in compliance with the Orders, the hotels lost significant revenue that guests would have provided if the pandemic had not occurred.

96. Plaintiffs’ adherence to the requirements of these Civil Authority Orders and proclamations was in furtherance of the protecting the public, the public’s good, supportive of public policy to attempt to minimize the risk of spread of COVID-19 and consistent with them complying with the Civil Authority Orders entered.

IV. Impact to Plaintiffs

97. As a result of the Orders referenced herein, access to Plaintiffs' Insured Properties was significantly impacted causing the suspension of amenities in the hotels and suspension of or reduction of business operations.

98. As a consequence of the Orders, the events described above, the lack of an ability to provide amenities to potential guests, the limits on travel, and the dangers and physical omnipresence of the Coronavirus in the California Hotel and the surrounding areas of the California Hotel, the California Hotel suspended its ordinary operations on March 19 and its normal operations have remained suspended. As noted in paragraph 5 above, significant restrictions were placed on the hotel by Marin County officials. Aside from these restrictions the opening of the pool has been delayed and restaurants were ordered to close yet again. A hotel, as a business of providing among other things, amenities to customers, cannot operate normally when civil authority orders prevent it from engaging in its normal form of business. To the extent the hotel may be able to operate normally at a time in the future, it is expected that its operation will be exceedingly limited. During 2019 the hotel occupancy was at about 70% for the full year. That form of occupancy was at normal rates and with the use of amenities that provided additional revenue. When the Pandemic began and Orders were entered, the hotel's occupancy dropped to below 20% and it lost the additional revenue associated with the amenities. As noted in Paragraph 5 above, during the month of July 2020, and currently, the hotel has provided rooms to prison guards. This has increased the hotel's occupancy temporarily to about or above 70% but the hotel's room rates and overall revenue are still down compared to pre-Covid-19 levels as this occupancy with prison guards is at a reduced room rate and the amenities are still closed.

99. As a consequence of the Orders, the events described above, the lack of an ability to provide amenities to potential guests, the limits on travel, the dangers and physical

omnipresence of the Coronavirus in the Arizona Hotel and the surrounding areas of the Arizona Hotel, the Arizona Hotel significantly reduced its operations. By March 20, the Arizona Hotel, like of Plaintiffs' hotels, all of the hotels, had significantly reduced their operations as a consequence of the public's response to the Pandemic and the entry of civil authority orders that impacted Plaintiffs' business.

100. As a consequence of the Orders, the events described above, the lack of an ability to provide amenities to potential guests, the limits on travel, the dangers and physical omnipresence of the Coronavirus in the Georgia Hotels and the surrounding areas of the Georgia Hotels, the Georgia Hotels significantly reduced their operations. As stated above, by March 20 all of the hotels, had significantly reduced their operations as a consequence of the public's response to the Pandemic and the entry of civil authority orders that impacted Plaintiffs' business.

101. Prior to the above dates, Plaintiffs hotels were open. Plaintiffs' hotels are not a closed environment; people – staff, customers, and others – constantly cycle in and out of the properties. Accordingly, there is an ever-present risk that the Insured Properties are contaminated and would continue to be contaminated and open access presented an ever-present risk that people entering the Insured Properties could be exposed to COVID-19 and become ill from such exposure and become spreaders of COVID-19 to others. To eradicate any Coronavirus that was present in the facility, Plaintiffs regularly cleaned and sanitized the hotels. Enhanced cleaning and sanitation protocols went into place in beginning in or around late February to early March 2020 at each of the hotels. Since that date and continuing to the present and expected to continue into the foreseeable future, the Plaintiff hotels have been following CDC and hotel brand guidelines for cleaning and sanitation, which continues to this day. Also, Plaintiffs mandate that within the hotels, the wearing of facial coverings/masks is required, regardless of local or state mandates, in

an effort to minimize the threat of spread of the Coronavirus within the hotel buildings. Plaintiffs could not use their hotel properties for their intended purposes. Therefore, the novel coronavirus has caused “direct physical loss of or damage to” Plaintiffs’ Insured Properties under the Policy.

102. Plaintiffs’ business is highly susceptible to rapid person-to-property transmission of the virus, and vice-versa, because the activities of the customers and the staff require them to work in close proximity to one another within the property and to come in contact with personal property within the building premises that could contain the COVID-19 novel coronavirus.

103. The virus is physically impacting the Insured Properties. Any effort by Defendant to deny the reality that the virus causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger Plaintiffs and the public.

104. Plaintiffs’ hotels, including the Insured Properties, are highly susceptible to contamination and damage, from, among other things, the rapid person-to-person and person-to-property contamination as COVID-19 is carried into the Insured Properties from the surrounding area and other contaminated and damaged premises.

105. Because of the nature of COVID-19 as described above, relating to its persistence in locations and the prospect of causing asymptomatic responses in some people, the risk of infection to persons is not only high, but could cause persons with asymptomatic responses to then come into contact with others who would not be so fortunate as to suffer merely an asymptomatic response, and instead suffer serious illness.

106. The Civil Authority Orders entered by the state and local government were in the exercise of authority to protect the public and minimize the risk of spread of disease.

107. Even with the entry of these Civil Authority Orders there remained physical impact not only in and within Plaintiffs’ business properties but in and around the surrounding location of

Plaintiffs' business properties in light of COVID-19 presence not being detectable other than through microscopic means, and occurrence of illness.

108. The entry of the Civil Authority Orders to mitigate health risks to the public by attempting to prevent COVID-19 contamination, through the closing businesses and ordering persons to stay at home resulted in a physical impact on Plaintiffs' business and Insured Properties.

109. Plaintiffs specifically sought coverage for business interruption losses and extended expenses and paid premiums for such coverage and with an expectation that the Policy Plaintiffs purchased provided such coverage, with no disclosures to the contrary being made to Plaintiffs by Defendant or its agents.

110. Plaintiffs had no choice but to comply with the Civil Authority Orders, for failure to do so would have exposed Plaintiffs and their hotels to fines and sanctions. Plaintiffs' compliance with mandates resulted in Plaintiffs suffering business losses, business interruption and extended expenses of the nature that the Policy covers and for which Plaintiffs' reasonable expectation was that coverage existed in exchange for the premiums paid. As a result of these Orders, Plaintiffs has incurred, and continues to incur, among other things, a substantial loss of business income and additional expenses covered under the Policy.

111. A declaratory judgment is necessary to be entered that determines that coverage exists under the Policy for the events and circumstances described herein. The entry of a declaratory judgment will prevent Plaintiffs from being left without vital insurance coverage that was paid for through premiums to ensure the survival of the hotels and business which were significantly impacted due to the omnipresence of the Coronavirus in the hotels and the areas surrounding the hotels and because of the described shutdowns involving the amenities, the

California hotel and the impact that the civil authorities' response had on the communities where the hotels are located and on the prospect of guests staying at and using the hotels.

CAUSE OF ACTION

DECLARATORY RELIEF

112. Plaintiffs re-alleges and incorporates by reference into this cause of action each and every allegation set forth in each and every paragraph of this Complaint.

113. An actual controversy has arisen, pursuant to R.I.G.L. § 9-30-1, *et seq.*, between Plaintiffs and Defendant as to the rights, duties, responsibilities and obligations of the parties under the Policy in that Plaintiffs contends and, on information and belief, Defendant disputes and denies, *inter alia*, that:

- a. The Civil Authority Orders constitute a prohibition of access to Plaintiffs' Insured Properties;
- b. The prohibition of access by the Civil Authority Orders has specifically prohibited access as defined in the Policy;
- c. The Civil Authority Orders trigger coverage;
- d. The Policy provides coverage to Plaintiffs for any current and future closures in Arizona, California, and Georgia due to physical loss or damage directly or indirectly from the Coronavirus and/or pandemic circumstance under the Civil Authority coverage parameters;
- e. The Policy's exclusions for virus and bacteria do not apply to the circumstances presented in the lawsuit and the kind and types of damages and losses suffered by Plaintiffs;
- f. Defendant's denial of coverage for losses sustained that were caused by the entry of the Civil Authority Orders referenced, and Plaintiffs' adherence to the Civil Authority Orders violates public policy;
- g. The under the circumstances of this Pandemic and the entry of the Civil Authority Orders referenced, Plaintiffs' had no choice but to comply with the Civil Authority Orders, and that Plaintiffs' compliance resulted in Plaintiffs suffering business losses, business interruption and extended expenses which is therefore a covered expense;

- h. The Policy provides business income coverage in the event that Coronavirus has directly or indirectly caused a loss or damage at the insured premises or immediate area of the Insured Properties; and
- i. Resolution of the duties, responsibilities and obligation of the parties is necessary as no adequate remedy at law exists and a declaration of the Court is needed to resolve the dispute and controversy.

114. Plaintiffs seeks a Declaratory Judgment to determine whether the Civil Authority Orders constitute a prohibition of access to Plaintiffs' Insured Properties.

115. Plaintiffs further seeks a Declaratory Judgment to affirm that the Civil Authority Orders trigger coverage.

116. Plaintiffs further seeks a Declaratory Judgment to affirm that the Policy provides coverage to Plaintiffs for any current and future closures of businesses such as Plaintiffs' in Arizona, California, and Georgia due to physical loss or damage from the Coronavirus and/or the pandemic and the Policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the Insured Properties.

117. Plaintiffs further seek a Declaratory Judgment to affirm that any reliance on the Virus Exclusion clause is estopped by the principles of regulatory estoppel.

118. Plaintiffs do not seek any determination of whether the Coronavirus is physically in or at the Insured Properties, amount of damages, or any other remedy other than declaratory relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs herein pray as follows:

- a. For a declaration that the Civil Authority Orders constitute a prohibition of access to Plaintiffs' Insured Properties.
- b. For a declaration that the prohibition of access by the Civil Authority Orders specifically prohibited access as defined in the Policy.

- c. For a declaration that the Civil Authority Orders trigger coverage under the Policy.
- d. For a declaration that the Policy provides coverage to Plaintiffs for any current and future closures in Arizona, California, and Georgia due to physical loss or damage directly or indirectly from the Coronavirus and/or pandemic circumstance under the Civil Authority coverage parameters.
- e. For a declaration that the Policy's exclusions for virus and bacteria do not apply to the circumstances presented in the lawsuit and the kind and types of damages and losses suffered by Plaintiffs.
- f. For a declaration that Defendant's denial of coverage for losses sustained that were caused by the entry of the Civil Authority Orders referenced, and Plaintiffs' adherence to the Civil Authority Orders violates public policy.
- g. For a declaration that under the circumstances of this Pandemic and the entry of the Civil Authority Orders referenced, Plaintiffs' had no choice but to comply with the Civil Authority Orders, and that Plaintiffs' compliance resulted in Plaintiffs suffering business losses, business interruption and extended expenses which is therefore a covered expense.
- h. For a declaration that the Policy provides coverage to Plaintiffs for any current, future and continued closures of non-essential businesses due to physical loss or damage directly or indirectly from the Coronavirus.
- i. For a declaration that the Policy provides business income coverage in the event that Coronavirus has directly or indirectly caused a loss or damage at the Plaintiffs' Insured Properties or the immediate area of the Plaintiffs' Insured Properties.
- j. For such other relief as the Court may deem proper.

TRIAL BY JURY IS DEMANDED

Plaintiffs hereby demand trial by jury.

Respectfully submitted,

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