

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

SFM REALTY, CORP., 9 CROSBY, LLC)
a/k/a NOMO SOHO HOTEL, and 260-261)
MADISON AVENUE, LLC a/k/a 260-261)
MADISON AVENUE,)
Plaintiffs)

v.)

THE CONTINENTAL INSURANCE)
COMPANY, CONTINENTAL CASUALTY)
COMPANY, INC., and CNA FINANCIAL)
CORPORATION,)

Defendants

Case No.: 2022CH07990

Jury Demanded

COMPLAINT FOR DECLARATORY JUDGMENT AND BREACH OF CONTRACT

Plaintiffs SFM Realty, Corp., 9 Crosby, LLC a/k/a NoMo SoHo Hotel, and 260-261 Madison Avenue, LLC a/k/a 260-261 Madison Avenue, through undersigned counsel and for its Complaint against Defendants, The Continental Insurance Company, Continental Casualty Company, Inc., and CNA Financial Corporation (collectively "CNA Defendants"), pursuant to 735 ILCS 5/2-701, *et seq.*, alleges and states as follows:

1. This case was originally filed on March 15, 2021. On August 18, 2021, the matter was voluntarily dismissed pursuant to 735 ILCS 5/2-1009, with leave to refile after one year pursuant to *Hudson v. City of Chicago*, 228 Ill.2d 462 (2008). At the time of dismissal, no counts of the then-pending complaint had been previously dismissed pursuant to §2-615, §2-619, or §2-1005 of the Illinois Code of Civil Procedure, and no adverse orders had been entered against Plaintiffs.

2. The original lawsuit did not include a count for declaratory relief. The original lawsuit was assigned to the Honorable Judge Margaret Brennan, who has since retired.

3. As will be alleged in detail below, Plaintiffs seek a declaration that Defendants are required to provide insurance coverage for Covid-related business losses under the terms of the all-risk business policy issued to Plaintiffs (the “Insurance Policy,” attached hereto as **Exhibit A** and incorporated by reference).

4. As of the filing of this action, two petitions for leave to appeal are pending before the Illinois Supreme Court in two Covid-related insurance coverage disputes, *Sweet Berry Café, Inc. v. Society Insurance, Inc.* (Docket No. 128399) and *Alley 64, Inc. v. Society Insurance, Inc.* (Docket No. 128576). The denial of a petition for leave to appeal has no precedential value.

5. As of the filing of this action, the Illinois Supreme Court has not issued an opinion about whether all-risk business interruption policies, particularly policies without express virus exclusions, provide coverage for Covid-related losses.

6. In addition, after the voluntary dismissal of Plaintiffs’ original suit and before the filing of this action, a chancery court in Cook County, Illinois presided over a declaratory judgment action involving the CNA Defendants and an all-risk policy similar to the policy in this matter. That case was captioned *JDS Construction Group LLC v. Continental Casualty Co.*, 2020CH5678 (hereinafter the “JDS/CNA Action”). The chancery court in the JDS/CNA Action denied the CNA Defendants’ § 2-615 motion to dismiss along with their subsequent motion to reconsider. The JDS/CNA Action remains pending. The orders on the motion to dismiss and motion to reconsider are attached as **Exhibit B** and herein incorporated by reference.

I. PARTIES

7. Plaintiff SFM Realty, Corp. (“Plaintiff SFM”) is a New York corporation with its principal place of business in New York City, New York. Plaintiff SFM is the parent company for Plaintiffs 9 Crosby, LLC a/k/a NoMo SoHo Hotel and 260-261 Madison Avenue, LLC a/k/a

260-261 Madison Avenue. These properties are referred to herein as “the Hotel,” “260-261 Madison,” “the Properties,” or the “covered Locations.”

8. Plaintiff 9 Crosby, LLC a/k/a NoMo SoHo Hotel (“Plaintiff 9 Crosby”) is a Delaware limited liability company with its principal place of business in New York City, New York. Plaintiff 9 Crosby owns and operates the NoMo SoHo Hotel, a boutique hotel located at 9 Crosby Street, New York City, New York, as well as the food beverage and retail services located within the NoMo SoHo Hotel.

9. Plaintiff 260-261 Madison Avenue, LLC a/k/a 260-261 Madison Avenue (“Plaintiff 260-261 Madison”) is a Delaware limited liability company with its principal place of business in New York City, New York. Plaintiff 260-261 Madison owns, operates and/or manages the office buildings and commercial spaces located at and within 260 Madison Avenue and 261 Madison Avenue near Midtown Manhattan. Where appropriate, Plaintiff 9 Crosby and Plaintiff 260-261 Madison are collectively referred to herein with Plaintiff SFM as “Plaintiffs.”

10. Defendant, The Continental Insurance Company (“Continental”), is a corporation organized under the laws of Pennsylvania with its principal place of business in Chicago, Illinois.

11. Defendant, Continental Casualty Company, Inc. (“Continental Casualty”), is a corporation organized under the laws of Pennsylvania with its principal place of business in Chicago, Illinois.

12. Defendant, CNA Financial Corporation. (“CNA Financial”), is an Illinois corporation with its principal place of business in Chicago, Illinois. CNA Financial is an insurance holding company. CNA and its insurance company subsidiaries, including Continental and Continental Casualty, constitute one of the largest and most sophisticated insurance conglomerates in the United States. In 2019, CNA Financial and its insurance company subsidiaries collected \$7.7 billion in premiums from policyholders, including Plaintiffs.

II. NATURE OF THE CAUSE OF ACTION

13. This is a lawsuit arising out of the CNA Defendants presumptively denying Plaintiffs coverage for Plaintiffs' losses under the Time Element: Business Interruption (Gross Earnings), Denial of Access by Civil Authority and Ingress-Egress, Extra Expense, and Ordinance or Law provisions of its property Insurance Policy with the CNA Defendants. These losses have resulted, and continue to result from, or have been caused by, and continue to be caused by: (a) the SARS-CoV-2 virus ("COVID-19") causing direct physical loss of or damage to Plaintiffs' properties and property of third parties such as food and beverage suppliers and patron facilities; (b) the governments' stay-at-home orders, including, without limitation, the State of New York's stay-at-home orders; (c) the New York governor's order temporarily shutting down hotels, as well as on premises businesses, including but not limited to, restaurants; (d) executive orders issued by the then-mayor of New York City, Bill DeBlasio and; (e) the U.S. Centers for Disease Control and Prevention's ("CDC") recommendation on travel restrictions; and/or (f) former President Trump's travel restrictions.

14. This is an action for declaratory judgment and breach of contract arising out of the refusal of the CNA Defendants, a multi-billion dollar business, to live up to their promise to their policyholders, Plaintiffs. The CNA Defendants promised to pay for, in exchange for premiums paid, physical loss of or damage to insured property and related business interruption losses and expenses under an "all risk" Insurance Policy.

15. Plaintiffs seek enforcement of the CNA Defendants' contractual promises to insure Plaintiffs against Plaintiffs' significant and ongoing losses resulting from COVID-19 outbreaks in New York City and around the world.

16. These losses are "direct." Plaintiffs are not asking CNA to reimburse them after someone obtained a judgment against Plaintiffs for getting them sick. That might be indirect loss.

Plaintiffs are asking the CNA Defendants to pay for their loss of business income occasioned directly by being unable to use their properties.

17. These losses are “physical.” Plaintiffs’ properties are unable to operate in the manner in which they had previously operated. The probability of illness prevents the use of Plaintiffs’ properties in no less of a way than, on a rainy day, a crumbling and open roof from the aftermath of a tornado would make the dining room of a cafeteria unusable.

18. This loss is a loss. It is the loss of functionality of the properties for business purposes. It is the diminishment of the usable physical space of Plaintiffs’ hotel. What once could hold many now can safely hold only a few.

19. Plaintiffs are suing the CNA Defendants for declaratory relief, breach of contract, and are seeking monetary damages.

**Prefatory Note: The Underlying Issue in This Case about
Whether Covid Causes Direct Physical Loss of or Damage to Property
Is Fact-Specific Not Amenable to a Motion to Dismiss**

20. The policy period for the Insurance Policy at issue in the case had a term of November 17, 2019 to November 17, 2020. Thus, when the policy period began, Covid had not yet emerged; but, by the time the policy terminated, Covid had permeated every corner of the globe.

21. Epidemiologists characterized this coronavirus as “novel”—when the SARS-CoV-2 virus initially emerged, very little was known about how easily or how far the virus would spread, nor how many deaths it would ultimately cause. In July 2020, the CDC noted: “The novel (new) coronavirus that first appeared in China had never been seen before, so it quickly gained the attention of scientists around the world.”¹

¹*Identifying the source of the outbreak*, U.S. Centers for Disease Control and Prevention, (July 1, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/science/about-epidemiology/identifying-source-outbreak.html>.

22. As will be set forth in further detail below, and as supported by scientific studies, statements, and research conducted by the World Health Organization and the Centers for Disease Control and Prevention, the novel coronavirus causes direct physical loss of or damage to Plaintiffs' insured properties.

23. On information and belief, the CNA Defendants believe that the novel coronavirus does not cause direct physical loss of or damage to Plaintiffs' premises and property. In so claiming, the CNA Defendants may rely upon the same or different scientific studies.

24. To the extent that the CNA Defendants disagree with Plaintiffs' well-pleaded facts, the battleground for resolving disputed facts is trial, following discovery.

25. Between the voluntary dismissal of the original action in August 2021 and the present, numerous Illinois trial courts have granted insurers' motions to dismiss policyholders' request for Covid-related coverage losses. Some Illinois appellate courts have affirmed dismissals on the pleadings.

26. Insofar as the Illinois Supreme Court has not ruled on the legal and factual issues implicated in this type of case, it does not matter that other courts have reached an opposite conclusion. Indeed, a Cook County Circuit Court rejected this precise argument in the JDS/CNA action:

There may be some suggestion that the August 12, 2021 Order [denying CNA's Section 2-615 motion to dismiss] must be wrong because so many other courts have reached a contrary conclusion. Economists refer to this as an appeal to "herding behavior"—a process by which group-think replaces individual decision making...Judges are not sheep, and do not decide a case by counting noses. Further, the "herd" can be wrong. *See, e.g., A. Daughety, et al., "Stampede to Judgment: Persuasive Influence and Herding Behavior by Courts," 1 American Law and Economics Review* 158 (Fall 1999) (analyzing a cascade of decisions among various circuits of United States Court of Appeals on a single point of law later invalidated by the United States Supreme Court).

III. JURISDICTION AND VENUE

27. This Court has subject matter jurisdiction over the matters alleged herein.

28. Personal jurisdiction exists over the CNA Defendants, because they are domiciled in Illinois, do business in Illinois as it relates to the issues in this case, and generally conduct business in Illinois.

29. This Court has subject matter jurisdiction under Article VI, Section 9, of the Illinois Constitution. In addition, the Illinois Supreme Court does not have original, exclusive jurisdiction over this case.

30. Venue in this county is proper under 735 ILCS 5/2-101, because Cook County is the county of residence for the CNA Defendants, Cook County is the county in which the transaction or some part of the transaction occurred out of which this case arose, Cook County is the county from which the Insurance Policy at issue herein was issued by the CNA Defendants, and Cook County is the county in which the CNA Defendants expect and receive payments under the policy at issue herein. Moreover, the CNA Defendants denied, either expressly or as a matter of law, Plaintiffs' claim for insurance coverage from their business locations in Cook County.

IV. CORONAVIRUS AND COVID-19

31. COVID-19 is caused by the SARS-CoV-2 virus and is a disease that can result in serious illness or death.

32. COVID-19 has infected over 91 million people in the United States and caused approximately 1,000,000 deaths in the United States.²

33. COVID-19 is a deadly disease caused by the recently discovered coronavirus known as SARS-CoV-2. As of the date of this Complaint, nearly 590 million people have

² 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> (Data as of Aug. 8, 2022, 2:55 PM ET).

contracted COVID-19 and more than 6 million people have died from the disease worldwide and nearly 1,025,000 people have died from Covid in the United States.

34. COVID-19 is highly contagious. The coronavirus can be transmitted in several ways, including by inhaling airborne viral particles and by touching surfaces or objects on which viral particles are present. The coronavirus spreads easily from a person into the air, and from a person to surfaces or objects. Contamination occurs primarily through small, physical droplets expelled from the nose or mouth when an infected person speaks, coughs, sneezes, sings, cheers, or yells, as well as transfer from hands to surfaces.

35. In the scientific and medical community, it is widely held that the SARS-CoV-2 virus can persist on inanimate surfaces. For example, the website WebMD states that the SARSCoV-2 virus can exist on wood, including furniture, for four days and on glass, including windows and drinking glasses, for five days.

36. The vast majority of medical literature and studies on the issue have confirmed that coronaviruses can exist on paper, wood, and glass for up to 4-5 days. *E.g., Persistence of Coronavirus on Inanimate Surfaces and Their Inactivation with Biological Agents*, The Journal of Hospital Infection, March 2020, Volume 104, Issue 3, Pages 246-251. This SARS-CoV-2 virus strain can, in all probability, exist on multiple surfaces beyond 4-5 days.

37. Another study found that the coronavirus remains active and dangerous on plastics for at least three days, while another reported that the coronavirus remained stable and viable for seven days on a range of common surfaces, including stainless steel, plastic, glass, and wood.³ Another study even detected viable coronavirus samples on stainless steel and glass approximately

³Neeltje van Doremalen et al., *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, 382 N. Engl. J. Med. 1564 (2020); Yongjian Liu et al., *Stability of SARS-CoV-2 on environmental surfaces and in human excreta*, 107 J. Hosp. Infect. 105 (2021); Riddell, S., Goldie, S., Hill, A. et al. *The effect of temperature on persistence of SARS-CoV-2 on common surfaces*. 17 Virol. J. 145 (2020).

one month if left at or around room temperature. All of these materials are used at Plaintiffs' properties.

38. Most of the people who transmit the coronavirus are unaware they are doing so. The "pre-symptomatic" incubation period for COVID-19—*i.e.*, the time between exposure to the coronavirus and symptom onset—can be up to 21 days. Pre-symptomatic individuals frequently have high viral loads, making them highly contagious, but they often do not know they are infected. In addition, some individuals never become symptomatic ("asymptomatic" carriers) and may never know they were infected. The U.S. Centers for Disease Control and Prevention ("CDC") and others have suggested that asymptomatic carriers make up about 40 to 70 percent of those infected. Scientists have concluded that "the majority of transmission is attributable to people who are not exhibiting symptoms, either because they are still in the pre-symptomatic stage or the infection is asymptomatic."⁴

39. Respiratory droplets (*i.e.*, droplets larger than 5-10 μm) expelled from infected individuals land on, attach, and adhere to surfaces and objects. In doing so, they structurally change the property and its surfaces by becoming a part of those surfaces. This structural alteration renders any physical contact with those previously safe, inert surfaces (*e.g.*, fixtures, handrails, furniture) unsafe.

40. According to the WHO, people can become infected with the coronavirus by touching such objects and surfaces, then touching their eyes, nose, or mouth. This mode of transmission—indirect transmission via objects and surfaces—is known as "fomite transmission." As the WHO has noted, fomite transmission is "a likely mode of transmission for SARS-CoV-2" because studies have consistently confirmed the existence of virus-laden droplets on objects and

⁴ Moghadas et al., *The Implications of Silent Transmission for the Control of COVID-19 Outbreaks*, 117 PNAS 17, 513, (July 28, 2020), <https://www.pnas.org/content/117/30/17513> (last visited Aug. 4, 2022).

surfaces “in the vicinity of infected cases,” and because it is well known that other coronaviruses can be transmitted via fomite transmission.⁵

41. A study of a COVID-19 outbreak published in the CDC’s Emerging Infectious Diseases journal identified indirect transmission via objects such as elevator buttons and restroom [sink?] taps as an important possible cause of a “rapid spread” of the coronavirus in a shopping mall in Wenzhou, China.⁶

42. The coronavirus may also spread through the air. Air is a physical substance made up of oxygen, nitrogen, and other gases. Airborne coronaviruses can transmit the virus from one person to another. When individuals carrying the coronavirus breathe, talk, cough, or sneeze, they expel aerosolized droplet nuclei (*i.e.*, those smaller than 5-10 μm) that remain in the air and, like dangerous fumes, make the premises unsafe and affirmatively dangerous. This process alters the structural properties of air in buildings from safe and breathable to unsafe and dangerous.

43. According to research published in The Journal of the American Medical Association, a person who sneezes can release a cloud of pathogen-bearing droplets that can span as far as 23 to 27 feet.⁷ If a person is infected with SARS-CoV-2, whether symptomatic or asymptomatic, infectious viral particles will be aerosolized and physically permeate the air around the person. Once airborne, many virus particles quickly fall and settle on surfaces and objects, where they transfer to other people who touch those surfaces.

⁵ See, *Transmission of SARS-CoV-2: implications for infection prevention precautions*, World Health Org. (WHO), (July 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions>

⁶ Cai et al., *Indirect Virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China, 2020*, 26 Emerging Infectious Diseases 1343, 1345 (June 2020), https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article (last visited Aug. 4, 2022).

⁷ See, Lydia Bourouiba, *Turbulent Gas Clouds and Respiratory Pathogen Emissions: Potential Implications for Reducing Transmission of COVID-19*, 323 JAMA 1837-1838 (2020)

44. But many coronavirus particles also remain airborne for a time sufficient to travel a considerable distance, filling indoor and outdoor spaces, and lingering in, attaching to, and spreading through heating, ventilation, and air conditioning (“HVAC”) systems. One study found the presence of the coronavirus within the HVAC system servicing hospital ward rooms of COVID-19 patients. This study detected SARS-CoV-2 RNA in ceiling vent openings, vent exhaust filters, and central ducts that were located more than 50 meters from the patients’ rooms.⁸

45. The Environmental Protection Agency (“EPA”) has compiled several studies reflecting epidemiological evidence suggestive of coronavirus transmission through aerosol.⁹ Based on these and other studies, the EPA has recommended that facilities make improvements to their ventilation and HVAC systems by, for example, increasing ventilation with outdoor air and air filtration.¹⁰ The purpose of these measures is to physically remediate the quality of the air by, among other things, diluting the concentration of virus particles or by trapping and removing them.

46. Merely cleaning surfaces may reduce—but does not altogether eliminate—the risk of transmission amongst people. There may be surfaces with residual infectious virus, and aerosolized infectious particles. In other words, disinfection is temporary at best; however, a space may remain contaminated if an aerosol is present, and immediately become contaminated thereafter if another infected person is present in the area. This contamination will provide a constant modality for infection to people.

⁸ See, Nissen et al., Long-Distance Airborne Dispersal of SARS-CoV-2 in COVID-19 Wards, at 7 (Oct. 20, 2020 version) (preprint), <https://www.researchsquare.com/article/rs-34643/v2> (last visited Aug. 4, 2022).

⁹ See, U.S. Environmental Protection Agency, *Indoor Air and COVID-19 Key References and Publications* (last updated July 18, 2022), <https://www.epa.gov/coronavirus/indoor-air-and-covid-19-key-references-and-publications> (last visited Aug. 4, 2022).

¹⁰ See, U.S. Environmental Protection Agency, *Indoor Air and Coronavirus (COVID-19)* (Dec. 15, 2021), <https://www.epa.gov/coronavirus/indoor-air-and-coronavirus-covid-19> (last visited Aug. 4, 2022).

V. THE CNA DEFENDANTS' HISTORY WITH VIRUSES IN INSURANCE POLICIES

47. Plaintiffs purchased an all-risk Insurance Policy from the CNA Defendants to protect themselves against various risks, including the risks of loss of income and extra expenses because of direct physical loss of or damage to its property.

48. Plaintiffs required coverage to protect their business in the event that Plaintiffs had to suddenly suspend operations for reasons outside of their control, or if they had to act in order to prevent further property damage. Therefore, Plaintiffs obtained insurance coverage from the CNA Defendants, including the Time Element: Business Interruption (Gross Earnings), Denial of Access by Civil Authority and Ingress-Egress, Extra Expense, and Ordinance of Law provisions.

49. Historically, the risk of loss due to pandemic is a covered cause of loss under all-risk policies.

50. “All risk” property policies insure against losses from unexpected and unprecedented circumstances and provide coverage for risks of any kind or description, unless specifically excluded.

51. “Business interruption” insurance provides coverage—often up to a year or more—to replace business income lost as a result of a covered cause of loss. Under industry-standard “all risk” policies procured by many insureds, business interruption coverage is triggered when a policyholder suffers direct “loss or damage” to its premises.

52. These policies provide businesses with comfort knowing they have coverage for even unforeseeable or unlikely risks that may physically impair or alter their property.

53. Due to the breadth of coverage, policyholders paid substantial premiums for “all risk” policies with business interruption coverage. In doing so, Plaintiffs reasonably understood, expected, and believed their policy would cover business income losses from any and all non-

excluded risks. Those risks, in the eyes of a reasonable policyholder, include shutdown orders caused by direct physical “loss or damage,” and that the shutdown orders themselves are “a direct physical loss” of the premises for their intended use, as policyholders understood those words to mean.

54. Business interruption coverage thus insures against the risk that a business-owner’s property will not be able to function as intended.

55. That kind of interruption is precisely what happened when shutdown orders required hotels to make physical, detrimental alterations that materially impaired the functionality of their premises. In barring or limiting on-premises dining, those orders caused the loss of millions of square feet of vital physical space.

56. The orders dispossessed hotels of their tangible spaces and forced very real, material detrimental physical changes and alterations to their premises.

57. Payment of business interruption losses due to pandemic were most recently issued in 2003 during the Severe Acute Respiratory Syndrome (SARS) pandemic caused by a coronavirus, SARS-CoV-2.

58. For example, the Mandarin Oriental International Ltd. secured a \$16 million payment for its business interruption losses for its hotels due to cancellations and reduced local food and beverage sales stemming from the SARS outbreak. Similarly, the Peninsula Hotel Group received a payment of \$12 million from their business interruption insurance to mitigate the loss of income due to SARS.

59. After SARS, the insurance industry and, based upon information and belief, the CNA Defendants knew that the language under their all-risk policies provided coverage for losses associated with pandemics, a covered cause of loss.

60. Upon information and belief, certain insurance policies provided by the CNA Defendants provide limited coverage for certain losses caused by “virus.” The Insurance Policy at issue here is not one of those policies.

61. Unlike many policies that provide Business Interruption coverage (also referred to as “business income” coverage), the CNA Defendants’ policy issued to Plaintiffs does not include, and is not subject to, any exclusion for losses caused by the spread of viruses or communicable diseases.

62. The Insurance Policy contains an obligation to pay for direct physical loss of or damage to covered property caused by or resulting from a covered cause of loss.

63. The Insurance Policy does not define direct physical loss of or physical damage.

64. The presence of the disjunctive “or” in “physical loss of or damage to property” means that coverage is triggered if either a physical loss of property or damage to property occurs.

65. As drafter of the Insurance Policy, the CNA Defendants could have defined the terms “physical loss of property” or “damage to property.”

66. When the CNA Defendants sold the policy to Plaintiffs, they knew the policy provided coverage for losses caused by viruses.

67. In February 2019, only a few months before the CNA Defendants sold the Insurance Policy to Plaintiffs, the CNA Defendants, explicitly warned its investors about the potential for “material losses” to CNA and its affiliates from “pandemics” in its 2018 Form 10-K annual report filed with the U.S. Securities and Exchange Commission. In fact, CNA repeatedly told its investors that such losses are “an inevitable part of [CNA’s] business.”¹¹ Importantly,

¹¹ See, CNA Financial Corporation, 2018 Annual Report (Form 10-K) (Feb. 13, 2019) https://s25.q4cdn.com/951400234/files/doc_financials/2018/ar/Annual-Report-2018.pdf (last visited Aug. 3, 2022); CNA Financial Corporation, 2019 Annual Report (Form 10-K) (Feb. 11, 2020) (last visited Aug. 3, 2022); https://www.annualreports.com/HostedData/AnnualReportArchive/c/NYSE_CNA_2019.pdf; and CNA Financial Corporation, 2020 Annual Report (Form 10-K) (Feb. 9, 2021),

CNA also relayed these warnings in the 2019 and 2020 annual reports, which covered the effective period of the Insurance Policy.

68. Moreover, CNA's 2020 Form-10K and annual report exhibited a stern COVID-19-specific warning, and braced its investors for the likely onslaught of business interruption coverage claims, including those arising out of shelter in place restrictions and business closures. CNA cautioned its investors:

The COVID-19 pandemic and measures to mitigate the spread of the virus have resulted in significant risk across our enterprise, which have had, and may continue to have, material adverse impacts on our business, results of operations and financial condition, the extent of which cannot be determined with any certainty at this time.

Continued spread of the virus, as well as new or extended shelter in place restrictions and full or partial business closures, could cause us to experience additional COVID-19 related catastrophe losses in future quarters, which could be material.

We have incurred and may continue to incur substantial expenses related to litigation in connection with COVID-related legal matters. These actions primarily relate to denial of claims submitted as a result of the pandemic and the mitigating actions under commercial property policies for business interruption coverage, including lockdown and closing of certain businesses. The significance of such litigation, both in substance and volume, and the resultant activities initiated, including external counsel engagement, and the costs related thereto, may have a material impact on our business, results of operations and financial condition, the extent of which cannot be determined with any certainty at this time.¹²

69. CNA has been keenly aware of how a pandemic, generally, and the COVID-19 virus, specifically, could trigger voluminous business interruption claims from policy holders, and have a material impact on its enterprise as a whole.

70. The vast majority of insurance policies issued in the United States that cover business income losses contain an exclusion for losses caused by "virus." According to a June

https://s25.q4cdn.com/951400234/files/doc_financials/2020/ar/1512-2020-Annual-Report-10K-Wrap-Final-03.08.21-IR.pdf (last visited Aug. 3, 2022).

¹² CNA Financial Corporation, 2020 Annual Report (Form 10-K) (Feb. 9, 2021), https://s25.q4cdn.com/951400234/files/doc_financials/2020/ar/1512-2020-Annual-Report-10K-Wrap-Final-03.08.21-IR.pdf (last visited Aug. 3, 2022).

2020 report by the National Association of Insurance Commissioners, 83 percent of insurance policies covering business income losses contain a virus exclusion.¹³

71. Sophisticated insurance companies like the CNA Defendants knew that viruses cause direct physical loss of or damage to property and that such losses are covered by their policies unless specifically limited or excluded. That is why, upon information and belief, the CNA Defendants specifically limited certain losses caused by “virus” in other insurance policies sold by the company.

72. During a May 4, 2020 earnings call with investors, the chairman and CEO of CNA Defendants, Dino Robusto, claimed that property policies issued by the CNA Defendants “have exclusions barring coverage for viruses[,] ... [s]o with respect to business interruption, our property policy exclusionary language does not provide coverage for COVID-19....” He acknowledged, however, that “[t]here are a very few policies where [business interruption] coverage may exist.”¹⁴

73. The CNA Defendants and the insurance industry recognized before the Insurance Policy in this case was issued that viruses can cause direct physical loss of or physical damage to property. In the Insurance Service Office, Inc.’s (“ISO”) July 6, 2006 Circular regarding an ISO endorsement (CP 01 40 07 06) for exclusion of viruses (“ISO Virus Exclusion”) ISO stated:

Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses.

¹³ National Association of Insurance Commissioners, *COVID-19 Property & Casualty Insurance Business Interruption Data Call: Part 1, Premiums and Policy Information*, at 3 (June 2020), https://content.naic.org/sites/default/files/inline-files/COVID-19%20BI%20Nat%27l%20Aggregates_2.pdf

¹⁴ CNA Financial Corp (CNA) Q1 2020 Earnings Call Transcript, The Motley Fool (May 5, 2020), <https://www.fool.com/earnings/call-transcripts/2020/05/05/cna-financial-corp-cna-q1-2020-earnings-call-trans.aspx> (last visited Aug. 4, 2022).

74. On information and belief, between 2006 and 2019, some CNA all risk policies contained the ISO Virus Exclusion and some did not.

75. On information and belief, the CNA Defendants consciously chose not to incorporate the express ISO Virus Exclusion from 2006 into Plaintiffs' Insurance Policy. If incorporated into Plaintiffs' Insurance Policy, the ISO Virus exclusion would have arguably made it clear that losses caused by Covid—a virus—were not covered. Discovery should yield answers on this issue.

76. By intentionally refusing to include the ISO Virus Exclusion, the CNA Defendants created a self-inflicted ambiguity in its policy about whether damage caused by Covid is a covered loss, an ambiguity which should be construed against it.

77. On information and belief, the CNA Defendants discussed how, when or whether to incorporate the ISO Virus Exclusion in some or all of its all-risk policies. On information and belief, between at least 2006 and the end of 2019, CNA employees and agents discussed and debated whether, when, and under what circumstances the ISO Virus Exclusion was to be included in insurance policies to its customers. Discovery should yield answers on this issue.

VI. REACTIONS TO COVID-19 AT THE NATIONAL, STATE, AND LOCAL LEVEL

78. On January 20, 2020, the CDC confirmed the first SARS-CoV-2 virus case in the United States.¹⁵

79. On or about January 31, 2020, former President Trump signed the Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus. This Proclamation states: "The entry into the United

¹⁵ Holshue, et al., *First Case of 2019 Novel Coronavirus in the United States*, 382 New Eng. J. Med. 929, (March 5, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMoa2001191> (last visited Aug. 4, 2022).

States, as immigrants or nonimmigrants, of all aliens who were physically present within the People's Republic of China, excluding the Special Administrative Regions of Hong Kong and Macau, during the 14-day period preceding their entry or attempted entry into the United States is hereby suspended and limited subject to section 2 of this proclamation."

80. On March 11, 2020, the World Health Organization declared the COVID-19 outbreak a pandemic. On or about March 11, 2020, President Trump imposed a travel ban barring travel from the Schengen zone of Europe to the U.S. in order to slow the spread of the SARS-CoV-2 virus and COVID-19. On March 13, 2020, a national emergency was declared in the United States due to the spread of COVID-19.

81. On March 7, 2020, New York State Governor Andrew Cuomo declared a Disaster Emergency for the entire state of New York as a result of COVID-19. On March 12, 2020, the City of New York declared a state of emergency due to the threat posed by COVID-19.

82. On March 15, 2020, New York City Mayor Bill de Blasio issued Emergency Executive Order No. 99, which stated "In order to avoid mass congregation of people in public places and to reduce the opportunity for the spread of COVID-19, any large gathering or event for which attendance is anticipated to be in excess of five hundred people shall be cancelled or postponed."

83. Beginning on March 7, 2020, New York Governor Andrew Cuomo and New York City Mayor Bill DeBlasio issued a series of executive orders. Among other things, those executive orders, declared a "State disaster emergency for the entire State of New York," closed all schools, and ultimately required the closure of non-essential businesses in New York City.

84. On March 16, 2020, New York City Mayor de Blasio issued Emergency Executive Order No. 100, which stated:

WHEREAS, the risk of community spread throughout New York City impacts the life and health of the public and public health is imperiled by the person-to-person spread of COVID-19; and... WHEREAS, the reduction of opportunities for the person-to-person transmission of COVID-19 in meetings and other gatherings is necessary to combat the spread of this disease; and... WHEREAS, this order is given because of the propensity of the virus to spread person to person and also *because the virus physically is causing property loss and damage*.

Emergency Executive Order No. 100 (March 16, 2020) (attached hereto as **Exhibit C** and incorporated herein by reference) (emphasis added).

85. Mayor de Blasio's express order that the COVID-19 virus physically causes property loss and damage was an official governmental position on the novel virus's ability to cause material loss and damage to physical property.

86. Furthermore, Emergency Executive Order No. 100 was made with the intention and expectation it would be relied upon by the by the citizens and business owners of New York City.

87. Because Emergency Executive Order No. 100 stated that the COVID-19 virus physically causes property loss and damage, it was reasonable for business owners in New York to believe and expect material physical losses or damage may occur within their businesses.

88. Because it was reasonable for business owners in New York to believe and expect material physical losses or damage may occur within their businesses in light of Emergency Executive Order No. 100, it was also reasonable for New York business owners with business interruption coverage to expect such coverage would apply to physical damage or loss that occurred within the physical space of their business as a result of the presence of the COVID-19 virus.

89. Executive Order No. 100 also directed "all establishments – including restaurants, bars, cafes – that offer food or drink shall close until further notice, effective Monday, March 16, 2020 at 8:00 PM." The order allowed the restaurants to remain open only for the "sole purpose of providing take-out or delivery service, provided the establishments do no exceed fifty percent of

their occupancy or seating capacity while persons are waiting for take-out and that such persons follow social distancing protocols.” The Order additionally directed that “all entertainment venues, including those with seating capacity below 500, are hereby closed effective Monday, March 16, 2020 at 8:00 PM. Entertainment venues shall include, but not be limited to movie theatres, clubs, cinemas, theatres and concert venues.”

90. In the following months, the State of New York and New York City (like cities, counties, and states across the nation) issued a series of orders (collectively the "NY Executive Orders"). The NY Executive Orders included (but are not limited to) the following:

- New York State Executive Order #202 (March 7, 2020)
 - declared State disaster emergency.
- New York City Executive Order #98 (March 12, 2020)
 - declared State of Emergency.
- New York City Emergency Executive Order #99 (March 15, 2020)
 - limited occupancy/seating capacity to 50% for all places.
- New York State Executive Order #202.3 (March 16, 2020)
 - shut down all dine-in restaurants and bars.
 - allowed restaurants and bars to provide only take-out service.
- New York City Emergency Executive Order #100 (March 16, 2020)
 - shut down all dine-in restaurants and bars.
 - allowed restaurants and bars to provide only take-out service.
- New York State Executive Order #202.6 (March 18, 2020)
 - limited workforce to 50% for all non-essential businesses.
- New York State Executive Order #202.8 (March 20, 2020)
 - directed all non-essential workers to stay at home.
- New York City Emergency Executive Order #103 (March 25, 2020)
 - all non-essential businesses were required to reduce their in-person workforce by 100%.
 - all non-essential gatherings "of any size for any reason" were ordered to be cancelled or postponed.

- New York State Executive Order #202.41 (June 13, 2020)
 - removing closure restrictions on restaurants and bars (Phase 3 businesses) in select locations, not including New York City.
- New York City Emergency Executive Order #126 (June 18, 2020)
 - established an outdoor dining program for restaurants in New York City.
- New York State Executive Order #205 (June 24, 2020)
 - imposed a 14-day quarantine restriction on travelers coming from a high-risk state.
- New York City Emergency Executive Order #137 (August 5, 2020)
 - established travel restrictions and checkpoints for incoming travelers.
- New York City Emergency Executive Order #141 (August 18, 2020)
 - commanded that hotels question incoming guests about their travel history and refuse lodging until they can prove they have not been in a restricted state within 14 days or fill out a mandated health form.

The collected Executive Orders are herein attached as **Exhibit D** and incorporated by reference.

91. The CDC recommends that people stay at home as much as possible which includes limiting travel for only essential purposes.¹⁶

VII. THE IMPACT OF COVID AND THE CLOSURE ORDERS ON PLAINTIFFS' PREMISES AND OPERATIONS: PLAINTIFFS' PROPERTY EXPERIENCED DIRECT PHYSICAL LOSS OR DAMAGE

92. As of the filing of this lawsuit, the State of New York has over 5.8 million confirmed cases of COVID-19 and approximately 70,000 deaths as a result of COVID-19.¹⁷ The City of New York ("NYC") has almost has over 2.3 million confirmed cases of COVID-19 and over 35,000 deaths as a result of COVID-19.¹⁸

93. 9 Crosby is located at 9 Crosby Street, in Manhattan, New York, in ZIP code 10013.

¹⁶ See U.S. Centers for Disease Control and Prevention, *Travel During COVID-19* (May 3, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html> (last visited Aug. 4, 2022).

¹⁷ See Johns Hopkins University of Medicine: Coronavirus Resource Center, *New York State Overview*, <https://coronavirus.jhu.edu/region/us/new-york> (last visited Aug. 4, 2022).

¹⁸ See New York City Department of Health, *COVID-19: Data*, <https://www1.nyc.gov/site/doh/covid/covid-19-datatotal.page> (last visited Aug. 4, 2022).

94. ZIP code 10013 encompasses just over 0.5 sq/mi, and is home to over 27,000 NYC residents. The neighborhood is home to many bars and restaurants, entertainment venues, and schools to accommodate its residential population.

95. The neighborhood also boasts an active non-resident and tourist population. 9 Crosby is located directly between New York's SoHo and Chinatown neighborhoods, among the most visited neighborhoods in New York by tourists and sightseers alike. The neighborhood is home to world renowned street food, art museums, and retail shopping.

96. According to the New York City Department of Health, the known range for COVID-19 cases in ZIP code 10013 as of March 31, 2020 was already 112-182, with 38,936 total cases in NYC.¹⁹

97. Due to COVID-19 and the Executive Orders, 9 Crosby closed the hotel restaurant and severely reduced capacity in its hotel in mid-March of 2020.

98. 260-261 Madison is located at both 260 Madison Avenue and 261 Madison Avenue, Manhattan, New York in ZIP code 10016. Plaintiff 260-261 Madison's properties each house 40 commercial units, housing 5 total retail operations, 32 office suites, and four commercial operations. The units range in size from 500 square feet to over 115,000 square feet.

99. ZIP code 10016 encompasses just over 0.5 sq/mi, and is home to over 54,000 NYC residents. The neighborhood is home to many bars and restaurants, entertainment venues, and schools to accommodate its residential population.

100. According to the New York City Department of Health, the known range for COVID-19 cases in ZIP code 10016 as of March 31, 2020 was already 182-306, with 38,936 total cases in NYC.²⁰

¹⁹ See n. 18, *supra*.

²⁰ *Id.*

101. 260-261 Madison is located in the heart of Manhattan. It sits only four blocks from Grand Central Terminal and six blocks from the Empire State Building. Madison Avenue itself is a world-famous thoroughfare running the length of the island of Manhattan and hosting flagship locations of some of the finest luxury retail brands in the world.

102. 260-261 Madison is also located five blocks from Mount Sinai Beth Israel Hospital, which has been “on the forefront of the fight against COVID-19” and has “helped large numbers of people recover from the virus.”²¹ COVID-19 has been present at Mount Sinai and other healthcare facilities in the vicinity, and has caused physical damage to those properties since at least March 2020. The Executive Orders were issued, at least in part, in response to the dangerous physical conditions and damage at Mount Sinai and other hospitals, and to prevent further damage at those hospitals.

103. There have been numerous and obvious structural alterations, changes, and/or repairs made by Plaintiffs in an effort to resume operations after experiencing direct property damage caused by COVID-19 and to avoid imminent threat of further property damage.

104. The coronavirus is ubiquitous—it has spread throughout Manhattan, New York, and all fifty states. Some individuals carry it with no symptoms, and it cannot be visibly detected on surfaces, despite its physical presence, and can remain on surfaces for weeks.

105. The prolonged prevalence of COVID-19 in the areas surrounding and encompassing Plaintiffs’ properties made it unavoidable that individuals with COVID-19 or otherwise carrying the coronavirus, including employees, visitors, trade workers, patrons, guests, and business visitors, would be physically present at Plaintiffs’ properties since the earliest days of the pandemic.

²¹ *Coronavirus (COVID-19) Facts and Resources*, Mt. Sinai Hosp., <https://www.mountsinai.org/about/covid19>. (last visited Aug. 9, 2022)

106. The coronavirus and the fomites, droplets, and droplet nuclei carrying it are dangerous physical substances that have a material, tangible existence on Plaintiffs' properties.

107. COVID-19 caused physical loss of and/or damage to Plaintiffs' properties by, among other things, destroying, distorting, corrupting, attaching to, and physically altering property, including their surfaces, and by rendering property unusable, uninhabitable, unfit for intended function, dangerous, and unsafe. COVID-19 has caused such physical loss of and/or damage to Plaintiffs' properties, as described further below.

108. When the coronavirus and COVID-19 attached to and adhered on surfaces and materials of Plaintiffs' properties, they became a part of those surfaces and materials, converting the surfaces and materials to fomites.²² This represents a physical change in the affected surface or material, which constitutes physical loss or damage.

109. The presence of COVID-19 at Plaintiffs' properties caused physical loss of and damage to said property by necessitating remedial measures to reduce or eliminate the presence of cases of COVID-19 and the coronavirus on-site.

110. The presence of the virus at Plaintiffs' properties, whether circulating or stagnant, changed the object, surface, or premises, in that they have become dangerous to handle and/or enter, and cannot be used without remedial measures. Their use can only be restored with remedial action and sufficient time for the contaminated air to be evacuated, as suggested by infectious disease experts.

111. The presence of cases of COVID-19 at a Plaintiffs' properties caused physical loss of or damage to the premises rendering a property that is usable and safe for humans into a property

²² See n. 5, *supra*.

that, absent remedial measures, is unsatisfactory for use, uninhabitable, unfit for their intended function, and extremely dangerous and potentially deadly for humans.

112. In addition, the presence of COVID-19 on Plaintiffs' properties created an imminent threat of further damage to those properties or to nearby property. Individuals who come into contact, for example, with respiratory droplets at one location in the building by touching a fixture, pressing an elevator button, or gripping a handrail, will carry those droplets on their hands and deposit them elsewhere in the building, causing additional damage and loss.

113. Even frequent cleanings cannot be assumed to have eliminated the coronavirus from a premises, given the coronavirus's ability to spread easily and quickly as long as people are entering the premises during an outbreak at or near the premises. It is clear from the epidemiological trajectory of the outbreaks in the U.S. and other countries that even expensive new cleaning measures cannot completely eliminate viral presence once the virus binds to and adheres to surfaces.

114. Many hotels, bars, restaurants, retail and commercial locations and properties, including The NoMo SoHo Hotel, 260 Madison Avenue and 261 Madison Avenue, experienced extensive direct physical loss and damage due to COVID-19.

VIII. THE INSURANCE COVERAGE PURCHASED BY PLAINTIFFS

115. To protect their businesses against property damage or business interruptions, on or about November 17, 2019, Plaintiffs entered into a contract of insurance with the CNA Defendants bearing Policy Number 6023308691, naming Plaintiff SFM, Plaintiff 9 Crosby, and Plaintiff 260-261 Madison as named insureds and/or additional insureds under the Insurance Policy.

116. The policy period for the Insurance Policy for Policy No. 6023308691 is November 17, 2019 through November 17, 2020.

117. Plaintiff 9 Crosby and Plaintiff 260-261 Madison are listed as the “Named Insured” under the CNA Policy, reflected on page 1 of 3 of the Insurance Policy’s Policy Declarations as well as page 4 of 37 of the Insurance Policy.

118. The relevant policy limits under the Insurance Policy are: (a) \$500,000,000 “subject to a maximum limit any one occurrence”; (b) \$110,621,000 for “Blanket Business Interruption (Gross Earnings); (c) \$1,000,000 for “Denial of Access by Civil Authority / Ingress – Egress”; (d) \$1,000,000 for “Extra Expense”; and (e) \$2,500,000 for “Ordinance or Law: Business Interruption, Extra Expense, or Rental Value” as outlined in Section I. DECLARATIONS, 4. **LIMITS OF LIABILITY** of the Insurance Policy.

119. The relevant time limit for “Business Interruption Period of Indemnity” is: “Twelve (12) Months,” but per the Special Conditions of the Additional Remarks Schedule for Plaintiff 9 Crosby, that time limit is extended to “Eighteen (18) Months.” The relevant time limit for “Denial of Access by Civil Authority / Ingress – Egress is “Thirty (30) Days.”

120. As outlined in Section II. COVERGE, this Insurance Policy “insures against risks of direct physical loss of or damage to property and/or interests described herein at covered *Locations*,” “[e]xcept as hereafter excluded and subject to the **LIMITS OF LIABILITY**.”

121. The Insurance Policy defines “Location” as the “area within legal boundaries of the premises, or of the portion of the premises, in which the Insured has an interest.”

122. The Insurance Policy defines “Covered Property and Related Interests” to include:

a. The interest of the Insured in all real and personal property owned or used by the Insured, or hereafter erected, installed, or acquired, including while in course of building, erection, installation, and assembly, and including interest in **Improvements and Betterments**.

In the event of loss or damage, the Company agrees to accept and consider the Insured as sole and unconditional owner of **Improvements and Betterments**, notwithstanding any contracts or leases to the contrary.

b. The interest of the Insured in the real and personal property of others in the Insured's care, custody and control, and the Insured's liability imposed by law or assumed by contract for physical loss or damage to such property.

c. Personal property to the Insured's officers and employees while at **Locations** of the Insured, or within one thousand (1,000) feet thereof.

123. Plaintiffs' properties, as well as the food, beverage, and retail services located within those properties, are Covered Locations as defined above.

124. The Insurance Policy contains no exclusions that would apply to, preclude, or limit coverage for Plaintiffs' losses. None of the exclusions applicable to the Insurance Policy's Coverage Part refer to viruses, communicable diseases, or pandemics.

1. Business Interruption (Gross Earnings)

125. The Insurance Policy includes coverage to insure against "Time Element" loss.

126. Paragraph B. of Time Element, **BUSINESS INTERRUPTION (GROSS EARNINGS)** coverage states:

a. This policy covers against loss resulting from necessary interruption of business caused by direct physical loss of or damage to covered property, except **Finished Stock**, by the peril(s) insured against and occurring during the term of this policy at covered **Locations** occupied by the Insured, subject to the sublimit specified in Section I.4. of this policy.

In the event such physical loss or damaged the Company shall be liable for the actual loss sustained by the Insured resulting directly from such interruption of business, but not exceeding the reduction in **Gross Earnings** as set forth below less charges and expenses which do not necessarily continue during the interruption of business, for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such part of the property herein described as has been damaged or destroyed, commencing with the date of such damage or destruction and not limited by the date of expiration of this policy, but in no event to exceed the number of months specified in Section **I.5. TIME LIMITS** if a Business Interruption Period of Indemnity limit is specified.

b. Determination of Gross Earnings:

- (1) Manufacturing **Locations**: **Gross Earnings** are the sum of:
 - (a) Total net sales value of production;
 - (b) Total net sales of **Merchandise**; and

- (c) Other earnings derived from operations of the business; Less the cost of:
 - (d) **Raw Stock** from which production is derived;
 - (e) Supplies consisting of materials consumed directly in the conversion of such **Raw Stock** into **Finished Stock** or in supplying the service(s) sold by the Insured;
 - (f) **Merchandise** sold, including packaging materials therefore;
 - (g) Services(s) purchased from outsiders (not employees of the Insured) for resale which do not continue under contract;
 - (h) Ordinary Payroll expense (the entire payroll expense for all employees of the insured, except officers, executives, department managers and employees under contract) beyond the number of days included in Section **I.5.** of this policy;
 - (i) Depreciation Expense for any asset destroyed by perils insured hereunder; and
 - (j) Other Discontinued Expenses meaning any other operating expenses discontinued as a result of the direct physical loss or damage caused by peril(s) insured against.
- (2) Mercantile & Non-Manufacturing **Locations**: **Gross Earnings** are the sum of:
- (a) Total net sales; and
 - (b) Other earnings derived from operations of the business; Less the cost of:
 - (c) **Merchandise** sold, including packaging materials therefore;
 - (d) Materials and supplies consumed directly in supplying the service(s) sold by the Insured;
 - (e) Services(s) purchased from outsiders (not employees of the Insured) for resale which do not continue under contract; and
 - (f) Depreciation Expense for any asset destroyed by perils insured hereunder;
 - (g) Ordinary Payroll expense (the entire payroll expense for all employees of the insured, except officers, executives, department managers and employees under contract) beyond the number of days included in Section **I.5.** of this policy; and
 - (h) Other Discontinued Expenses meaning any other operating expenses discontinued as a result of the direct physical loss or damage caused by a peril insured against.

127. As a result of COVID-19, Plaintiffs have sustained direct physical loss of or damage to property of the type insured under the Insurance Policy: (a) to property (i.e., Real and Personal Property at the covered Locations) described in the Insurance Policy and not otherwise excluded by the Insurance Policy; (b) that Plaintiffs used; (c) is located at covered Locations; and (d) occurred during the Periods of Liability. In fact, as a result of COVID-19 and the direct physical loss of or damage to the properties beginning in mid-March 2020, Plaintiffs ceased normal hotel, restaurant, bar, and retail service operations, lost scheduled bookings for social/celebratory events and group business events, and lost substantial income from the loss of monthly rents from property tenants. To date, Plaintiffs continue to suffer losses as a result of business interruptions related to COVID-19 and the resulting direct physical loss of or damage to their properties (i.e. reduced occupancy, drops in revenue from food, beverage, retail and monthly tenant rental payments). Therefore, Plaintiffs have suffered Time Element losses, which are covered under the **BUSINESS INTERRUPTION (GROSS EARNINGS)** coverage of the Insurance Policy.

128. As a result of COVID-19 and the direct physical loss of or damage to property caused thereby, Plaintiffs have been: (a) wholly or partially prevented from continuing business operations or services (i.e., operating the hotel, commercial property, and other related dining, beverage and retail services); (b) unable to make up lost production within a reasonable period of time; (c) unable to continue such operations or services (i.e., operating its hotel, commercial property, and other related dining, beverage and retail services) during the Period of Liability; and (d) able to demonstrate a loss of sales for the operations or services prevented as well as receipt of monthly tenant rentals. Therefore, Plaintiffs are entitled to coverage for their losses under the **BUSINESS INTERRUPTION (GROSS EARNINGS)** provision of the Insurance Policy.

2. Denial Of Access By Civil Authority And Ingress-Egress

129. Paragraph C.10. of ADDITIONAL COVERAGES, COVERAGE EXTENSIONS AND LIMITATIONS states:

10. DENIAL OF ACCESS BY CIVIL AUTHORITY AND INGRESS EGRESS

This policy is extended to cover for up to the time limit specified in Section I.5. but not exceeding the sublimit shown in Section I.4. of this policy, the actual loss sustained:

- a. during the period of time while access to the Insured's Location is prohibited by order of civil authority, but only when such order is given as a direct result of physical loss or damage to property of the type insured from a peril insured against occurring at or in the immediate vicinity of said Location; or
- b. during the period of time when as a direct result of physical loss or damage to property of the type insured from a peril insured against, ingress to or egress from the Insured's Location is thereby physical prevented.

130. Plaintiffs have sustained losses as a result of direct physical loss of or damage to their insured property that are not excluded in the Insurance Policy. In addition, the Civil Authority Orders have impaired access to the Plaintiffs' properties as well as access to restaurants, bars and retail locations at or near Plaintiffs' properties. Accordingly, Plaintiffs are entitled to coverage for its losses under the DENIAL OF ACCESS BY CIVIL AUTHORITY AND INGRESS-EGRESS provision.

131. Further, Plaintiffs incurred costs, expenses, and losses to mitigate the spread of COVID-19 in response to the Civil Authority Orders.

3. Extra Expense

132. Paragraph C.15. of ADDITIONAL COVERAGES, COVERAGE EXTENSIONS AND LIMITATIONS states:

15. EXTRA EXPENSE

The Company will pay for the reasonable and necessary extra expense, as hereinafter defined, incurred by the Insured in order to continue as nearly as practicable the normal operation of the Insured's business following direct physical loss of or damage to covered property by perils(s) insured against.

In the event of such physical loss or damage, the Company shall be liable for such reasonable and necessary extra expense incurred for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such part of the property as has been damaged, commencing with the date of damage and not limited by the date of expiration of this policy, subject to the sublimit specified in Section **I.4.** of this policy.

133. Plaintiffs have incurred reasonable and necessary extra expenses to temporarily continue as nearly normal as practicable the providing of hotel, restaurant/bar/retail, and tenant and management services within the properties at the covered Locations. Plaintiffs' losses and **EXTRA EXPENSE** incurred were a direct result of the direct physical loss of or damage to the covered Locations. None of the **EXTRA EXPENSE** Exclusions apply. As a result, Plaintiffs are entitled to coverage for the extra costs and expenses under the **EXTRA EXPENSE** provision of the Insurance Policy.

4. Ordinance Or Law, Demolition Cost, And Increased Cost Of Construction

134. Paragraph **C.23.** of **ADDITIONAL COVERAGES, COVERAGE EXTENSIONS AND LIMITATIONS** states:

23. ORDINANCE OR LAW, DEMOLITION COST, AND INCREASED COST OF CONSTRUCTION

In the event of physical loss or damage covered hereunder that causes the enforcement of any law or ordinance in effect at the time of loss regulating the construction, repair or use of the damaged building(s), this Company shall be liable for:

- a. The value of the undamaged portion of the damaged building(s) that must be demolished;

b. The cost of demolishing the undamaged portion of the damaged building(s) that must be demolished because of such law or ordinance, including the cost of clearing the site;

c. The increased cost of repair or reconstruction of the damaged and undamaged portion of the damaged building(s) on the same site or another site, but limited to the costs that would have been incurred in order to comply with the minimum requirements of such law or ordinance regulating the repair or reconstruction of the damaged building(s) on the same site; and

d. The increased loss or costs for business interruption, extra expense or rental value arising out of the additional time required to comply with said law or ordinance.

135. Moreover, the Loss Conditions section of the Insurance Policy at issue required that Plaintiffs protect their properties from further loss or damage and maintain the properties in the best possible order. In other words, the remedial efforts alleged above which were undertaken by Plaintiffs in response to the physical loss of or damage to their properties were also part of Plaintiffs' mitigation obligations under the policy.

136. If Plaintiffs had not closed, altered, or remediated their hotel, properties, and operations, COVID-19 would have remained in and on Plaintiffs' property. By suspending and reducing operations, Plaintiffs avoided actual and imminent covered property damage, as well as potential third party claims.

137. Plaintiffs have sustained losses and increased costs of repair as a result of direct physical loss of or damage to the covered Locations caused by COVID-19. Plaintiffs have sustained increased loss or costs for business interruption and extra expense arising out of the additional time required to comply with laws and ordinances that required Plaintiffs to increase their costs in the form of personal protective equipment, increased cleaning/sanitary procedures, and the installation and maintenance of HEPA filters at the covered Locations.

138. Accordingly, Plaintiffs are entitled to coverage for its losses under the **ORDINANCE OR LAW, DEMOLITION COST, AND INCREASED COST OF CONSTRUCTION** provision.

IX. PLAINTIFFS' CLAIM FOR COVERAGE

139. COVID-19 was present at Plaintiffs' property in various ways including: (1) respiratory droplets in the air at or surrounding the insured property, (2) on the surface of objects or tangible things at the insured property, and (3) in persons infected with the disease such as customers, employees, and service providers who are at or in proximity to the insured properties and objects or tangible things located at or near the insured properties. In effect, COVID-19 is pervasively present and ubiquitous at any time and in any place where real or personal property is located or where people are or can be.

140. In fact, Plaintiff 260-261 Madison had multiple operational staff members test positive for COVID-19. Plaintiff 9 Crosby hosted at least one hotel guest who tested positive for COVID-19. Upon information and belief, a number of employees and other hotel guests have tested positive for COVID-19 on the premises.

141. When individuals carrying the coronavirus breathe, talk, cough, or sneeze, they expel aerosolized droplet nuclei that remain in the air and, like dangerous fumes, make the premises unsafe and affirmatively dangerous. In addition, the coronavirus physically alters the air. Air inside buildings that was previously safe to breathe but can no longer safely be breathed due to coronavirus and COVID-19 has undergone a physical alteration.

142. Coronavirus droplets have been conveyed from infected persons (whether symptomatic, pre-symptomatic, or asymptomatic) to solid surfaces, including but not limited to furniture, doors, floors, bathroom facilities, equipment, and supplies, and into the air and HVAC

system at Plaintiffs' properties, causing damage and alteration to physical property and ambient air at the premises. Aerosolized coronavirus has entered the air on Plaintiffs' properties.

143. The presence of coronavirus and COVID-19, including but not limited to coronavirus droplets or nuclei on solid surfaces and in the air at insured Locations, has caused and will continue to cause direct physical damage to physical property and ambient air at the premises. Coronavirus, a physical substance, has attached and adhered to Plaintiffs' hotel, commercial rental spaces, and the surfaces therein, and by doing so, altered that property. Such presence has also directly resulted in loss of functionality of that property.

144. In mid to late March 2020, Plaintiffs' property was forced to close and cease normal business operations as a result of the direct physical loss of or damage to said property caused by COVID-19, the NY Executive Orders, the CDC's travel recommendations, former President Trump's travel orders, the Civil Authority Orders, and/or other states' stay-at-home orders. All bookings at the Plaintiff 9 Crosby's hotel were cancelled, and the restaurant, bar, and other retail services were temporarily unable to conduct business. They were further forced to cancel all previously booked/scheduled events and could not accept future bookings or reservations. Moreover, Plaintiff 260-261 Madison experienced a sudden drop in revenue as a result of tenants being unable to conduct business and pay the monthly rents owed due to COVID-19, shutdown orders, and stay-at-home orders.

145. As a result of the direct physical loss of and damage to property caused by COVID-19, the coronavirus pandemic and directly resulting business interruption, the NY Executive Orders, the CDC's travel recommendations, former President Trump's travel orders, the Civil Authority Orders, and/or other states' stay-at-home orders, Plaintiffs have sustained significant losses and expenses and will continue to do so.

146. The physical losses to Plaintiffs' hotel and commercial rental space include without limitation the rendering of the properties from a satisfactory state to a state dangerous and/or unsatisfactory for use because of the fortuitous presence and effect of the coronavirus, fomites, and respiratory droplets or nuclei directly upon those properties.

147. Physical losses to Plaintiffs' hotel and commercial rental spaces include without limitation the physical loss of the ability to use covered Locations for their primary function.

148. The presence of COVID-19 caused direct physical loss of or damage to covered Locations under the Policy by: (i) causing direct physical loss of or damage to Covered Locations; (ii) denying use of and damaging the Covered Locations; (iii) requiring physical repair and/or alterations to the Covered Locations; (iv) and/or by causing a necessary interruption of business during a period of liability.

149. On or about March 27, 2020, Plaintiffs submitted a claim to the CNA Defendants for coverage under the Insurance Policy.

150. Following Plaintiffs providing extensive information related to Plaintiffs' closures, interruptions to businesses, property loss and damage, the applicable shutdown orders and restrictions, and resulting financial losses and damages suffered by the Plaintiffs as a result of COVID-19, the CNA Defendants issued a denial letter dated February 10, 2021 in which they refused to provide coverage to any of the Plaintiffs under the Insurance Policy. Moreover, upon information and belief, the CNA Defendants have granted no coverage to other hotels and/or businesses in New York City related to COVID-19 and the resulting NY Executive Orders, the CDC's travel recommendations, former President Trump's travel orders, the Civil Authority Orders, and/or other states' stay-at-home orders.

IX. PLAINTIFFS' CAUSES OF ACTION

COUNT ONE (DECLARATORY RELIEF)

151. Plaintiffs hereby adopt and incorporate as if fully re-written herein all the allegations set forth in paragraph 1 through 150 of this Complaint.

152. Plaintiffs seek a declaration of the parties' rights and duties under the Insurance Policy pursuant to 735 ILCS § 5/2-701.

153. Under "§ 2-701 Declaratory Judgments" in Illinois Statutes Chapter 735 on Civil Procedure et seq., the court:

may, in cases of actual controversy make binding declarations of rights, having the force of final judgements, whether or not any consequential relief is or could be claimed, including the determination, at the instance of anyone interested in the controversy, of the construction of any statute, municipal ordinance, or other governmental regulation, or of any deed, will, contract or other written instrument, and a declaration of the rights of the parties interested.²³

154. An actual, present, and justiciable controversy has arisen between Plaintiffs and the CNA Defendants concerning Defendants' contractual duties to indemnify Plaintiffs' claims for time element losses, property losses, and other losses, costs, and expenses under the Insurance Policy.

155. The controversy between Plaintiffs and the CNA Defendants is ripe for judicial review.

156. The controversy is of sufficient immediacy to justify the issuance of declaratory relief.

157. Plaintiffs have suffered, and continue to suffer, a covered loss under the terms of the Insurance Policy and are entitled to coverage for their losses pursuant to the coverage

²³ 735 ILCS 5/2-701 (2021)

provisions of the Insurance Policy. No valid and/or applicable exclusion exists in the Insurance Policy to deny coverage. Upon information and belief, the CNA Defendants will deny Plaintiffs' claims without legal or factual basis for doing so.

158. Plaintiffs are the named insured under the Insurance Policy. As such, Plaintiffs are entities 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.

159. Plaintiffs allege that:

- a. The Insurance Policy's coverage provisions are triggered by the facts set forth herein;
- b. COVID-19 causes direct physical loss of or damage to properties, including the covered Locations, within the meaning of the Insurance Policy;
- c. Plaintiffs have satisfied or been excused from satisfying, or the CNA Defendants have waived or are estopped from enforcing, all conditions precedent under the Insurance Policy;
- d. Plaintiffs are entitled to coverage under the Insurance Policy for their business income losses and extra expenses arising out of the interruption and closure of business as a result of COVID-19 at or near the covered Locations;
- e. Plaintiffs are entitled to coverage under the Insurance Policy for their losses caused by the Civil Authority Orders which limited, restricted, or prohibited access to the covered Locations as a result of COVID-19 at the covered Locations;
- f. Plaintiffs have sustained increased loss or costs for business interruption and extra expense arising out of the additional time required to comply with the Civil Authority Orders that required Plaintiffs to increase their costs and expenses;
- g. Plaintiffs are entitled to coverage under the Insurance Policy for actual loss sustained to prevent and costs incurred to temporarily protect against actual or impending direct physical loss of or damage to the covered Locations;
- h. Plaintiffs have incurred reasonable and necessary extra expenses to temporarily continue normal business, to the extent possible, at the covered Locations following the direct physical loss of or damage to property of the type insured by the Insurance Policy;

- i. No exclusions in the Insurance Policy apply to preclude or limit coverage for Plaintiffs' claims;
- j. The CNA Defendants are liable to pay and indemnify Plaintiffs up to the coverage limits of the Insurance Policy for all costs, losses and liabilities associated with the covered losses under the Insurance Policy;
- k. Plaintiffs are entitled to costs and expenses in connection with this action, including but not limited to, reasonable attorneys' fees and pre-and post-judgment interest; and
- l. Plaintiffs are entitled to any such other and further relief as this Court finds just and proper.

WHEREFORE, Plaintiffs SFM Realty, Corp., 9 Crosby, LLC a/k/a NoMo SoHo Hotel, and 260-261 Madison Avenue, LLC a/k/a 260-261 Madison Avenue, respectfully request that this Court, pursuant to 735 ILCS 5/2-701, declare in Plaintiffs' favor and against the CNA Defendants, as follows:

- a. The Insurance Policy's coverage provisions are triggered by the facts set forth herein;
- b. COVID-19 causes direct physical loss of or damage to properties, including the covered Locations, within the meaning of the Insurance Policy;
- c. Plaintiffs have satisfied or been excused from satisfying, or the CNA Defendants have waived or are estopped from enforcing, all conditions precedent under the Insurance Policy;
- d. Plaintiffs are entitled to coverage under the Insurance Policy for their business income losses and extra expenses arising out of the interruption and closure of business as a result of COVID-19 at or near the covered Locations;
- e. Plaintiffs are entitled to coverage under the Insurance Policy for their losses caused by the Civil Authority Orders which limited, restricted, or prohibited access to the covered Locations as a result of COVID-19 at the covered Locations;
- f. Plaintiffs have sustained increased loss or costs for business interruption and extra expense arising out of the additional time required to comply with the Civil Authority Orders that required Plaintiffs to increase their costs and expenses;
- g. Plaintiffs are entitled to coverage under the Insurance Policy for actual loss sustained to prevent and costs incurred to temporarily protect against actual or impending direct physical loss of or damage to the covered Locations;

- h. Plaintiffs have incurred reasonable and necessary extra expenses to temporarily continue normal business, to the extent possible, at the covered Locations following the direct physical loss of or damage to property of the type insured by the Insurance Policy;
- i. No exclusions in the Insurance Policy apply to preclude or limit coverage for Plaintiffs' claims;
- j. The CNA Defendants are liable to pay and indemnify Plaintiffs up to the coverage limits of the Insurance Policy for all costs, losses and liabilities associated with the covered losses under the Insurance Policy;
- k. Plaintiffs are entitled to costs and expenses in connection with this action, including but not limited to, reasonable attorneys' fees and pre-and post-judgment interest; and
- l. Plaintiffs are entitled to any such other and further relief as this Court finds just and proper.

COUNT TWO (BREACH OF CONTRACT)

160. Plaintiffs hereby adopt and incorporate as if fully re-written herein all the allegations set forth in paragraphs 1 through 159 of this Complaint.

161. Plaintiffs submitted a claim for coverage under the Time Element: Business Interruption (Gross Earnings), Denial of Access by Civil Authority and Ingress-Egress, Extra Expense, Ordinance or Law, and related provisions of the property Insurance Policy ("Coverage Provisions") for the direct physical loss of or damage to their property, and resulting expenses, caused by COVID- 19 and the losses, damages and expenses caused by the NY Executive Orders, the CDC's travel recommendations, former President Trump's travel orders, the Civil Authority Orders, and/or other states' stay-at-home orders.

162. Plaintiffs are entitled to coverage for their losses, damages and expenses under the applicable Coverage Provisions.

163. The CNA Defendants have expressly denied, or denied by operation on applicable law, Plaintiffs' claims for coverage under the Coverage Provisions.

164. Plaintiffs are entitled to recover their incurred costs, expenses, and losses to mitigate the spread of COVID-19 in complying with Civil Authority Orders, which are covered under the Insurance Policy.

165. The CNA Defendants have expressly denied, or denied by operation of applicable law, Plaintiffs' claim for costs, expenses, and losses to mitigate the spread of COVID-19 in complying with Civil Authority Orders.

166. Plaintiffs have substantially performed all required conditions precedent under the Insurance Policy, such provisions have been waived by the CNA Defendants, or the CNA Defendants are estopped from asserting them.

167. By denying such coverage as outlined herein, the CNA Defendants have materially breached the Insurance Policy.

168. As a direct and proximate result of the CNA Defendants' breaches of the Insurance Policy, Plaintiffs have been damaged in an aggregate amount in excess of \$50,000.00, the exact amount to be proven at trial.

WHEREFORE, Plaintiffs respectfully pray that the Court enter a judgment in their favor and against the CNA Defendants on the breach of contract claim set forth above in Count One and award Plaintiffs:

- a. compensatory and general damages in an amount to be proven at trial, including consequential damages;
- b. attorney fees and costs incurred in obtaining the benefits under the Insurance Policy;
- c. pre-judgment and post-judgment interest at the maximum legal rate; and
- d. such other and further relief as this Court finds just and proper.

XI. DEMAND FOR TRIAL BY JURY

Plaintiffs demand a jury trial on all issues and claims so triable.

Respectfully Submitted,

GAUTHIER MURPHY & HOUGHTALING LLC

/s/ Perrey S. Lee
Counsel for Plaintiff SFM Realty, Corp.

TANNEN LAW GROUP, P.C.

/s/ Michael M. Tannen
Local Counsel for Plaintiff SFM Realty, Corp.

Perrey S. Lee (*to be admitted Pro Hac Vice*²⁴)
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²⁴ Ms. Lee's application for *pro hac* admission will be filed soon after the clerk of the circuit court assigns a case number.