IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

BAYLOR SCOTT & WHITE HOLDINGS	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. _____
	§	
FACTORY MUTUAL INSURANCE COMPANY	§	
	§	
	§	
Defendant.	§	

PLAINTIFF'S ORIGINAL COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, Baylor Scott & White Holdings ("Baylor") files this Original Complaint against Defendant Factory Mutual Insurance Company ("FM") and respectfully shows the Court as follows:

I. INTRODUCTION

1. This is an insurance dispute arising out of FM's failure to fulfill its coverage obligations to Baylor under its property and business interruption insurance policy. Despite agreeing to cover Baylor for "all risks" of physical loss or damage to covered property unless specifically excluded, FM refuses to honor its insurance policy sold to Baylor and cover Baylor for its over $192 million in business interruption loss associated with the SARS CoV-2 coronavirus ("Coronavirus") and its resulting disease, COVID-19 (collectively, "COVID-19"). Baylor's significant losses are covered under the FM policy and FM should be required to pay for those losses.

2. Due to the physical structure of the Coronavirus, including the spikes or clubs protruding from the virus's spherical casing, depending on the physical/chemical composition of the reactant surface, the Coronavirus chemically or ionically bonds with solids and particulate

matter suspended in ambient air, resulting in a physical alteration of property. The Coronavirus does not simply gravitationally rest on property surfaces, as originally thought, but materially bonds with air and property, which is physically changed by its interaction with the Coronavirus.

3. Since early 2020, the COVID-19 pandemic has infected employees and patients at Baylor, who have shed the Coronavirus through talking, sneezing, coughing, or breathing into the ambient air and on the surface of solid materials, such as stainless steel, wood, plastic, fabrics, and glass, within the premises of Baylor's facilities.

4. The spread of the Coronavirus through suspended particulate matter in the air and the infestation of property surfaces has caused physical loss and damage to Baylor's facilities. As a result of this physical loss and damage to its properties, Baylor has lost over $192 million in revenue.

5. The policy is an "all risk" property policy and covers all losses except those excluded. There is no policy exclusion which applies to limit coverage for losses caused by the Coronavirus and COVID-19.

6. Additionally and without limitation, the Policy also provides a "coverage extension" beyond business interruption coverage that provides Baylor additional lost income coverage during the Policy's "Extended Period of Liability." This coverage provides additional coverage continuing past the business interruption period until such time as Baylor's business can be restored, up to the Policy's maximum 180-day limit. Baylor remains unable to restore its facilities to a pre-Covid condition even today and is entitled to this additional coverage under the Policy.

7. Notwithstanding the Policy's broad "all risk" coverage, the coverage extension for the "Extended Period of Liability," and the prevailing science around the spread of COVID-

19 and the interaction of the Coronavirus with both air and property, FM has refused to cover Baylor's losses, except those under its limited Interruption by Communicable Disease coverage. But the Interruption by Communicable Disease provision expressly states that it is a coverage "extension," and FM sold this additional product as an "enhancement" to what the base policy form already covered as **communicable disease**. This coverage does not operate to limit the general business interruption coverage or Extended Period of Liability coverage provided under the policy when the disease causes physical loss or damage to property.

8. Baylor has accordingly brought this lawsuit against FM to recover its covered loss of income and related relief through claims for (1) breach of contract, (2) violations of Texas' Prompt Payment of Claims statute, Chapter 542 of the Texas Insurance Code, and (3) attorneys' fees.

II. PARTIES

9. Baylor is a company organized and existing under Texas law with its principal place of business in Dallas, Texas.

10. FM is a corporation organized under the laws of the state of Rhode Island with its principal place of business in Johnston, Rhode Island. FM is a foreign insurer that conducts business within the state of Texas, including through the issuance of the policy at issue. FM may be served with process by serving its registered agent, CT Corporation System, at 1999 Bryan Street, Suite 900, Dallas, Texas 75201-3136.

III. JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction over this matter under 28 U.S.C. § 1332 because the amount in controversy exceeds $75,000 exclusive of interest and costs, and complete diversity of citizenship exists.

12. This Court has personal jurisdiction over FM pursuant to the Texas long-arm statute because FM has submitted to the jurisdiction in this state by conducting business in this state, insuring property located in this state, and making a contract substantially connected with Texas.

13. Venue is proper in this District under 28 U.S.C. § 1391(b)(2) because a substantial portion of the events and omissions giving rise to the claims and losses at issue occurred within the District, including but not limited to FM's adjustment and denial of the Claim.

14. Venue is also proper in this District under 28 U.S.C. § 1391(b)(1) because FM resides in and is subject to personal jurisdiction in this district.

IV. FACTUAL BACKGROUND

A. Baylor Purchased "All Risk" Coverage from FM to Cover Its Entire Network of Hospitals and Healthcare Facilities.

15. Baylor is the largest not-for-profit health system in the state of Texas, serving more than three million Texans through 51 hospitals and more than 1,100 facilities, including flagship academic medical centers in Dallas, Fort Worth, and Temple.

16. FM is an insurance company that sold an "all risk" property insurance policy to Baylor, which provides coverage against "ALL RISKS OF PHYSICAL LOSS OR DAMAGE" except as specifically excluded for the period from November 1, 2019 to November 1, 2020 (the "Policy"). Ex. A (Policy at COMPLAINT_000008).

17. The Policy covers all of Baylor's scheduled locations. *See* Ex. A (Policy at COMPLAINT_000079-000117). These locations are referred to herein as "Baylor Facilities."

18. The Policy also insures and covers Baylor's business income losses and extra expense (identified as "Time Element" losses in the Policy) at all Baylor Facilities resulting from

either "physical loss or damage" of the type insured, up to the policy's $1.5 billion limit Ex. A (Policy at COMPLAINT_000009, 000043).

19. In addition to general Time Element coverage, the Policy also includes several "Time Element Coverage Extensions" which include, without limitation, Baylor's "Extended Period of Liability." Ex. A (Policy at COMPLAINT_000062). This coverage extension is unique and different than the general business interruption coverage. It begins when the business interruption coverage period ends and continues "for an additional length of time as would be required with the exercise of due diligence and dispatch to restore [Baylor's] business to the condition that would have existed had no loss happened," up to 180-days.[1]

20. Physical loss or damage caused by **communicable disease**[2]**—**including the Coronavirus and COVID-19—is physical loss and/or physical damage of the type insured under the Policy because the Policy is an "all risks" policy and no exclusions apply to exclude **communicable disease**.

21. The Policy defines **communicable disease** as "a disease which is . . . transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges."

22. As used in the Policy, the term "physical loss" is separate, distinct, and has an independent meaning from the term "damage."

23. The Policy does not define the term "physical."

24. The Policy does not define the term "physical loss."

25. The Policy does not define the term "damage."

26. The Policy does not define the phrase "physical loss or damage."

[1] Ex. A (Policy, at COMPLAINT_000062, 000011).
[2] Terms in **bold** are defined in the Policy.

27. When undefined, the terms and phrase "physical loss or damage" is susceptible to more than one reasonable interpretation.

28. When the undefined terms and phrase "physical loss or damage" is susceptible to more than one reasonable interpretation, it must be construed against the insurer, FM.

B. COVID-19 Is a Deadly Disease that Causes Physical Loss and Damage to Property.

29. A pneumonia of unknown origin was first reported to the World Health Organization ("WHO") on December 31, 2019.[3] China provided the genetic sequence for what has become known as the SARS-CoV-2 virus (the "Coronavirus") on or about January 12, 2020. *Id*.

30. By the end of January 2020, the WHO had declared a global health emergency.[4]

31. The disease caused by the Coronavirus was identified as "COVID-19" on February 11, 2020.[5]

32. Over the next six weeks, the number of cases, deaths and affected countries continued to climb to the point that the WHO classified the COVID-19 outbreak as a "pandemic."[6]

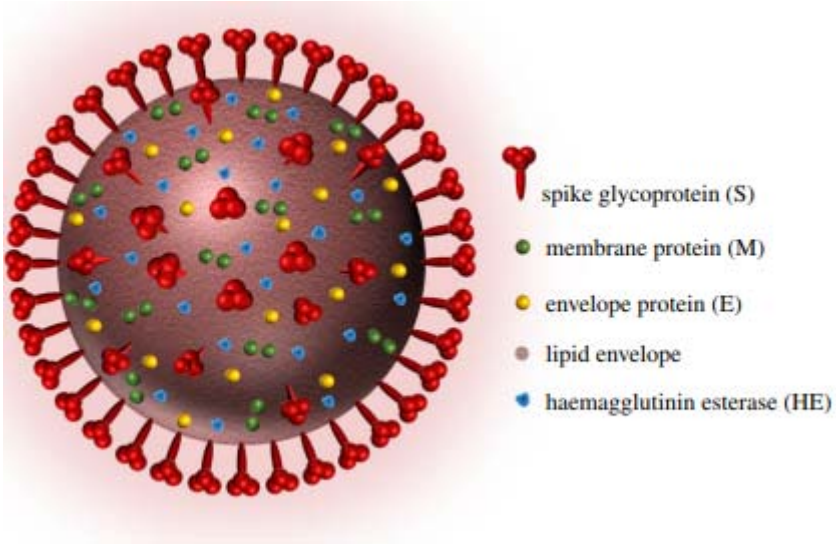
33. As a global pandemic, the presence of COVID-19 is, by definition, worldwide.

34. As of the date of this complaint, COVID-19 has infected over 74 million people in the U.S. and caused more than 879,000 deaths, and continues to spread, including through variants.[7]

[3] World Health Organization, *Rolling updates on coronavirus disease (COVID-19)* (Updated July 31, 2020), available at https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen ("WHO Rolling Update").
[4] World Health Organization, Novel Coronavirus (2019-nCoV), Situation Report-11 (Jan. 31, 2020), available at https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200131-sitrep-11-ncov.pdf?sfvrsn=de7c0f7_4.
[5] WHO Rolling Update.

35. The Cornavirus is derived from the root word "corona," which means "crown."

36. The "crown" refers to the unique morphology characteristic of the Coronavirus. The virus is a viral RNA encased in a spherical lipid membrane from which "spike proteins" protrude, giving the virus the physical appearance of a crown, as depicted in the figure below:[8]



37. The spike proteins on the outside of the virus are what is used to bond with and invade human cells. But these spike proteins also impact how the Coronavirus interacts with other substances, including property.

38. Spike proteins are made up of different amino acids, which have distinct chemical properties and, in some cases, carry an electric charge.[9] These chemical and electric properties of the spike proteins dictate how the Coronavirus behaves in the air and on surfaces.

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[6] World Health Organization, WHO Director-General's opening remarks at the media briefing on COVID-19 (Mar. 11, 2020), available at https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

[7] CDC, *Cases in the U.S.*, available at https://covid.cdc.gov/covid-data-tracker/?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcases-updates%2Fcases-in-us.html#cases_casesper100klast7days (last visited Jan. 31, 2021).

[8] *See, e.g.*, Aydogdu, et al., *Surface interactions and viability of coronaviruses*, at 3, Fig. 3, J. R. SOC. INTERFACE (Dec. 7, 2020), *available at* https://royalsocietypublishing.org/doi/pdf/10.1098/rsif.2020.0798 ("[T]he SARS-CoV-2 coronavirus carries a different structure of proteins which are membrane glycoprotein (M), spike protein (S), hemagglutinin esterase (HE) and envelope (E) protein as shown in figure 3a and the nucleocapsid protein (N) can be found inside the lipid layer, which accompanies the viral RNA and protects it.").

39. Depending on the surrounding pH values, the amino acid structures can attach to metallic surfaces such as stainless steel or gold and chemically bond with oxygen-containing surfaces such as wood, cotton, or glass.[10]

40. Under certain circumstances, including in conditions of high humidity, proteins on the surface of the Coronavirus can also form hydrogen bonds with the hydrophilic surface of material. [11]

41. The chemical, ionic, and electrostatic bonds between the Coronavirus and different materials explains why the virus is known to persist on inanimate objects for days at a time.[12] For example, according to one study, the Coronavirus was found in substantive concentrations on cloth for up to 24 hours, on steel for up to 48 hours, and on plastics for up to 72 hours.[13]

42. Other studies have found similar results, indicating that the Coronavirus can persist at infectious levels on plastics and metals for up to 3-4 days, and glass, ceramic, and rubber for up 2 days.[14]

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[9] Joonaki, et al., *Surface Chemistry Can Unlock Drivers of Surface Stability of SARS-CoV-2 in a Variety of Environmental Conditions*, at 2137, CHEM (Sept. 10, 2020), available at https://www.cell.com/chem/pdf/S2451-9294(20)30411-3.pdf ("Therefore, -NH2, -NH3 +, -COOH, and -COO- groups of amino acids in the SARS-CoV2 S protein drive adsorption onto the solid surfaces through double electrostatic interactions between the virion's ionized surface-active species and the oppositely charged surfaces, as well as hydrogen bonding based on the surface characteristics.").

[10] *Id.*

[11] *Id.* at 2139 & Fig. 3A.

[12] *See, e.g.*, Aydogdu, et al., *supra* note 7, at 4 & Fig. 4, ("At 21 to 23°C degrees of ambient temperature with $10^{5.25}$ viral titre, steel, air, cardboard and copper were tested, and results indicated that the SARSCoV-2 was able to survive 3 h in air, 4 h on copper, 24 h on cardboard, 48 h on steel and more than 72 h on plastic. In addition, Chin *et al.* reported that persistence of the SARS-CoV-2 was 96 h on surgical masks and 24 h on cloth under $10^{7.8}$ viral titre at 22°C." (citations omitted)).

[13] *Id.* at Fig. 4.

[14] Aboubakr, et al., *Stability of SARS-CoV-2 and other coronaviruses in the environment and on common touch surfaces and the influence of climatic conditions: A review*, TRANSBOUNDARY & EMERGING DISEASES (Vol. 68 Mar. 2021), available at https://onlinelibrary.wiley.com/doi/10.1111/tbed.13707.

43. Another study by the *Virology Journal* concluded that the virus was detectible and remains viable for at least 28 days on a variety of surfaces, including glass, stainless steel, and vinyl—significantly longer than previously thought.[15]

44. All of these materials are used by Baylor throughout its Facilities.

45. When the Coronavirus bonds chemically or ionically with a surface, that surface is, by definition, physically altered and changed from a benign state to a condition blighted with viral contagion.

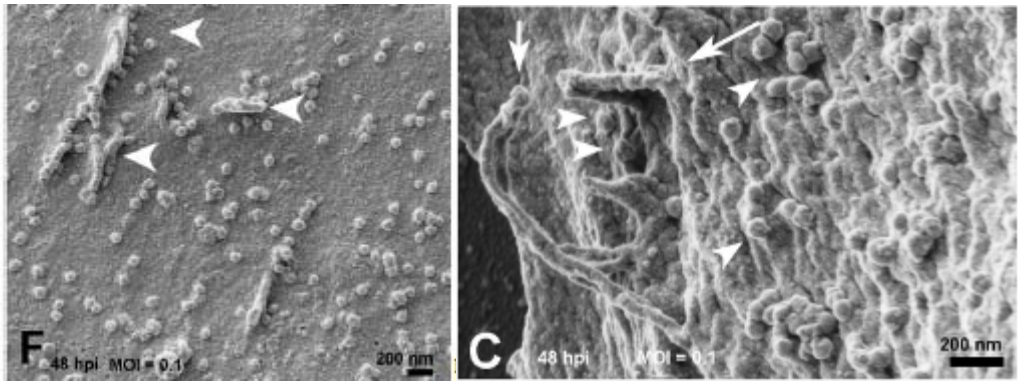
46. The bonding between the Coronavirus's spike proteins and abiotic property surfaces is similar to the interaction between the Coronavirus and organic host cells. During an infection of the body, the spike proteins bond with angiotensin-converting enzyme (ACE2) receptors on the surface of living cells.[16]

47. The below images depict the bonding between the Coronavirus and organic cells, similar to the chemical bonding that is occurring between the Coronavirus and physical property,

[15] Riddell, et al., *The effect of temperature on persistence of SARS-CoV-2 on common surfaces*, 17 VIROLOGY J. 145 (Oct. 7, 2020), available at https://doi.org/10.1186/s12985-020-01418-7.

[16] *See, e.g.*, Lan, et al., *Structure of the SARS-CoV-2 spike receptor-binding domain bound to the ACE2 receptor*, NATURE (Mar. 2020), available at https://www.nature.com/articles/s41586-020-2180-5 ("Coronaviruses use the homotrimeric spike glycoprotein (comprising a S1 subunit and S2 subunit in each spike monomer) on the envelope to bind to their cellular receptors. Such binding triggers a cascade of events that leads to the fusion between cell and viral membranes for cell entry. Previous cryo-electron microscopy studies of the SARS-CoV spike protein and its interaction with the cell receptor ACE2 have shown that receptor binding induces the dissociation of the S1 with ACE2, prompting the S2 to transit from a metastable pre-fusion to a more-stable post-fusion state that is essential for membrane fusion. Therefore, binding to the ACE2 receptor is a critical initial step for SARS-CoV to enter into target cells."); Yang, et al., *Molecular interaction and inhibition of SARS-CoV-2 binding to the ACE2 receptor*, NATURE (May 14, 2021), available at https://www.nature.com/articles/s41467-020-18319-6 ("[W]e investigated the interaction established between the SARS-CoV-2 S glycoprotein and the ACE2 receptor using single-molecule force spectroscopy. We demonstrated a specific binding mechanism between the S1 subunit and the ACE2 receptor. By comparing the binding of the S1 subunit and the RBD toward the ACE2 receptor, our experiment evidenced that both domains interact with the same kinetic and thermodynamic properties toward the ACE2 receptor, highlighting that SARS-CoV-2 binding to ACE2 is dominated by the RBD/ACE2 interface.").

and confirm that the Coronavirus's adhesion to materials—including metal, wood, fabrics, and glass—causes a physical alteration, although not visible to the naked eye:[17]



48. Studies have also documented the physical changes occurring to inorganic property exposed to Coronavirus spike proteins. As shown in the below atomic force microscopy (AFM) topographic images, surface roughness is measurably increased by absorption of spike proteins:[18]

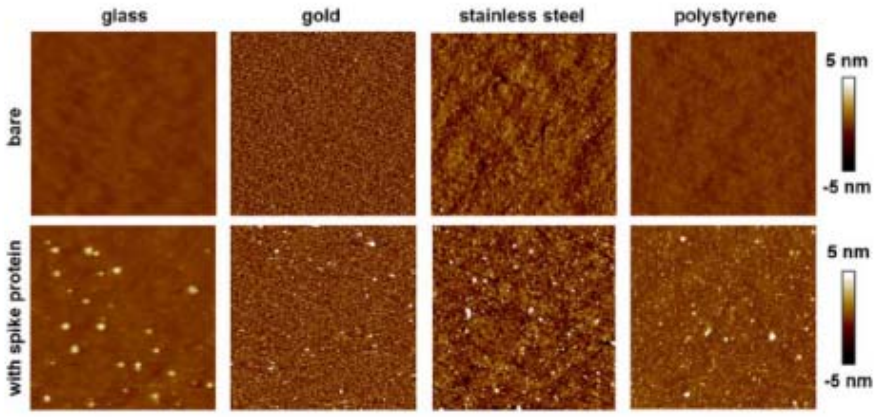


Figure 2

AFM topography images ($5 \times 5\ \mu m^2$) of glass, gold, SS, and PS before and after the adsorption of spike protein.

[17] Caldas, et al., *Ultrastructural analysis of SARS-CoV-2 interactions with the host cell via high resolution scanning electron microscopy*, NATURE, at Fig. 1 & Fig. 4, (Sept. 30, 2020), available at https://www.nature.com/articles/s41598-020-73162-5 (depicting images of virus "adhesion").

[18] Xie, et al., *A Nanochemical Study on Deciphering the Stickiness of SARS-CoV-2 on Inanimate Surfaces*, ACS APPL MATTER INTERFACES, at Fig. 2, (Dec. 30, 2020), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7770894/?report=classic ("The bare glass, gold, SS, and PS surfaces exhibit a root-mean-square (RMS) roughness of 0.3–0.7 nm, and such smooth surfaces allow the accurate observation of protein adsorption. It is noted that the uniform grainlike pattern on bare metal (i.e., gold and SS) surfaces is arising from their metal particles. After spike protein adsorption, all the surfaces become rough with the obvious binding of spike protein as indicated by the white dots shown in Figure 2.").

49. In addition to surface roughness, the Coronavirus also creates an additional change to property. Property exposed to the Coronavirus has been shown to be more hydrophobic, *i.e.*, more likely to repel water.[19]

50. A similar physical transformation occurs in the ambient air as respiratory droplets contaminate the air when an infected person breathes, coughs, sneezes, sings, or talks.[20]

51. The Centers for Disease Control and Prevention has confirmed that the Coronavirus is subject to airborne transmission, particularly in confined, indoor spaces, where virus-containing respiratory droplets comprised of smaller droplets and particles can remain suspended in the air over long distances (usually greater than 6 feet) and for long periods (from minutes to hours).[21]

52. Research has clarified that COVID-19 is not spread only by the inhalation of droplets (which studies have shown can have a range of 23 to 27 feet)[22] but by airborne transmission as the Coronavirus attaches to aerosols in the air.[23]

53. Just as the spike proteins dotting the outer shell of the Coronavirus become chemically and electrostatically absorbed on various solid surfaces, like metal, wood, fabrics,

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[19] *Id.* at § 2.2, Fig. 3 ("[T]he water contact angle increases from 28.4° ± 0.6° for the AFM probe without protein modification to 40.2° ± 0.8° for the protein-functionalized AFM probe (inset of Figure 3A), which suggests that the AFM probe becomes relatively hydrophobic after the protein modification.").

[20] World Health Organization, *Transmission of SARS-CoV-2: implications for infection prevention precautions* (July 9, 2020), available at https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions ("Current evidence suggests that transmission of SARS-CoV-2 occurs primarily between people through direct, indirect, or close contact with infected people through infected secretions such as saliva and respiratory secretions, or through their respiratory droplets, which are expelled when an infected person coughs, sneezes, talks or sings.").

[21] Centers for Disease Control and Prevention, Scientific Brief: SARS-CoV-2 and Potential Airborne Transmission (updated May 7, 2021), available at https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fscience%2Fscience-briefs%2Fscientific-brief-sars-cov-2.html.

[22] Lydia Bourbouiba, *Turbulent Gas Clouds and Respiratory Pathogen Emissions: Potential Implications for Reducing Transmission of COVID-19*, JAMA (2020) available at https://jamanetwork.com/journals/jama/fullarticle/2763852.

[23] H. Humphreys & F. Fitzpatrick, *Airborne Transmission of Covid-19: Implications for Irish Hospitals*, IRISH MED. J. Vol. 113 available at https://www.imj.ie/wp-content/uploads/2020/07/Airborne-Transmission-of-Covid-19-Implications-for-Irish-Hospitals.pdf.

and glass,[24] the same spike proteins react with particulate matter in respiratory droplets and in the ambient air, including minerals, soot, or plastics, to remain airborne over extended periods of time.[25]

54. Of particular concern here are restrooms. Restrooms are an essential part of any healthcare facility, including all Baylor Facilities. Yet several studies have identified an elevated concentration of the Coronavirus inside the restroom facilities of hospitals (and other buildings that house many people), despite careful cleaning measures.[26] Researchers have flagged hospital restrooms as an area of particular concern, theorizing that flushing produces aerosolized SARS-CoV-2 that could lead to recirculation in the ventilation systems of the healthcare building.[27] The chemical, ionic, or other physical bonding between the Coronavirus and existing airborne particular matter and aerosols constitutes a physical alteration or change in the ambient air of Baylor's Facilities.

55. The Centers for Disease Control and Prevention confirms that exposure to the Coronavirus occurs in three principal ways: (1) inhalation of very fine respiratory droplets and

[24] *See supra* ¶¶ 37-48.

[25] Duval, et al., *Chemodynamic features of nanoparticles: Application to understanding the dynamic life cycle of SARS-CoV-2 in aerosols and aqueous biointerfacial zones*, ADVS. COLLOID & INTERFACE SCI. (Apr. 2021), at 5, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7931671/ ("Virions that are shed in respiratory droplets may sorb to PM that is initially present in the respiratory droplet or encountered during the droplet's trajectory through the atmosphere. Airborne PM is heterogeneous in size and chemical composition, comprising a diverse range of inorganic and organic materials, e.g., minerals, soot, plastics, as well as various sorbed species."); *see also* Liu, et al., *Aerodynamic characteristics and RNA concentration of SARS-CoV-2 Aerosol in Wuhan Hospitals during COVID-19 Outbreak*, BIORXIV (Mar. 10, 2020), available at https://www.biorxiv.org/content/10.1101/2020.03.08.982637v1.full.

[26] *See id*. ("This study also recorded an elevated airborne SARS-CoV-2 concentration inside the patient mobile toilet of Fangcang Hospital. This may come from either the patient's breath or the aerosolization of the virus-laden aerosol from patient's feces or urine during use."); *see also* Kang, et al., *Probable Evidence of Fecal Aerosol Transmission of SARS-CoV-2 in a High-Rise Building*, ANNALS OF INTERNAL MEDICINE, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7464151/.

[27] McDermott, et al., *Put a lid on it: are faecal bio-aerosols a route of transmission for SARS-CoV-2?*, J. HOSP. INFECTION, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7166010/#bib10; Gabriel Birgand, et al., *Assessment of Air Contamination by SARS-CoV-2 in Hospital Settings*, JAMA NETWORK OPEN (Dec. 23, 2020) available at https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2774463 ("The presence of SARS-CoV-2 RNA in stool samples has been described in several studies. Toilet flushing may lead to the aerosolization of RNA in small and nonventilated toilets or bathrooms.").

aerosol particles, (2) deposition of respiratory droplets and particles on exposed mucous membranes in the mouth, nose, or eye, and (3) by touching mucous membranes in the mouth, nose, or eye after touching surfaces with the virus.[28]

56. Therefore, when an infected person—whether symptomatic, asymptomatic, or pre-symptomatic—coughs, sneezes, talks, sings, or breathes, toxic virions physically, if not chemically, alter the ambient breathable air and constituent particulate matter.

57. While the contaminated respiratory droplets and aerosols may remain airborne for several hours, once they fall from airborne suspension and become deposited on solid property, the Coronavirus can physically bond with and alter metal, wood, plastics, fabrics, glass, and other materials leaving such property susceptible to further transmission of COVID-19.[29]

C. COVID-19 Has Caused Physical Loss or Damage to Baylor's Property, Triggering Coverage Under The "All Risks" Business Interruption Coverage.

58. The "All Risks" coverage that FM sold to Baylor "covers property, as described in this Policy, against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded, while located as described in this Policy." Ex. A (Policy at COMPLAINT_000008).

59. FM drafted the Policy.

60. **Communicable Disease** is a risk of physical loss or damage covered under the Policy because the Policy covers "all risks" of physical loss or damage that are not excluded, and risk of loss by **communicable disease** is not excluded by the policy.

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[28] Centers for Disease Control and Prevention, *supra* note 20.

[29] Michelle L. Holshue, et al., *First Case of 2019 Novel Coronavirus in the United States*, NEW ENGLAND J. MED. (Mar. 5, 2020), available at https://www.nejm.org/doi/full/10.1056/NEJMoa2001191; Po Ying Chia, et al., *Detection of Air and Surface Contamination by SARS-CoV-2 in Hospital Rooms of Infected Patients*, Nature Communications 11, 2800 (2020), available at https://doi.org/10.1038/s41467-020-16670-2 (discussing that not likely touched, including air vent returns and floors, would be due to settling air contamination).

61. Pursuant to the Policy's various coverage provisions, physical loss and damage caused by **communicable disease** triggers coverage under the Policy up to the Policy's $1.5 billion limit.

62. The Policy expressly evidences FM's intent and expectation that **communicable disease** causes loss or damage to property.

63. Pursuant to the "Communicable Disease Response" coverage, the Policy expressly covers, among other things, "the reasonable and necessary costs incurred … for the: 1) cleanup, removal and disposal of … **communicable diseases** from insured property." Ex. A (Policy at COMPLAINT_000028).

64. The Policy defines **communicable disease**, in relevant part, as a disease which is "transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges[.]" Ex. A (Policy at COMPLAINT_000074).

65. The Policy does not exclude loss, cost or damage caused by **communicable disease**.

66. The Policy does not exclude loss, cost or damage caused by a virus that causes **communicable disease**.

67. COVID-19 is a disease that is transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges. *Ibid.* Therefore, COVID-19 is a **communicable disease** under the Policy.

68. By providing for the "cleanup, removal and disposal of . . . **communicable disease**," the Policy explicitly recognizes that communicable disease physically damages property. Ex. A (Policy at COMPLAINT_000028).

69. The Policy's explicit recognition that communicable disease causes "loss or damage" is confirmed by FM's regulatory submissions concerning related policy forms and FM's addition of communicable disease as a covered peril.

70. In prior versions of its policy, FM stated specifically with respect to the "Communicable Disease" coverage extension, that "the presence of and the spread of communicable diseases will be considered direct physical damage and the expenses listed above will be considered expenses to repair such damage."[30]

71. As evidenced by FM's representations to state insurance regulators, the **communicable disease** coverage provided in the Policy did not change this intent. Rather, FM intended only to "simplify the coverage wordings to provide contract clarity" with its updates to the **communicable disease** coverage.[31]

72. The actual presence of COVID-19 at Baylor's Facilities has triggered coverage under the "all risk" Policy's Time Element Coverage for Baylor's business interruption losses.

73. Baylor hospitals have been treating COVID-19 patients since the start of the pandemic.

74. Early in the pandemic, Baylor began to record COVID-19 infections at its Facilities.

75. Healthcare workers have been hit especially hard. In September 2020, the WHO announced the healthcare workers accounted for 1 in 7 Coronavirus cases recorded worldwide.[32]

[30] See Ex. B at COMPLAINT_000153 (excerpts from FM's regulatory filing regarding the FMG7446 form).
[31] *Id.* at COMPLAINT_000138.
[32] Ruby Mellen & Adam Taylor, *Health-care workers made up 1 in 7 covid-19 cases recorded globally, WHO says*, WASHINGTON POST (Sept. 17, 2020) available at https://www.washingtonpost.com/world/2020/09/17/health-care-workers-make-up-one-seven-covid-19-cases-recorded-globally-who-says/.

76. Baylor has had approximately 1,800 employees and 37,000 patients test positive for COVID-19 from March of 2020 through the end of October 2020. Many more employees and patients have tested positive since that time.

77. COVID-19 has been detected in employees and patients in all of Baylor's hospitals and many of the clinics in the Baylor system.

78. This is in addition to pre-symptomatic and asymptomatic patients, guests and employees who have COVID-19 and have been at Baylor's Facilities frequently, regularly, and consistently over the course of this pandemic. These individuals go undetected even by the most robust COVID-19 screening, control, and mitigation protocols.

79. Due to the high numbers of individuals being treated for COVID-19 at Baylor's hospitals, and the high volume of patients, visitors, vendors, and employees generally at Baylor's Facilities, COVID-19 and SARS-CoV-2 have been consistently present at, and are constantly being reintroduced to, the properties during the policy period.[33]

80. While onsite, those individuals infected with COVID-19 shed SARS-CoV-2 into the indoor air and onto surfaces throughout the property. *See supra*, ¶¶ 35-57.

81. As a result, the SARS-CoV-2 virus has been omnipresent (and regularly reintroduced) into the indoor air and on surfaces at Baylor Facilities from March to October 2020. Its complete elimination from the indoor air and surfaces at Baylor Facilities was not possible.

82. The presence of COVID-19 on property, including real and personal property at Baylor Facilities, causes a tangible alteration to that property. *See supra*, ¶¶ 35-57.

[33] *See* Po Ying Chia, et al., *Detection of Air and Surface Contamination by SARS-CoV-2 in Hospital Rooms of Infected Patients*, Nature Communications 11, 2800 (2020), available at https://doi.org/10.1038/s41467-020-16670-2 (finding in a hospital study that SARS-CoV-2 was present in hospital patient rooms in high concentrations on surfaces and in the air, despite the rooms having 12 air changes per hour).

83. Under normal operating conditions, there was no effective way to completely remediate the physical loss or damage caused by COVID-19 to healthcare facilities like Baylor, because the continued exposure to and treatment of infected individuals resulted in continual reintroduction of COVID-19 to the property both through airborne transmission and on surfaces.

84. Mere cleaning and disinfecting of the surfaces of the property did not repair or remediate the actual physical and tangible alteration to property caused by COVID-19, because it was consistently being reintroduced by patients and employees.[34]

85. Baylor, as the largest not-for-profit health system in Texas, could not simply stop admitting patients. Baylor has incorporated extensive engineering and administrative measures to aid in the containment, remediation, and mitigation of the physical loss or damage caused by COVID-19 throughout its Facilities.

86. For example and without limitation, Baylor constructed temporary walls and doors for isolation areas at many of its hospitals, modified existing beds to dedicated Covid-19 negative-pressure containment wards, installed air purification systems, reconfigured air handlers, set up temporary refrigeration trucks to support morgue capacity, created spaces to store and process PPE, installed plexiglass shields at all staffed locations, hired a professional engineer to design and support facility modifications, and negotiated premium contracts with key vendors to maintain critical supplies and resources as needed.

87. Yet even with these measures, Baylor has suffered extensive covered business interruption losses that have continued from 2020 to 2022 as a result of the physical loss and/or damage to Baylor's property.

88. Such losses are covered under the Policy's "all risk" coverage.

D. Baylor has Additional Coverage Under the Policy's "Extended Period of Liability" Coverage.

89. In addition to the Policy's "all risk" coverage, discussed above, the Policy also provides an "additional time element coverage extension," beyond the standard business interruption period, for the "Extended Period of Liability" suffered by Baylor.

90. The Extended Period of Liability is the additional loss in gross earnings, beginning *after* the business interruption period ends, and continuing for such length of time as would be required to restore Baylor's business to its pre-Covid condition, up to 180 days.[35]

91. Baylor's business continues to be impacted, and it has not been able to return to its pre-Covid condition since the start of the pandemic.

92. Thus, irrespective of the length of Baylor's business interruption claim—which is substantial, as alleged above—Baylor is entitled to its "Extended Period of Liability" coverage, up to the Policy's maximum 180 days.

F. No Exclusion, Including the Contamination Exclusion, Precludes Coverage.

93. Without assuming any burden of proof as to any exclusion or exception to coverage, the Policy contains no provision that would render exposure to the Coronavirus outside the Policy's "all risk" coverage.

94. The Policy's Communicable Disease Response coverage provides coverage for, among other things, "the reasonable and necessary costs incurred . . . for the: 1) cleanup, removal and disposal of . . . **communicable disease** from insured property." Ex. A (Policy at COMPLAINT_000028).

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[34] *See, e.g.*, Liu, et al. *Aerodynamic Characteristics and RNA Concentration of SARS-CoV-2 Aerosol in Wuhan Hospitals during COVID-19 Outbreak*, BIORXIV, available at https://www.biorxiv.org/content/10.1101/2020.03.08.982637v1.full.

[35] Ex. A (Policy) at COMPLAINT_000011 & COMPLAINT_000062.

95. COVID-19 is a **communicable disease** transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges (including from affected property). *Id. at* COMPLAINT_000074; *supra* ¶¶ 35-57.

96. Thus, COVID-19 meets the definition of **communicable disease** under the Policy.

97. The Policy contains an exclusion that purports to preclude coverage for **contamination**. *Id.* at COMPLAINT_000020.

98. The Policy defines **contamination** as, among other things, a "virus." *Id.* at COMPLAINT_000074.

99. Yet, the Policy's Contamination exclusion does not mention **communicable disease.** While FM included within the "contamination" definition the terms "pathogen," "pathogenic organism," "virus," and "disease causing or illness causing agent," FM did not use those terms in its definition of "communicable disease."

100. Nor does the Policy's Contamination exclusion contain an exception for coverage for **communicable disease**.

101. The Policy cannot simultaneously provide coverage for **communicable disease** yet purport to simultaneously exclude SARS-CoV-2 or COVID-19.

102. The Policy's Contamination exclusion therefore does not exclude coverage for loss caused by **communicable disease**, including SARS-CoV-2 or COVID-19.

103. Furthermore, the Contamination exclusion excludes only contamination and associated "costs," not "loss" or "damage," or even indirect "costs," such as time element loss and extra expenses.

104. Contamination exclusions like the one FM drafted here apply to traditional pollution, not to natural catastrophes such as pandemic. To the extent COVID-19/SARS-CoV-2 is actually present or suspected of being present at a Baylor Facility, its presence would be the result of a natural process, as opposed to an act of pollution or contamination.

105. The Policy's Contamination exclusion does not exclude coverage for Baylor's claim.

106. To the extent FM contends that the Policy's Contamination exclusion bars coverage for loss caused by communicable disease or some other aspect of Baylor's claim, the Policy is, at worst, ambiguous, and therefore, must be construed in favor of coverage.

G. The Policy's Communicable Disease Sublimit Does Not Cap Baylor's Losses.

107. The Policy affords coverage to Baylor for the actual presence of **communicable disease** at a Baylor Location. This **communicable disease** coverage is found under two sections of the Policy titled "Communicable Disease Response" and "Interruption by Communicable Disease" (together, the "Communicable Disease Coverages").

108. The Communicable Disease Response provision expressly provides that it is an "Additional Coverage."

109. The Interruption by Communicable Disease provision expressly provides that it is a coverage "Extension."

110. When FM sold this type of policy to insureds, it added the Communicable Disease Coverages as "enhancements" to what the base policy form already covered as communicable disease.[36]

[36] *See The FM Global Advantage® All-Risk Policy*, FM GLOBAL (April 2, 2020), available at https://web.archive.org/web/20200402064501/https://www.fmglobal.com/products-and-services/products/the-fm-global-advantage-all-risk-policy.

111. The Communicable Disease Coverages do not operate to limit any other coverage under the Policy that may also apply to loss or damage resulting from or caused by **communicable disease**, including physical loss or damage resulting from or caused by **communicable disease** at or away from Baylor Facilities.

112. Similarly, any sublimit applicable to the Communicable Disease Coverages does not apply to limit any other coverage under the Policy that may also apply to loss or damage resulting from or caused by **communicable disease**, including physical loss or damage resulting from or caused by **communicable disease** at or away from Baylor Facilities.

113. Rather, coverage for physical loss or damage, and/or resulting business interruption loss, from or caused by **communicable disease**, including physical loss or damage resulting from or caused by **communicable disease** at or away from Baylor Facilities, is subject to the Policy limits associated with the coverage or coverages implicated.

H. FM Denied Coverage for Baylor's Claim.

114. Baylor submitted its partial proof of loss for its business interruption claim for the losses at Baylor Regional Medical Center – Grapevine ("BRMC-Grapevine") under the Policy's Interruption by Communicable Disease Coverage on or about October 16, 2020. Baylor submitted this single location in its partial proof of loss because the losses at BRMC-Grapevine alone exceeded the Policy's $5 million Interruption by Communicable Disease limit.

115. FM ultimately paid this partial proof of loss after some disagreement as to whether FM would pay Baylor's claim preparation costs, which are also covered under the Policy.

116. On or about June 16, 2021, Baylor submitted loss documentation in support of Part II of its Claim under the Policy's general Business Interruption and Civil Authority coverages for the remaining Baylor Facilities.

117. In the Part II submission, Baylor provided proper support for its business interruption losses as a result of COVID-19 totaling over $192 million for the period from March 1, through June 30, 2020. Those losses continue even through today.

118. Baylor also included additional incurred claim preparation costs of nearly $300,000 in Part II of its loss submission.

119. As part of its Part II loss submission, Baylor explained that its claim was based on the physical loss and/or physical damage to property caused by, among other things, the presence of COVID-19 at Baylor Facilities.

120. Although Baylor provided all support and analysis needed for its business income losses, FM denied the claim on July 16, 2021.

121. FM claims that the only coverage under the Policy for losses arising from COVID-19 is from the Communicable Disease coverages, which has been exhausted. But FM's conclusion is based on an unsupportable reading of the Policy it drafted.

122. For all the reasons described above, the Communicable Disease coverage is in addition to, and not a limitation on, the coverage offered under the general business interruption and the Extended Period of Liability.

123. FM has wrongfully denied Baylor's claim for coverage under the Policy.

124. As a result of FM's conduct, Baylor has suffered and is continuing to suffer damages in an amount not less than $192 million, plus attorneys' fees, which continue to accrue, in pursuit of its claim under the Policy.

V. CAUSES OF ACTION

A. Count One – Breach of Contract (General Business Interruption)

125. Baylor incorporates each and every allegation set forth in this Complaint as if fully set forth in this section.

126. The Policy is a valid and enforceable contract between Baylor and FM.

127. Baylor is an insured under the Policy.

128. Baylor has complied with all applicable Policy provisions, including paying premiums and providing timely notice of its claim.

129. Baylor has satisfied all conditions that exist under the Policy or those conditions have been waived by FM.

130. In the Policy, FM agreed to cover Baylor's Time Element loss, as provided in the Time Element Coverages, as a direct result of physical loss or damage of the type insured under the Policy.

131. COVID-19 has caused physical loss and/or damage to Baylor's property that has caused Baylor to suffer Time Element loss.

132. No exclusions apply to bar coverage.

133. Baylor is entitled to coverage for its Time Element loss related to COVID-19.

134. Nonetheless, FM denied the claim and unjustifiably refuses to pay for these losses and expenses in breach of the Policy.

135. As a direct and proximate result of FM's breach of contract, Baylor has been deprived of the benefits of the Policy and has incurred damages, the amount of which shall be determined at trial, plus pre- and post-judgment interest and any other costs and relief that this Court deems appropriate.

B. Count Two – Breach of Contract (Extended Period of Liability)

136. Baylor incorporates each and every allegation set forth in this Complaint as if fully set forth in this section.

137. The Policy is a valid and enforceable contract between Baylor and FM.

138. Baylor is an insured under the Policy.

139. Baylor has complied with all applicable Policy provisions, including paying premiums and providing timely notice of its claim.

140. Baylor has satisfied all conditions that exist under the Policy or those conditions have been waived by FM.

141. In the Policy, FM agreed to cover Baylor's loss under the "Additional Time Element Coverage Extensions, including the Extended Period of Liability.

142. COVID-19 has caused physical damage to property at Baylor's Facilities.

143. No exclusions apply to bar coverage.

144. Baylor is entitled to coverage for its additional business interruption losses up to the Policy's maximum 180-day period.

145. Nonetheless, FM denied the claim and unjustifiably refuses to pay for these losses and expenses in breach of the Policy.

146. As a direct and proximate result of FM's breach of contract, Baylor has been deprived of the benefits of the Policy and has incurred damages, the amount of which shall be determined at trial, plus pre- and post-judgment interest and any other costs and relief that this Court deems appropriate.

C. Count Three – Chapter 542 of the Texas Insurance Code

147. Baylor incorporates each and every allegation set forth in this Complaint as if fully set forth in this section.

148. Baylor has made a claim under the Policy for its loss of business income and has satisfied all conditions under the Policy.

149. FM has violated Chapter 542 of the Texas Insurance Code by failing to timely pay Baylor's loss in connection with its claim.

150. Consequently, Baylor is entitled to the damages set forth in § 542.060 of the Texas Insurance Code including, in addition to reasonable and necessary attorney's fees, interest at a rate of eighteen percent (18%) per annum, as well as any and all other relief provided therein.

D. Count Four – Attorney's Fees

151. Baylor incorporates each and every allegation set forth in this Complaint as if fully set forth in this section.

152. Due to the actions of FM, Baylor has been required to retain the services of the law firm of Haynes and Boone, LLP. Baylor has agreed to pay Haynes and Boone a reasonable fee for its services necessarily rendered and to be rendered in this action. Pursuant to Section 38.001 of the Texas Civil Practices & Remedies Code and Section 542.060 of the Texas Insurance Code, Baylor is entitled to an award of its reasonable attorneys' fees against FM in an amount to be established at trial.

VII. JURY TRIAL DEMANDED

153. Baylor demands a jury trial pursuant to Fed. R. Civ. P. 38.

VIII. PRAYER

WHEREFORE, Baylor respectfully requests that this Court grant it the following relief:

a. Judgment awarding Baylor all damages it has suffered as a result of FM's breach of the Policy;

b. Judgment awarding Baylor all damages sustained as a result of FM's violations of Chapter 542 of the Texas Insurance Code;

c. Judgment awarding Baylor all reasonable and necessary attorneys' fees and expenses incurred in this matter under Section 38.001 of the Texas Civil Practice & Remedies Code and/or Chapter 542 of the Texas Insurance Code;

d. Judgment awarding Baylor pre-judgment and post-judgment interest in the amount allowed by law;

e. Judgment awarding Baylor all costs of court; and

f. Such other and further relief as is equitable and just, both at law and in equity, as Baylor may show itself justly entitled.

Respectfully submitted,

/s/ Ernest Martin, Jr.

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