

IN THE CIRCUIT COURT FOR BALTIMORE CITY

BROADWAY HOSPITALITY VENTURE LLC,
57TH STREET HOSPITALITY PARTNERS LLC,
THE FINER DINER LLC D/B/A BROOKLYN
DINER TIMES SQUARE, BROOKLYN DINER
USA LP D/B/A BROOKLYN DINER,
FIORELLO'S ROMAN CAFÉ INC. D/B/A CAFÉ
FIORELLO, RED EYE GRILL LP D/B/A RED
EYE GRILL, RED EYE/BROOKLYN
ASSOCIATES LP, CIELI PARTNERS LP D/B/A
TRATTORIA DELL'ARTE, PETERSON-
FIREMAN VENTURE B45 LLC DBA BOND 45,
PETERSON-FIREMAN PIZZA VENTURE, LLC
D/B/A FIORELLA'S ITALIAN KITCHEN,

Plaintiffs,

v.

INDEMNITY INSURANCE COMPANY OF
NORTH AMERICA,

Defendant.

Civil Action No.

24-c-20-003737

RECEIVED
CIRCUIT COURT FOR
BALTIMORE CITY
2020 SEP -2 AM 8:51
CIVIL DIVISION

Case: 24-C-20-003737

CV File New

\$08.00

RIF-New Case

\$08.00

Appear Fee

\$00.00

HLSC

\$00.00

TOTAL

\$195.00

A restaurant is a fantasy – a kind of living fantasy in which diners are the most important members of the cast.

RECEIVED 2020090310554

Cashier: LCC C03001915

09/02/20 9:47am

~ Warner LeRoy

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs Broadway Hospitality Venture LLC, 57th Street Hospitality Partners LLC, The Finer Diner LLC d/b/a Brooklyn Diner Times Square, Brooklyn Diner USA LP d/b/a Brooklyn Diner, Fiorello's Roman Café Inc. d/b/a Café Fiorello, Red Eye Grill LP d/b/a Red Eye Grill, Red Eye/Brooklyn Associates LP, Ciel Partners LP d/b/a Trattoria Dell'Arte, Peterson-Fireman Venture B45 LLC d/b/a Bond 45, Peterson-Fireman Pizza Venture LLC d/b/a Fiorella's Italian Kitchen, (collectively, "Fireman's Hospitality") complain of defendant Indemnity Insurance Company of North America ("Indemnity") and allege as follows:

NATURE OF THIS LAWSUIT

1. Starting 45 years ago with Café Fiorello, the eight restaurants in this lawsuit (collectively, the “Insured Restaurants”) have provided high-quality hospitality and dining experiences to their guests.

2. Located in the heart of New York City, between Lincoln Center, Carnegie Hall, and Broadway, six of the restaurants are inexorably intertwined with the opera, the philharmonic, the ballet, and the theater. Indeed, these family owned restaurants—Bond 45, Brooklyn Diner – 43rd and 57th Street Locations, Café Fiorello, Redeye Grill, and Trattoria Dell’Arte—are in the heart of the entertainment centers of New York City.

3. Two of the restaurants are located in National Harbor, Maryland, on the banks of the historic Potomac River, just minutes from the nation’s capital. These restaurants—Bond 45 and Fiorella’s Italian Kitchen—bring a taste of New York to National Harbor and the shores of the Potomac.

4. By this action, Fireman’s Hospitality seeks insurance coverage for business income losses and extra expenses incurred as a direct result of actions of civil authorities. These actions caused direct physical loss of or damage to the Insured Restaurants by requiring physical alterations to them that substantially impaired and/or rendered them incapable of performing of the intended function of the restaurants – serving their guests.

5. As a result of civil authority actions in New York City and State, for example, the Red Eye Grill had to make physical alterations to its space that have left it substantially impaired and able only to serve 50 guests outdoors, down from 350 guests indoors and outdoors before COVID-19. Three of the other New York restaurants have been unable to reopen.

6. Bond 45 in National Harbor, as a result of civil authority actions in Prince George's County and Maryland, had to make physical alterations to its space that have left it substantially impaired and able only to serve 150 guests. This is down from 364 guests before COVID-19.

7. When Fireman's Hospitality turned to Indemnity, its commercial property and business interruption insurer, Fireman's Hospitality reasonably expected Indemnity to afford coverage for its financial losses. After all, Indemnity sold Fireman's Hospitality a broad all-risk policy, at significant expense, with additional coverages for loss due to action of civil authority and loss due to interruption in computer operations by a virus, as well as a "Restaurant Enhancement" that further broadened the policy to cover communicable diseases in the context of food contamination (the "Policy"). The Policy also covers loss or damage to the interior of a building, as well as loss or damage from things like smoke, vapor, and gas.

8. Instead of honoring its promises, Indemnity wrongfully withheld the policy benefits that Fireman's Hospitality is entitled to receive—and that it needs to weather the past, present, and future circumstances associated with the spread of the SARS-CoV-2 (the virus that causes the disease COVID-19), COVID-19, and actions to "flatten the curve," rebound from its financial losses, and continue operating as a productive member of New York and Maryland's economies.

9. Indemnity's wrongful denial deprived Fireman's Hospitality of millions of dollars of promised insurance, favored Indemnity's own interests over those of its insured, and breached the terms the Policy as well as the duty of good faith and fair dealing.

10. By this lawsuit, Fireman's Hospitality therefore seeks damages to compensate it for Indemnity's contractual breaches, wrongful conduct, and tortious failure to act in good faith

pursuant to *Md. Code Ann., Cts. & Jud. Proc.*, § 3-1701. It also seeks declaratory relief, pursuant to *Md. Code Ann., Cts. & Jud. Proc.*, § 3-409, against Indemnity confirming that (1) Fireman's Hospitality's losses are covered under the Policy and (2) that Indemnity's interpretation of "loss" (a term that Indemnity elected not to define in the policy) is not reasonable or is not the only reasonable interpretation of that undefined term.

THE PARTIES

New York Restaurants

Bond 45

11. Broadway Hospitality Venture LLC is a limited liability company existing under the laws of the State of Delaware and has its principal place of business in New York, New York. Broadway Hospitality Venture LLC owns the restaurant Bond 45. The members of Broadway Hospitality Venture are citizens of Arizona, Delaware, Florida, Indiana, Michigan, New York, Pennsylvania, and Texas.

12. Bond 45 has been in business for nearly 18 years. Bond 45, a New York Italian Kitchen and Bar, is located in the heart of the Theatre District. It was originally located in the former historic Bond Clothing Store. Bond 45 is best known for its vegetable antipasto bar, which offers a rotating selection of market vegetables and features an expansive menu that includes specialty veal chops, seafood, house-made pasta, thin crust pizza, and breakfast all day.

Brooklyn Diner -- 43rd Street and 57th Street Locations

13. 57th Street Hospitality Partners LLC is a limited liability company existing under the laws of the State of Delaware and has its principal place of business in New York, New York. The members of 57th Street Hospitality Partners are citizens of California, Florida, Georgia, Indiana, Michigan, New Jersey, and New York.

14. The Finer Diner LLC d/b/a Brooklyn Diner Times Square is a limited liability company existing under the laws of the State of Delaware and has its principal place of business in New York, New York. The Finer Diner LLC is a wholly owned subsidiary of 57th Street Hospitality Partners LLC.

15. Brooklyn Diner USA LP d/b/a Brooklyn Diner is a limited partnership existing under the laws of the State of Delaware and has its principal place of business in New York, New York. The members of Brooklyn Diner USA LP are Red Eye/Brooklyn Associates L.P. and Brooklyn Diner, Inc. Brooklyn Diner, Inc. is a New York corporation with its principal place of business in New York, New York.

16. Red Eye/Brooklyn Associates L.P. is a limited partnership existing under the laws of the State of Delaware and has its principal place of business in New York, New York. The members of Red Eye/Brooklyn Associates L.P. are citizens of Florida, France, Indiana, Maine, Michigan, New Jersey, New York, Pennsylvania, and Texas.

17. The 57th Street location has been in business for over 25 years, while the 43rd Street location has been in business for over 15 years.

18. With two locations in midtown Manhattan, both in the heart of the City's entertainment center, Brooklyn Diner's slogan is "It's like going home...where everybody's welcome!"

19. As explained in the Menu:

The idea here is to celebrate "American Ethnic" food. We're talking classic American dishes that have a distinct ethnic personality – be it Italian, Jewish, Spanish, Arabic, German, Irish, or any of the other ethnic groups that enrich the American melting pot...The kind of food that could make you feel good about the world simply by the way the house smelled while it was being prepared.

Café Fiorello

20. Fiorello's Roman Café Inc. d/b/a Café Fiorello is incorporated under the laws of the State of New York and has its principal place of business in New York, New York.

21. Café Fiorello has been in business for nearly 45 years. It is an institution across the street from Lincoln Center, serving breakfast, lunch, dinner, and, brunch on the weekends. It is a great spot for pre-theatre dining. And, open late each night, the restaurant is also perfect for a post-theater dinner, a light bite at the antipasto bar, or cocktails and dessert.

22. Per Café Fiorello's website, "Café Fiorello is right across the street from Lincoln Center. We have been getting our guests to the opera, the philharmonic, and the ballet on time for years."

23. Café Fiorello has indoor seating for 200 and outdoor seating for 86.

Red Eye Grill

24. Red Eye Grill LP d/b/a Red Eye Grill is a limited partnership existing under the laws of the State of Delaware and has its principal place of business in New York, New York. The members of Red Eye Grill LP are Red Eye/Brooklyn Associates L.P. , the membership of which is provided in paragraph 16 above, and Red Eye Grill, Inc. Red Eye Grill, Inc. is a New York corporation with its principal place of business in New York, New York.

25. The Redeye Grill has been a dining staple in midtown Manhattan for over 25 years. Located directly across from Carnegie Hall, the Redeye Grill's name is derived from the infamous late-night flight linking New York City and Los Angeles. The menu features such classics as Redeye Grill's famous "dancing shrimp," sushi burger, lobster cobb salad, and banana cream pie.

26. The Redeye Grill has indoor seating for 250 guests, as well as private dining spaces for celebrations and events, and outdoor seating for 80 guests.

Trattoria Dell'Arte

27. Cieli Partners LP d/b/a Trattoria Dell'Arte is a limited partnership existing under the laws of the State of New York and has its principal place of business in New York, New York. The members of Cieli Partners LP are citizens of California, Colorado, Florida, Indiana, Maryland, Michigan, New Jersey, New Mexico, New York, and Texas.

28. Trattoria Dell'Arte has been in business for nearly 33 years. Trattoria Dell'Arte was designed to evoke an Italian artist's studio with oversized sculptures and drawings and a wall gallery of famous Italian noses.

29. Trattoria Dell'Arte is located across the street from Carnegie Hall, and close to Lincoln Center, Columbus Circle, City Center 55th Street Theater, and many Broadway Theaters, including the Winter Garden, the Neil Simon, and the Gershwin.

30. Per the restaurant website, "It is the perfect place for pre- and post-concert or theater dining."

National Harbor Restaurants

Bond 45 National Harbor

31. Peterson-Fireman Venture B45 LLC d/b/a Bond 45 is a limited liability company existing under the laws of the State of Delaware and has its principal place of business in National Harbor, Maryland. The members of Peterson-Fireman Venture B45 LLC are citizens of Virginia. This entity owns the Bond 45 location in National Harbor.

32. Bond 45 is located in the heart of National Harbor, within walking distance to the Gaylord National Resort & Convention Center and a short drive from the Tanger Outlets.

33. Bond 45 has been in business for over ten years. The location brings New York steaks, dry-aged 28 days, as well as Bond 45's famous house made burrata, fresh seafood, and handcrafted pastas to the shores of the Potomac.

Fiorella's Italian Kitchen

34. Peterson-Fireman Pizza Venture LLC d/b/a Fiorella's Italian Kitchen is a limited liability company existing under the laws of the State of Delaware and has its principal place of business in National Harbor, Maryland. The members of Peterson-Fireman Pizza Venture LLC are citizens of Virginia. This entity owns Fiorella Italian Kitchen & Pizzeria ("Fiorella").

35. Fiorella is located in the heart of National Harbor, within walking distance to the Gaylord National Resort & Convention Center.

36. Fiorella's appeal, per its website, lies in its delicious food, natural warmth, and effortless Italian charm. Per the website, "Enjoy warm Italian hospitality the moment you enter our door."

Indemnity

37. Indemnity is incorporated under the laws of the Commonwealth of Pennsylvania and has its principal place of business in Philadelphia, Pennsylvania.

38. Indemnity is a member of the Chubb Group of Insurance Companies ("Chubb") with offices in Whitehouse Station, New Jersey. Chubb, *Global Licensing Chart* (July 1, 2020), available at

https://www.chubb.com/_Global-Assets/documents/licensinginformation.pdf

39. Chubb's principal office in the State of Maryland is located at St. Paul Plaza, 23rd Floor, 200 St. Paul Place, Baltimore, MD 21202-2038. Chubb, *Mid-Atlantic Region* (August 27, 2020), available at <https://www.chubb.com/us-en/agents-brokers/mid-atlantic-region.aspx>.

40. Fireman's Hospitality is informed and believes, and on that basis alleges, that Chubb is authorized to act and speak on behalf of Indemnity and its other member companies and makes decisions on behalf of Indemnity and its other member companies.

41. Chubb makes various representations on behalf of Indemnity and its other member companies on its website and through advertisements and public statements, including representations in its financial statements annual reports, 10-k statements, and 10-q statements.

42. Chubb gives the following response on its website to the question "How is Chubb different?":

We don't just process claims, we make things right.

We hope you never need to file a claim with us. But if you do, that's our opportunity to show you what "craftsmanship" means in service to you. It means a quick response when you need it most. It means Chubb people working with empathy, integrity and our legendary attention to detail to make you whole. It means we honor the promises we've made to you. Your loved ones, your employees, your home, your business reputation—these things matter. These things are personal, for you and for us.

We're here to help.

Chubb, *What Makes Chubb Different?* (August 27, 2020), available at

<https://www.chubb.com/us-en/claims/claims-difference.aspx>.

43. Chubb also represents to the public:

- "If being treated fairly and paid quickly are important to your clients when they have a loss, you want Chubb. When your clients insure with Chubb, they're buying *real* insurance." Chubb Ad, *Business Insurance*, at 11 (Apr. 4, 2008); and
- "The insurance claims process can sometimes be, well, a process. At Chubb, it's different. That's because we're not just in the insurance business, we're in the people business. Our experienced claims specialists are relentless about every detail in the most personal way possible. Whether you have a business, homeowners or auto policy, it's our policy to make

your life easier. . . . If a solution is possible, we'll find a way to make it happen.

Chubb, *Welcome to Chubb Claims* (August 27, 2020), available at <https://www.chubb.com/us-en/claims/>.

44. Chubb claims that its member companies specifically appreciate and understand that: "From the field to the table, when you are in the food industry, there is one key ingredient that cannot be overlooked. Chubb offers a wide range of insurance products and risk management solutions that address many of the critical exposures faced by good companies. Our industry experience, financial strength, world-class claims service and loss prevention expertise distinguishes us in the industry." Chubb, *Food* (August 27, 2020), available at <https://www.chubb.com/us-en/business-insurance/food.aspx>.

45. Chubb recognizes that its insureds involved in providing food to the public are involved in "[a]n Industry with Unique Pressures," that "[f]ood companies are a vital part of the business landscape," and that "[t]his industry needs high-quality insurance solutions to protect against a wide range of risks." *Id.*

46. Beyond this, Chubb claims to understand and appreciate the needs of the industry as follows:

Food companies face a unique and complex set of risks with high competition, low margins, numerous regulations, and consumers who are more aware of food safety issues and concerned about the environmental impact. These risks make securing the right solutions from the right insurer critical. Chubb understands this industry and is best positioned to proactively help food companies navigate and thrive in this challenging environment.

Chubb, *Food* (August 27, 2020), available at https://www.chubb.com/us-en/_assets/doc/t2-food-9-18.pdf.

47. Chubb advertises its “Industry Expertise,” which includes “[d]edicated underwriters focused on provide a broad range of precisely crafted yet flexible global insurance solutions tailored for food businesses.” *Id.*

48. Chubb’s “Service Offerings” include:

- Claims professionals with significant knowledge and expertise in food claims and litigation;
- Team of risk engineers focused exclusively on helping food companies identify, mitigate, and control physical, legal, and workplace risk; and
- Workplace safety, ranging from ergonomics to machine guarding to industrial hygiene.

49. The Food Industry brochure gives the example of insurance they have written for a “[b]aker of specialty desserts” and “The Chubb Difference” which included providing a “[r]esponsive machinery breakdown solution, including ammonia contamination.”

50. The brochure also gives the example of a claim scenario where “[a] bakery learned that their product had been unintentionally contaminated by a microbiological hazard, triggering recall costs, loss of profit, and rehabilitation expenses.” In that scenario, “Chubb offered crisis management services to mitigate reputational injury while simultaneously working to resolve the claim.”

51. Chubb also proclaims as follows on its website with respect to COVID-19:

Our hearts go out to those affected by the COVID-19 pandemic.
We have been — and stand ready to continue — supporting our
clients, distribution partners and communities.

Chubb, *COVID-19 Resource Center* (August 27, 2020), available at <https://www.chubb.com/microsites/covid19-resource-center/index.aspx>.

52. Chubb also states on behalf of its member companies:

Doing our part

Chubb takes pride in our continuing commitment to our clients.

Id.

53. Chubb echoed these sentiments in a news release in April, stating:

“We are committed to supporting people, business and communities most impacted by this global crisis,” said Evan G. Greenberg, Chairman and Chief Executive Officer.

Chubb, Chubb Commits \$10 Million to Pandemic Relief Efforts Globally; Company Pledges No COVID-19 Layoffs (April 5, 2020), available at <https://news.na.chubb.com/2020-04-05-Chubb-Commits-10-Million-to-Pandemic-Relief-Efforts-Globally-Company-Pledges-No-COVID-19-Layoffs>.

JURISDICTION AND VENUE

54. This Court has jurisdiction over this action pursuant to *Md. Code Ann., Cts. & Jud. Proc.*, § 6-103 because Indemnity: (1) transacts any business or performs any character of work or service in the State; (2) contracts to supply goods, food, services, or manufactured products in the State; (3) causes tortious injury in the State by an act or omission in the State; (4) causes tortious injury in the State or outside the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State; (5) has an interest in, uses, or possesses real property in the State; or (6) contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation, or agreement located, executed, or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.

55. Venue is proper in the Circuit Court for Baltimore City, pursuant to *Md. Code Ann., Cts. & Jud. Proc.*, § 6-201, because Chubb carries on a regular business, habitually engages in vocation, and maintains its principal Maryland offices in the County.

THE POLICY WITH “RESTAURANT ENHANCEMENT” COVERING
COMMUNICABLE DISEASE

56. Indemnity sold Fireman’s Hospitality a Policy with a “Restaurant Enhancement,” identified by Policy No. MCRD38179901, for the period August 1, 2019 to August 1, 2020 (the “Policy”). A true and correct copy of the Policy is attached hereto as Exhibit A and incorporated herein by reference. For ease of reference, the Policy has been bates stamped FH000001 – FH000211.

57. In advance of selling the Policy to Fireman’s Hospitality, Indemnity engaged in, or had reasonable opportunities to engage in, an extensive underwriting investigation, and became familiar with and knowledgeable of the nature and scope of Fireman’s Hospitality’s business and the nature of the risks that Indemnity was insuring against.

58. The Policy is a broad “all risk” property insurance policy—that is, a policy that insures all risks of physical loss or damage except those plainly, clearly, conspicuously, and expressly excluded.

59. The Policy insures the plaintiff entities named in this lawsuit pursuant to the Schedule of Named Insured(s). FH000012.

60. The Policy insures, among other things, Fireman’s Hospitality’s interests in the real and personal property at the following locations in the City, County and State of New York (collectively, the “Insured NY Restaurants”):

- Bond 45, 221 West 46th Street;
- Brooklyn Diner, 155 West 43rd Street;
- Brooklyn Diner, 212 West 57th Street;
- Café Fiorello, 1900 Broadway;
- Red Eye Grill, 890 Seventh Avenue; and

- Trattoria Dell'Arte, 900 Seventh Avenue.

See FH000008.

61. The Policy insures, among other things, Fireman's Hospitality's interests in the real and personal property at the following locations in National Harbor, Prince George's County, Maryland (collectively, the "Insured MD Restaurants"):

- Bond 45, 149 Waterfront Plaza; and
- Fiorella's Italian Kitchen, 152 National Plaza.

See *id.*

62. The Policy is comprised of a number of forms and endorsements that define the scope of coverage. Like most commercial property insurance policies, the Policy insures not only against physical loss or damage to covered property, but is broadened to include coverage for resulting economic and financial losses. In the Policy, this coverage is referred to as "Business Income (And Extra Expense)" coverage. See FH000045. The Policy contains a blanket business income limit of \$21,862,000. FH000092.

Business Income (And Extra Expense) Coverage

63. The Policy's Business Income (And Extra Expense) coverage is designed, understood, stated, and intended to insure Fireman's Hospitality, for economic losses, including losses from "suspension" of its business "operations," caused by "direct physical loss of or damage to" covered property. See FH000045. The term "suspension" is defined to mean "[t]he slowdown or cessation of your business activities" in the Policy. FH000053.

64. The wording "direct physical loss of or damage to property" is not defined in the Policy.

65. The “Extra Expense” portion of this coverage grant is designed, understood, stated, and intended to cover Fireman’s Hospitality for losses to avoid or minimize the “suspension” of business. *See* FH00045.

66. Within the Business Income (And Extra Expense) coverage, the Policy provides an “Additional Coverage,” further broadening the coverage and obligating Indemnity to pay Fireman’s Hospitality’s “loss of Business Income” and “Extra Expense” “caused by action of civil authority that prohibits access to the described premises,” provided that:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

See FH000046.

67. The Policy’s coverage for Business Income losses begins 72 hours after the time of the civil authority’s action and applies for a period up to four consecutive weeks from the date on which the coverage began. *Id.*

68. Within the Business Income (And Extra Expense) coverage, the Policy also provides an “Additional Coverage,” further broadening the coverage and obligating Indemnity to pay for Fireman’s Hospitality’s loss of “Business Income” and “Extra Expense” from the

“‘suspension’ or ‘operations’ caused by an interruption in computer operations due to destruction or corruption of electronic data due to a Covered Cause of Loss.” *See* FH000047-48.

69. “The Covered Causes of Loss include a virus, harmful code or similar instruction introduced or enacted on a computer system (including electronic data) or a network to which it is connected, designed to damage or destroy any part of the system or disrupt its normal operation.” FH000048.

Business Income From Dependent Properties

70. The Policy contains two “Business Income From Dependent Properties – Limited Form” endorsements. *See* FH00056-63. These endorsements modify and broaden the Business Income (And Extra Expense) coverage. Specifically, they provide \$1,000,000 in coverage, per enumerated “Leader Location[,]” for the loss of business income due to the “suspension” of “operations” caused by “direct physical loss of or damage to” the enumerated “Leader Locations” in the endorsements. The \$1,000,000 limits are “separate from any Business Income Limit of Insurance in this policy applicable when direct physical loss or damage occurs at your premises.” *Id.*

71. The enumerated “Leader Locations” are as follows:

- Carnegie Hall in NYC - \$1,000,000;
- Lincoln Center in NYC - \$1,000,000;
- National Harbor Mall in MD - \$1,000,000; and
- Richard Rodgers Theater - \$1,000,000.

Id.

Restaurant Enhancement Endorsement with Coverage for Communicable Disease

72. The Policy also contains a “Restaurant Enhancement Endorsement.” FH000064. The “Restaurant Enhancement Endorsement” modifies and broadens the Building and Personal

Property Coverage Form, the Business Income (And Extra Expense) Coverage Form, and the Causes of Loss – Special Form. With regard to Business Income (And Extra Expense), the Restaurant Enhancement Endorsement includes three coverage extensions – Food Contamination, Utility Services – Time Element, and Tips Included as Business Income.

73. The Food Contamination coverage extension requires Indemnity to pay for the loss of business income due to the “suspension” of “operations” and certain Extra Expenses “[i]f your business at the described is ordered closed by the Board of Health or any other governmental authority as a result of the discovery or suspicion of food contamination.”

FH000080-81.

74. The covered Extra Expenses include: the cleaning of equipment as required by any governmental authority, the replacement of food which is or suspected of being contaminated, medical tests or vaccinations for employees, and the cost of additional advertising to restore the businesses’ reputation. *Id.*

75. Food contamination “means an incidence of food poisoning to one or more of your patrons as a result of...(3) A communicable disease transmitted through one or more of your ‘employees.’” *Id.* at FH000081.

State Amendatory Endorsements

76. The Policy contains a number of State Amendatory Endorsements referencing either Maryland or New York. *See, e.g.*, FH000016 (New York Changes – Fraud); FH000017 (New York Changes – Calculation of Premium); FH000018 (Maryland Changes); FH000021 (New York Changes – Cancellation and Nonrenewal); FH00098 (New York Changes); FH000102 (New York Changes – Fungus, Wet Rot, and Dry Rot); FH000104 (New York – Exclusion of Loss Due to Virus Or Bacteria); FH000180 (Maryland Changes); FH000182 (New

York Changes – Liquor Liability Coverage Form); FH000184 (Maryland Changes – Premium); FH000197 (New York Changes – Products/Completed Operations Liability Coverage Form); FH000199 (New York Changes – Transfer of Duties When a Limit of Insurance is Used Up); FH000200 (New York Changes – Transfer of Duties When a Limit of Insurance is Used Up); FH000208 (New York Changes); FH000210 (New York Changes); *see also* FH000003 (Notice to Applicants in Maryland Regarding Cancellation and Premium Recalculation).

77. The Policy contains an endorsement specific to New York regarding viruses. It contains an exclusion that is narrower in scope than many other exclusions in the Policy. The “New York – Exclusion of Loss Due to Virus or Bacteria” Endorsement provides that, “[Indemnity] will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” FH000104.

78. Other exclusions in the Policy are broader in scope and contain broader lead-in language. The Nuclear Hazard exclusion, for example, contains the following lead-in language:

We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

FH000107-08. Indemnity elected not to use this more-encompassing language in the “New York – Exclusion of Loss Due to Virus or Bacteria” Endorsement.

79. Thus, even if the “New York – Exclusion of Loss Due to Virus or Bacteria” were to apply to a cause of loss to the Insured NY Restaurants, it will not limit coverage if other covered causes of loss are the predominant or proximate cause of loss.

80. Critically, the Policy does not contain any exclusion for losses caused by or resulting from communicable diseases or pandemics. Because the Policy broadly insures all

risks not expressly excluded, it insures losses caused by or resulting from communicable diseases and pandemics. Indeed, the Policy expressly provides additional coverage for loss due to action of civil authority, additional coverage for loss due to interruption in computer operations by a virus, an extension of coverage for communicable disease in the context of food contamination, as well as coverage for damage from risks such as smoke, vapor, or gas, and damage to the interior of a building. Simply put, because these risks are either expressly included or not otherwise excluded in this all-risk Policy, they are expressly insured.

81. Despite these facts, Indemnity predetermined that it would deny all business income losses associated with SARS-CoV-2, COVID-19, and closure orders. Chubb's website contains a "Final – March 26, 2020" notice, on behalf of Indemnity, stating in part:

Business interruption insurance generally covers losses to your business' income that result from disruption of your business. The disruption must be caused by physical loss or damage to your property by a "covered peril." The presence of an infectious agent or communicable disease at a location where there is covered property generally will not mean that property has suffered "physical loss or damage" under your policy. Generally, "physical loss or damage" means that the physical structure or physical characteristics of the property have been altered by a "covered peril." Loss of use, or diminished value of property that has not been physically altered will not be considered "physical loss or damage."

Chubb, *Notice to Commercial Property Insurance Policyholders* (April 1, 2020) available at https://www.chubb.com/microsites/covid19-resource-center/_assets/pdf/covid-commercial-property-policyholder-notice-4-1-2020.pdf.

82. Indemnity took this position 10 days after New York City Mayor Bill de Blasio issued Executive Order No. 100, detailed below, declaring that "the virus physically is causing property loss and damage." Chubb also took the same position through its trade association, the American Property Casualty Insurance Association in a letter to the United States House of

Representatives Committee on Business. The Association wrote on March 18, 2020, just two days after Mayor de Blasio's order, stating: "Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19." *See* March 18, 2020, Letter, American Property Casualty Insurance Association, The Council of Insurance Agents & Brokers, Big Independent Insurance Agents & Brokers of America, and National Association of Mutual Insurance Companies to House Committee on Small Business. Thus, it is clear that before Indemnity did any meaningful investigation (if it did any investigation at all), it already had decided it would not pay Fireman's Hospitality for its losses under the Policy.

83. Additionally, well before the Policy was sold to Fireman's Hospitality, Chubb knew of the possibility of a pandemic and the potential losses that could be associated with a pandemic. In fact, Chubb has long known that if there were a pandemic, it could be obligated to pay substantial amounts under all risk policies such as the Policy. For years, including for the fiscal year ended December 31, 2019, Chubb stated as follows in its Form 10-K filed with the United States Securities and Exchange Commission:

We have substantial exposure to losses resulting from . . . catastrophic events, *including pandemics*. (emphasis added).

Chubb further routinely stated in this annual filing that "catastrophes," "including a global or other wide-impact pandemic," may result in "substantial" "losses." Chubb further routinely represented in this annual filing that the "forward-looking" "risks" it contemplated includes "infection rates and severity of pandemics and their effects on our business operations and claims activity." Thus, Fireman's Hospitality is informed and believes, and on that basis alleges, that Chubb knew that its property and business interruption policies, such as the Policy, would cover losses associated with pandemics. In fact, as these disclosures show, instead of warning its insureds that policies, such as the Policy, would not cover pandemic-associated losses, Chubb

warned the public and their shareholders that the amounts they might have to pay for such losses could affect their financial condition.

84. There were many other publicly available reports about the risks of pandemics and what insurers should do—in the months and years before Indemnity sold the Policy to Fireman’s Hospitality in 2019. *See, e.g.,* Dorratoltaj, Narges, Phd. and Fullam, Doug, ASA, *What the 1918 Flu Pandemic Can Teach Today’s Insurers*, *AIR* (Mar. 29, 2018) available at <https://www.air-worldwide.com/publications/air-currents/2018/What-the-1918-Flu-Pandemic-Can-Teach-Today-s-Insurers/> (“Even with today’s technology, a modern severe pandemic would cause substantive direct financial losses to the insurance community. In addition, indirect losses would be severe, most notably on the asset side of the balance sheet.”).

85. One insurance industry repository shows the proverbial tip of the iceberg about how much information was available to insurers regarding the risks of pandemics. The Insurance Library Association of Boston, founded in 1887, describes itself as “the leading resource for and provider of literature, information services, and quality professional education for the insurance industry and related interests.” The Insurance Library, *About Us* (August 27, 2020) available at <http://insurancelibrary.org/about-us/>. The Association states on its website:

The past 20 years has seen the rise of a number of pandemics. Slate recently published an article on what has been learned about treating them in that time. We thought it might be apt for us to take a look back and see what the insurance industry has learned as well.

The Insurance Library, *Pandemics and Insurance* (August 27, 2020) available at <http://insurancelibrary.org/pandemics-and-insurance/>.

86. Thus, Indemnity knew, and publicly acknowledged, that it could be obligated to pay for massive losses in the event of a pandemic. It also knew of the risk of communicable

diseases, as the Policy includes it, but failed to specifically exclude communicable disease or pandemic-associated losses.

THE COVID-19 PANDEMIC AND
SUBSEQUENT CIVIL AUTHORITY ORDERS

87. COVID-19 is a disease caused by a recently discovered virus known as SARS-CoV-2. The World Health Organization has named the virus and a resulting disease as follows:

Official names have been announced for the virus responsible for COVID-19 (previously known as “2019 novel coronavirus”) and the disease it causes. The official names are:

Disease
coronavirus disease
(COVID-19)

Virus
severe acute respiratory syndrome coronavirus 2
(SARS-CoV-2).

The World Health Organization, *Naming the Coronavirus Disease (COVID-19) and the Virus that Causes It* (August 27, 2020) available at [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it).

88. The World Health Organization also provided a straight-forward example of the distinction between a virus and a disease:

Viruses, and the diseases they cause, often have different names. For example, HIV is the virus that causes AIDS. People often know the name of a disease, such as measles, but not the name of the virus that causes it (rubeola).

There are different processes, and purposes, for naming viruses and diseases.

Id.

89. The first reported cases of COVID-19 in humans were diagnosed in or around December 2019 in Wuhan, the capital city of the Hubei Province in China. Since then, SARS-CoV-2 and COVID-19 have spread throughout the world, prompting the World Health Organization to declare a global pandemic.

90. As explained by the World Health Organization,

[p]eople can catch COVID-19 from others who have the [SARS-CoV-2] virus. The disease can spread from person to person through small droplets from the nose or mouth which are spread when a person with COVID-19 coughs or exhales. These droplets land on objects and surfaces around the person. Other people then catch COVID-19 by touching these objects or surfaces, then touching their eyes, nose or mouth. People can also catch COVID-19 if they breathe in droplets from a person with COVID-19 who coughs out or exhales droplets.

The World Health Organization, *How does COVID-19 spread?* (April 16, 2020), available at <https://www.who.int/news-room/q-a-detail/q-acoronaviruses>.

91. Aerosolized droplets exhaled by normal breathing can travel significant distances and stay suspended in air for hours until gravity ultimately forces them to the nearest surface. Studies suggest that the SARS-CoV-2 virus can remain contagious on some surfaces for up to six days. Alex W.H. Chin, *et al.*, “Stability of SARS-CoV-2 in different environmental conditions,” *The Lancet Microbe* (April 2, 2020), available at [https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247\(20\)30003-3/fulltext](https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247(20)30003-3/fulltext).

92. Another study, in connection with the Diamond Princess cruise, identified SARS-CoV-2 RNA on a variety of surfaces in cabins of both symptomatic and asymptomatic infected passengers up to 17 days after cabins were vacated. Leah F. Moriarty, *et al.*, “Public Health Responses to COVID-19 Outbreaks on Cruise Ships – Worldwide, February-March 2020,” *CDC Morbidity and Mortality Weekly Report* (Mar. 27, 2020), available at <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6912e3-H.pdf>.

93. In a recently published study, researchers determined that, “[a]irborne transmission of viable SARS-CoV-2 is likely and plays a critical role in the spread of COVID-19” and that for aerosol-based transmission, “measures such as physical distancing by 6 feet would not be helpful in an indoor setting” John A. Lednicky, *et al.*, “Viable SARS-CoV-2 in the air of a hospital room 1 with COVID-19 patients,” (Aug. 4, 2020), *available at* <https://www.medrxiv.org/content/10.1101/2020.08.03.20167395v1.full.pdf>.

94. Restaurants are at particular risk. A study in Guangzhou, China, identified a COVID-19 outbreak in an air-conditioned restaurant. The study concluded that, “[I]n this outbreak, droplet transmission was prompted by air-conditioned ventilation. The key factor for infection was the direction of the airflow.” Jianyun Lu, *et al.*, “COVID-19 Outbreak Associated with Air Conditioning in Restaurant, Guangzhou, China, 2020,” *Emerging Infectious Diseases* (July 2020), *available at* https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article.

95. Indeed, the potential danger of COVID-19 in restaurants may be greater than that posed by many other businesses. People from all over the country and world travel to New York to see theatre and musical performances. Likewise, 12 million people visit National Harbor a year. Countless individuals, asymptomatic, pre-symptomatic, and otherwise, experienced Fireman’s Hospitality prior to the closure orders described below, and may have unknowingly spread COVID-19 inside the restaurants and to countless others before returning to the cities, states, and countries from which they came. Additionally, the operation of a restaurant involves a large gathering of people within an enclosed space for a prolonged period, increasing the likelihood that SARS-CoV-2 or COVID-19 would be in the airspace and on surfaces, and that such restaurant would be a potential source of exposure.

96. Fireman's Hospitality is indeed aware that at least one of its employees tested positive for COVID-19.

97. Since January 1, 2020, there have been more than 25,327,000 confirmed cases of COVID-19 throughout the world, more than 838,000 of which have resulted in death as of the date of filing of this complaint. See <https://covid19.who.int/>. There have been more than 5,936,000 confirmed cases of COVID-19 in the United States, more than 182,000 of which have resulted in death. There have been confirmed cases of COVID-19 in every state. Moreover, due in part to the initial absence and later limited availability of tests, and questions about the accuracy of the tests, it is believed that the true number of COVID-19 cases is significantly higher than the reported numbers might suggest. See The Associated Press, *How Many People Have Had Coronavirus with No Symptoms?* (April 20, 2020), available at <https://www.nbcnews.com/health/health-news/how-many-people-have-had-coronavirus-no-symptoms-n1187681>.

98. Accordingly, physical loss of or damage to property from SARS-CoV-2 and COVID-19 is ubiquitous and widespread throughout the United States.

99. When SARS-CoV-2 and COVID-19 impact property, they render that property dangerous and potentially fatal.

100. Thus, in response to COVID-19, civil authorities throughout the United States began issuing "stay-at-home" and "shelter in place" orders, requiring the suspension of non-essential business operations, and ordering businesses to close in March 2020.

Actions by New York State and New York City

New York State Actions

101. To help create a framework for the implementation of such policies in New York, Governor Andrew Cuomo issued Executive Order No. 202 on March 7, 2020, declaring a state of emergency in New York. The Executive Order makes reference to the World Health Organization's designation of "the novel coronavirus, COVID-19, outbreak" and that "both travel-related cases and community contact transmission of COVID-19 have been documented in New York and more are expected to continue."

102. In apparent recognition of these facts, Executive Order 202.1 was issued on March 12, 2020, directing that "any theater seating five hundred or more attendees for a live performance located in [the City of New York] shall not hold any further performances after 5:00 PM on March 12, 2020." This occurred one day after it was widely reported that an individual working at two different Broadway theaters—within 1 mile of the Insured NY Restaurants—tested positive. *See, e.g., Michael Paulson, Broadway Usher Tests Positive for Coronavirus* (March 11, 2020) available at <https://www.nytimes.com/2020/03/11/theater/broadway-show-usher-coronavirus.html>.

103. As to restaurants, Executive Order No. 202.3, prohibited gatherings over a certain size and required "[a]ny restaurant or bar in the state of New York [to] cease serving food or beverage on-premises effective at 8:00 PM on March 16, 2020."

104. On March 22, 2020, Governor Cuomo enacted a stay-at-home order named, "New York State on PAUSE," which required all non-essential workers to work from home.

105. On April 26, 2020, Governor Cuomo announced a phased approach to reopen industries and businesses in New York based upon a data-driven, regional analysis.

106. On June 3, 2020, Governor Cuomo announced outdoor dining at restaurants would be permitted in Phase 2 of reopening, in accordance with state-issued guidance.

107. The state closure orders were only partially lifted on June 6, 2020, per Executive Order 202.38, when the Governor allowed “a restaurant or bar to serve patrons food or beverage on-premises only in outdoor space, provided such restaurant or bar is in compliance with Department of Health guidance promulgated for such activity.”

108. Executive Order No. 202.38 further required that:

- Tables must be 6 feet apart;
- Restaurants can only have as many tables that can fit while still keeping 6 feet distance;
- Tables are limited to a maximum of 10 people; and
- Restaurants are not permitted to sell alcohol to patrons who are not also purchasing food.

109. Pursuant to Executive Order Nos. 202.48 and 202.55, the prohibition on indoor dining has been continued through September 4, 2020.

New York City Actions

110. On March 12, 2020, the Mayor of the City of New York, Bill de Blasio, issued Emergency Executive Order No. 98 declaring a local state of emergency. This Order was premised upon:

- The outbreak of COVID-19 in Wuhan;
- The announcement of a nationwide public health emergency to respond to COVID-19 at the federal level;
- The first case of COVID-19 in New York City; and
- The World Health Organization’s characterization of COVID-19 as a pandemic.

111. On March 15, 2020, the Mayor issued Emergency Executive Order No. 99 which referenced the threat from COVID-19 and declared that, “[t]he reduction of opportunities for the person-to-person transmission of COVID-19 in meetings and other gatherings is necessary to combat the spread of the disease.”

112. On March 16, 2020, the Mayor issued Emergency Executive Order No. 100 which referenced the risk of community spread and the reduction of opportunities for person-to-person transmission of COVID-19. The order was said to have been 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.” This order required the closure of all establishments that offer food or drink.

113. Emergency Executive Order No. 100 did permit restaurants, however, to remain open for the sole purpose of providing take-out or delivery service.

114. In that same Executive Order, the Mayor 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.”

115. On June 22, 2020, New York City entered in Phase 2 of Reopening. Phase 2 permitted outdoor, though not indoor, dining at restaurants. In accordance with the State guidelines referenced above, the Mayor issued Emergency Executive Order No. 127.

Emergency Executive Order No. 127 permitted:

restaurants, bars and other establishments participating in the Open Restaurants Program established pursuant to Emergency Executive Order No. 126, dated June 18, 2020, to provide onsite service in accordance with all guidance and procedures applicable to such program. All restaurants, bars and other establishments offering food or drink may continue to provide take-out and delivery

service, in accordance with the aforementioned Emergency Executive Orders.

116. As of the date of this filing, New York City is in a limited Phase 4 of New York's reopening plan. There is no date set or anticipated by which theatres or concert venues will be permitted to reopen in any capacity. There is also no set date set or anticipated by which restaurants or theatres or concert venues will be permitted to reopen at full capacity (or if restaurants or theatres or concert venues will ever be permitted to do so absent, for example, the worldwide availability of a vaccine).

Closure of Leader Locations

117. Indeed, access to the three "Leader Locations" in New York has been prohibited by actions of civil authority in accordance with the above orders and guidance.

118. Carnegie Hall has been closed since March 13, 2020 in line with the actions of civil authority set forth above "as well as guidelines issued by the CDC, all designed to battle the spread of COVID-19." See Carnegie Hall, *Carnegie Hall Events Cancelled Until January 7, 2021* (August 27, 2020), available at <https://www.carnegiehall.org/About/Press/Press-Releases/2020/06/18/Carnegie-Hall-Events-Cancelled-Through-Jan-7-6-18-2020#:~:text=Carnegie%20Hall%20has%20been%20closed,the%20spread%20of%20COVID%2D19>. Carnegie Hall does not expect to re-open to the public until January 7, 2021. *Id.*

119. The Richard Rodgers Theatre has been closed since March 12, 2020 in line with the actions of civil authority set forth above. On June 19, 2020, the Theatre, through the Broadway League, the national trade association for Broadway, announced that the Theatre will be closed through January 3, 2021. See Broadway Direct, *Statement on Coronavirus; All Broadway Shows Suspended Through January 3, 2021* (June 29, 2020), available at www.broadwaydirect.com/broadway-league-coronavirus/.

120. The Lincoln Center Theatre has been closed since March 12, 2020 in line with the actions of civil authority set forth above, and does not expect to reopen to the public until Spring of 2021. See Lincoln Center Theatre, *LTC News Alert* (March 12, 2020), available at www.lct.org/lct-news-alert/.

Actions By The State of Maryland and Prince George's County

Maryland Actions

121. On March 5, 2020, Hon. Lawrence J. Hogan, Jr., the Governor of Maryland, declared a state of emergency in Maryland (“Declaration of State of Emergency and Existence of Catastrophic Health Emergency – COVID-19”). The Declaration referenced “an outbreak of disease (‘COVID-19’),” referred to “COVID-19 [as] a severe respiratory disease, resulting in illness or death” and as a “public health catastrophe and public emergency.”

122. On March 16, 2020, referencing the Declaration of State of Emergency and Existence of Catastrophic Health Emergency – COVID-19, Governor Hogan issued an Order “Amending and Restating the Order of March 12, 2020, Prohibiting Large Gatherings and Events and Closing Senior Centers, and Additionally Closing Bars, Restaurants, Fitness Centers, and Theaters” (the “Order”). The Order’s purpose included that, “[i]t is further necessary to control and direct in Maryland the occupancy and use of buildings and premises, as well as places of amusement and assembly.”

123. The Order “controls the occupancy and use of restaurants, bars, and other similar establishments that sell food or beverages for consumption on-premises in Maryland.” Specifically, all restaurants and bars were closed to the general public with a limited exception to permit carry-out, drive-through, and off-premises delivery.

124. The Order also required the closure of “[s]tate and local government buildings and facilities with an expected occupancy or attendance of more than fifty people.”

125. The Order was subsequently extended.

126. On May 27, 2020, Governor Hogan issued an Executive Order permitting restaurants to provide outdoor dining on May 29, 2020, subject to the following limitations:

- All patrons must be seated six feet away from each other; and
- No groups larger than six can be seated together unless members of the same household.

127. On June 10, 2020, Governor Hogan issued an Executive Order permitting restaurants to provide indoor dining on June 12, 2020, subject to the following limitations:

- Restaurants are required to limit the number of persons in the establishment to 50 percent of the restaurant’s maximum capacity;
- Restaurants are not permitted to serve food in a buffet format; and
- Restaurants are not permitted to serve customers who are not seated.

128. On August 3, 2020, Governor Hogan issued an Executive Order permitting restaurants to continue limited indoor and outdoor dining pursuant to the above restrictions.

129. As of the date of this filing, these restrictions remain in effect.

Prince George’s County Actions

130. On March 16, 2020, Prince George’s County, Maryland (the “County”) issued an Executive Order declaring a state of emergency due to COVID-19.

131. The County issued a stay-at-home order on March 30, 2020 that closed all non-essential businesses, including restaurants.

132. On June 1, 2020, the County issued an Executive Order permitting restaurants to open but limiting them to outdoor service only with a maximum of six patrons per table.

133. On July 31, 2020, the County issued an Executive Order permitting restaurants in the County to provide indoor service (limited to a 50 person capacity, regardless of space), carry-out service, delivery service, and outdoor service.

134. As of the date of this filing, these restrictions remain in effect.

The National Harbor "Leader Location"

135. National Harbor, the location of the Insured MD Restaurants in the County, has been subject to the above actions of civil authority. The Gaylord National Resort and Convention Center, the largest non-gaming hotel and convention center on the east coast of the United States with 1,996 rooms and 110 suites, anchors National Harbor. It closed on March 24, 2020 and has remained closed. Ryman Hospitality Properties, owner of the Gaylord National Resort and Convention Center, told investors that, as of April 2020, it has lost \$58.7 million in lost revenue from the loss of 128,181 group room rates and associated food and beverage and other related revenue, as a result of COVID-19. *See Rebecca Cooper, Greater Washington's Largest Hotel to Remain Closed into May* (April 27, 2020), available at www.bizjournals.com/washington/news/2020/04/27/greater-washingtons-largest-hotel-to-remain-closed.html. Fireman's Hospitality is unaware of any plan by the Gaylord National Resort and Convention Center to reopen in the near term.

Physical Alterations to the Restaurants

136. Based on the conditions imposed on Fireman's Hospitality, it appears that as Fireman's Hospitality reopens its restaurants, it will continue to be with physical and structural alterations, potentially including the erective of protective barriers and partitions, new or re-

designed air flow and filtration systems, and even the redesign and physical alteration of the restaurants themselves, including seating, restrooms, access, and areas for employees and guests.

137. Pursuant to the orders set forth above, all of the Insured Restaurants closed on March 16, 2020.

138. In New York, Bond 45, the Brooklyn Diner on 43rd Street, and Trattoria Dell'Arte were rendered incapable of the performance of the intended function of the restaurants—serving guests—and remain closed.

139. The Brooklyn Diner on 57th Street partially reopened on July 6, 2020, after having to make physical alterations to its space that have left it substantially impaired and able to serve only a limited number of guests through use of a new outdoor seating area constructed in response to the actions of civil authority. The indoor seating area remains closed. As a result of the physical alterations to the restaurant, the Brooklyn Diner on 57th Street has 40 outdoor seats for guests, down from 80 before COVID-19.

140. Café Fiorello partially reopened on June 29, 2020, after having to make physical alterations to its space that have left it substantially impaired and able to serve only a limited number of guests through reduction of its existing outdoor seating area to comply with the actions of civil authority. The indoor seating area remains closed. As a result of the physical alterations to the restaurant, Café Fiorello has 46 outdoor seats for guests, down from 86 before COVID-19.

141. Red Eye Grill partially reopened on July 13, 2020, after having to make physical alterations to its space that have left it substantially impaired and able to serve only a limited number of guests through reduction of its existing outdoor seating area to comply with the actions of civil authority. The indoor seating area remains closed. As a result of the physical

alterations to the restaurant, Red Eye Grill has 50 seats for outdoor guests, down from 80 before COVID-19.

142. Bond 45 National Harbor partially reopened on June 26, 2020, after having to make physical alterations to its space that have left it substantially impaired and able to serve only a limited number of guests through reduction of its seating areas to comply with the actions of civil authority. Indoor seating was permitted, as of June 12, 2020, but only at up to 50 percent of capacity. As a result of the physical alterations to the restaurant, Bond 45 National Harbor has 150 seats for guests, down from 364 before COVID-19.

143. Fiorella's partially reopened on June 5, 2020, after having to make physical alterations to its space that have left it substantially impaired and able to serve only a limited number of guests through reduction of its seating areas to comply with the actions of civil authority. Indoor seating was permitted, as of June 12, 2020, but only at up to 50 percent of capacity. As a result of the physical alterations to the restaurant, Fiorella's has 76 seats for guests, down from 175 before COVID-19.

144. As a result of the above, Fireman's Hospitality has suffered business income losses estimated at nearly \$9,000,000 through June 2020. These losses are continuing.

INDEMNITY'S BREACHES AND WRONGFUL CONDUCT

145. As a result of the "suspension" of its business operations, Fireman's Hospitality sustained covered Business Income (And Extra Expense) losses as defined in the Policy. These losses were sustained due to the "slowdown or cessation of [Fireman's Hospitality's] business activities." These losses were also caused by the actions of the City and State of New York, Prince George's County, and the State of Maryland, each of which are a "civil authority" (collectively, the "Civil Authorities").

146. The actions undertaken by the Civil Authorities were issued due to the presence of COVID-19 in the jurisdictions of the Civil Authorities, and the desire to avoid the spread of COVID-19. Because the SARS-CoV-2 virus and/or COVID-19 can adhere to surfaces of property for days and can linger in the air in buildings for several hours, the presence of the SARS-CoV-2 virus and/or COVID-19 on or around property amounts to “direct physical loss of or damage to property,” as that phrase is used in the Policy.

147. Given the manner in which the SARS-CoV-2 virus and/or COVID-19 lingers in the air and on surfaces, and its manner of transmission, and the desire to “flatten the curve,” the Insured Restaurants were not capable of being used for their essential functions. Accordingly, the actions taken by the Civil Authorities substantially impaired Fireman’s Hospitality’s properties, constituting “direct physical loss of or damage to” the Insured Restaurants.

148. The actions of the Civil Authorities: (1) prohibited access to the area immediately surrounding the damaged property as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property and (2) were taken in response to dangerous physical conditions resulting from the damage.

149. As previously noted, the Civil Authorities expressly referenced the community spread and transmission of COVID-19 in their respective jurisdictions when taking actions to prohibit access to the Insured Restaurants.

150. Fireman’s Hospitality’s Business Income From Dependent Properties coverage under the Policy also applies. Carnegie Hall, Lincoln Center, National Harbor Mall, and the Richard Rodgers Theatre suffered “direct physical loss of or damage to” those properties. Given the fact that these so-called “Leader Locations” drove customers and revenue to the Insured Restaurants, the loss of business income is compensable under the Policy.

151. Additionally, the closures were necessary to prevent COVID-19 from spreading inside of the Insured Restaurants. The costs and losses associated with the closures therefore constitute reasonable costs incurred to reduce, prevent, and/or mitigate loss. Indemnity is obligated to pay these amounts to Fireman's Hospitality pursuant to the Policy, which obligated Fireman's Hospitality to "[t]ake every reasonable step to protect the Covered Property from further damage" and to "resume all or part of your 'operations' as quickly as possible," and the common law doctrine of mitigation. *See* FH000049.

152. Although Fireman's Hospitality sustained business income losses that fall squarely within the Policy's Business Income (And Extra Expense), Civil Authority, and Business Income From Dependent Properties coverages, Indemnity failed and refused to acknowledge coverage for those losses and refused to pay any portion of them, including the amounts Fireman's Hospitality has incurred, and is incurring, to mitigate its otherwise insured losses.

153. Indeed, after a perfunctory "investigation" into Fireman's Hospitality's losses, Indemnity denied Fireman's Hospitality's claim, incorrectly asserting that Fireman's Hospitality's losses were not caused by any direct physical loss of or damage to Covered Property or other property within one mile, or due to the prohibition of access by a civil authority. On the latter, Indemnity wrote that, "[i]t is our understanding that governmental authorities ordered the captioned premises to reduce occupancy and close as a precaution to prevent the spread of the COVID-19 virus." Indemnity took this position even though Civil Authorities had issued orders in response to the presence of COVID-19 in New York and Maryland, even though Mayor de Blasio had declared that SARS-CoV-2 virus was causing property damage, and even though the presence of SARS-CoV-2 virus and/or COVID-19 on or

around property amounts to “direct physical loss of or damage to property” under the governing rules of insurance policy interpretation.

154. Indemnity also cited the “New York – Exclusion of Loss Due to Virus or Bacteria” in its denial, stating that “COVID-19 is a virus that meets the criteria of this additional exclusion therefore also precluding coverage for your loss.” This is despite the fact that the World Health Organization and others have explained that COVID-19 is a disease, not a virus, and this Policy distinguishes between a virus and a communicable disease.

155. Fireman’s Hospitality is informed and believes, and on that basis alleges, that Indemnity denied Fireman’s Hospitality’s claim despite knowing for decades that many courts have determined that the contamination of property by a hazardous substance has been deemed to constitute property damage, and, that insurers, including members of the Chubb group of companies, had litigated and lost this issue. *See, e.g., AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 842 (1990) (“contamination of the environment satisfies” the requirement of property damage); *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 39-40 (1968) (direct physical loss when gasoline contaminated church building making it dangerous to use); *Farmers Ins. Co. v. Trutanich*, 123 Or. App. 6, 9-11 (1993) (odor from methamphetamine “cooking” constituted “direct physical loss”); *Sentinel Mgt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (“[A] building's function may be seriously impaired or destroyed and the property rendered useless by the presence of contaminants. . . . Under these circumstances, we must conclude that contamination by asbestos may constitute a direct, physical loss to property under an all-risk insurance policy.”). As a minimum, in light of these and many other court decisions, Indemnity knew that its policy language reasonably could be interpreted to cover Fireman’s Hospitality’s losses. Fireman’s Hospitality is informed and

believes and, on that basis alleges, that rather than define “direct physical loss of or damage to property,” Indemnity elected to leave the language as is, knowing that insureds could, and likely would, understand it to mean that pandemic-associated losses would be insured.

156. The Policy does not include, and Indemnity consciously decided not to include, any exclusions conspicuously, plainly, clearly, and unambiguously barring coverage for losses attributable to communicable diseases or pandemics.

157. To the extent not waived or otherwise excused, Fireman’s Hospitality has complied with all terms and conditions precedent contained in the Policy. Therefore, Fireman’s Hospitality is entitled to all benefits of insurance provided by the Policy.

FIRST CAUSE OF ACTION

(Breach of Contract)

158. Fireman’s Hospitality realleges and incorporates by reference herein each allegation contained in paragraphs 1 through 157 above.

159. Fireman’s Hospitality performed all obligations required of it under the Policy, except as otherwise excused.

160. Indemnity breached its duties under the Policy by unreasonably stating that Fireman’s Hospitality sustained no “direct physical loss of or damage to property;” that no property within one (1) mile sustained “direct physical loss of or damage to property” triggering Civil Authority coverage; that none of the Leader Locations sustained “direct physical loss of or damage to property;” and by denying coverage for all of Fireman’s Hospitality’s losses.

161. As a direct and proximate result of Indemnity’s acts, Fireman’s Hospitality has been damaged and will continue to sustain damages in an amount to be determined at trial.

162. In addition, Fireman’s Hospitality has incurred and continues to incur consequential damages, including claim preparation fees, internal costs, ongoing extra expenses,

and attorneys' fees, due to Indemnity's wrongful, unjustified and unreasonable failure to issue payment of amounts due, and improper treatment of the claim, all with the result of wrongfully diverting Fireman's Hospitality from its recovery efforts.

163. The consequential damages resulting from Indemnity's conduct were within the contemplation of the parties at the time the Policy was sold, as the natural and probable result of a breach of the Policy.

164. Fireman's Hospitality's damages were foreseeable given the purpose and particular circumstances of the property damage and business interruption coverage, and Restaurant Enhancement, sold by Indemnity under the Policy.

165. As a result of Indemnity's breach, Fireman's Hospitality requests entry of judgment for breach of contract, awarding payment of damages in an amount equal to the amount owed under the Policy and consequential damages, each in amounts to be proven at trial.

SECOND CAUSE OF ACTION

(Tortious Failure to Act in Good Faith – *Md. Code Ann., Cts. & Jud. Proc.*, § 3-1701)

166. Fireman's Hospitality realleges and incorporates by reference herein each allegation contained in paragraphs 1 through 157 above.

167. At all pertinent times, Indemnity had a duty to act in good faith toward Fireman's Hospitality as its insured, and thus Indemnity was and is required to make "informed judgment[s] based on honesty and diligence supported by evidence the insurer knew or should have known at the time the insurer made a decision on a claim." *See Md. Code Ann., Cts. & Jud. Proc.* § 3-1701(a)(4).

168. Indemnity has breached this duty of good faith by engaging in a continuous course of conduct to refuse and/or delay meeting its obligations to Fireman's Hospitality in connection with Fireman's Hospitality's losses. Specifically, Indemnity: (i) failed to undertake

any investigation whatsoever of Fireman's Hospitality's claim and, instead, arbitrarily and with reckless disregard of Fireman's Hospitality's rights, refused to acknowledge coverage or even conduct an investigation before denying Fireman's Hospitality's claim for coverage; (ii) denying Fireman's Hospitality's claim with either actual knowledge and/or reckless disregard of the fact that its acts and/or omissions constituted an unreasonable failure to honor its contractual obligations; (iii) knowingly and recklessly basing its denial of coverage on frivolous grounds which are unsupported by fact, law or the Policy itself and in doing so, showing greater concern for its monetary interest than the legitimate loss suffered by Fireman's Hospitality; and (iv) compelling Fireman's Hospitality to file this suit in order to receive the contractual benefits which it bought and paid for.

169. As a direct and proximate result of Indemnity's breaches of its duty of good faith, which are continuing as of the date of the filing of this Complaint, Fireman's Hospitality has sustained, and will continue to sustain, significant monetary damages, including attorneys' fees and cost associated with being forced to retain counsel to pursue its rights under the Policy.

THIRD CAUSE OF ACTION

(Declaratory Judgment - *Md. Code Ann., Cts. & Jud. Proc.*, § 3-409)

170. Fireman's Hospitality realleges and incorporates by reference herein each allegation contained in paragraphs 1 through 157 above.

171. Pursuant to the terms of the Policy, Indemnity is obligated to pay business income losses and extra expenses covered under the Policy that are not specifically, clearly, and unambiguously excluded.

172. Fireman's Hospitality's losses are covered under multiple Policy coverage grants and are not excluded.

173. Indemnity disputes and denies that it has any contractual obligation to cover any of Fireman's Hospitality's losses under the Policy.

174. Pursuant to *Md. Code Ann., Cts. & Jud. Proc.*, § 3-409, Fireman's Hospitality is entitled to a declaration by this Court of Indemnity's obligations under the Policy.

175. An actionable, substantial, and justiciable controversy exists between Fireman's Hospitality and Indemnity concerning the interpretation and construction of the Policy, and the rights and obligations of the parties thereto, with respect to Fireman's Hospitality's claim.

176. Pursuant to *Md. Code Ann., Cts. & Jud. Proc.*, § 3-409, this Court should enter a declaratory judgment in favor of Fireman's Hospitality and against Indemnity, declaring that there is coverage available for Fireman's Hospitality's claim. Such a declaration would resolve the current controversy between Fireman's Hospitality and Indemnity.

PRAYER FOR RELIEF

WHEREFORE, Fireman's prays for relief as follows:

(a) On the First Cause of Action, Fireman's Hospitality requests that the Court enter judgment against Indemnity, awarding Fireman's Hospitality compensatory and consequential damages in an amount to be determined at trial;

(b) On the Second Cause of Action, Fireman's Hospitality requests that the Court enter judgment against Indemnity in an amount to be determined at trial, plus prejudgment interest, costs, and attorneys' fees associated with this action;

(c) On the Third Cause of Action, Fireman's Hospitality requests that the Court enter a declaratory judgment in favor of Fireman's Hospitality against Indemnity, declaring that Indemnity is required to pay Fireman's Hospitality's claim; and

(d) On all Causes of Action, Fireman's Hospitality requests that the Court award costs, attorneys' fees, and pre- and post-judgment interest to the extent permitted by law, and such other, further, and different relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Fireman's Hospitality hereby demands a trial by jury on all issues so triable.

Dated: Baltimore, Maryland

September 2, 2020

PASICH LLP

By: 

Eric D. Vandelinde
CPE No. 6912170259
Greenspoon Marder, LLP
201 International Circle, Suite 230
Hunt Valley, MD 21030
Eric.vandelinde@gmlaw.com
(410) 891 5870

-and-

Peter A. Halprin (*pro hac vice* to be filed)
757 Third Avenue, 20th Floor
New York, New York 10017
Telephone: (212) 686-5000
PHalprin@PasichLLP.com

-and-

Kirk Pasich (*pro hac vice* to be filed)
Arianna Young (*pro hac vice* to be filed)
10880 Wilshire Boulevard, Suite 2000
Los Angeles, California 90024
Telephone: (424) 313-7850
KPasich@PasichLLP.com
AYoung@PasichLLP.com

-and-

James Turken (*pro hac vice* to be filed)
Greenspoon Marder, LLP
1875 Century Park East, Suite 1900
Los Angeles, CA 90067
James.turken@gmlaw.com
(323) 880 4523

Attorneys for Plaintiffs