

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

MERITAGE HOSPITALITY GROUP, INC.,

Plaintiff,

-Against-

NORTH AMERICAN ELITE INSURANCE COMPANY,

Defendant

**COMPLAINT
FOR DECLARATORY
JUDGMENT AND
OTHER RELIEF**

Index No.:

Date Filed:

NOW COMES Plaintiff Meritage Hospitality Group Inc. (“Meritage”), by and through its counsel, E. Stewart Jones Hacker Murphy, LLP, and for its Complaint against Defendant North American Elite Insurance Company (“NAEIC”) states as follows:

INTRODUCTION

1. Meritage asserts claims for business interruption insurance coverages under its all-risk commercial insurance policy issued to it by NAEIC. Under longstanding and bedrock insurance law principles, Meritage is entitled to payment under that policy for millions of dollars of business income losses and extra expenses incurred as a direct result of unprecedented state and local Closure Orders and restrictive Reopening Orders (collectively the “Orders of Civil Authority”). The Orders of Civil Authority caused physical loss or damage to Meritage’s insured properties by requiring physical, detrimental limitations and/or alterations to them that rendered Meritage’s properties non-functional or only partially functional as restaurants.

2. Meritage owns and operates 346 restaurants in 16 states. Most of these restaurants are Wendy’s™ fast food restaurants, though seven of Meritage’s Michigan-based locations are sit-down establishments. Prior to the Orders of Civil Authority, Meritage’s restaurants were bustling

with activity. Its dining rooms, at both its sit-down and fast food restaurants, were places where customers would meet and share a meal or drink, gather to celebrate special occasions, and where co-workers met for working or social lunches. The physical premises of Meritage's sit-down and fast food restaurants, including dining room layout, arrangement of seats and furniture, and flow of human traffic, were critical to their operations.

3. Meritage sought to protect itself – and reasonably believed that it had protected itself – in the event that the operations of its restaurants were suspended or reduced as a result of direct physical loss or damage by purchasing an “all-risk” commercial policy from NAEIC. Meritage faithfully paid nearly \$900,000 in premiums for the policy period at issue to ensure protection in the event of a catastrophic loss. When the Covid-19 pandemic swept across the country in early 2020, the hospitality industry was hit as hard as any sector of the economy. The pandemic and resulting Orders of Civil Authority caused unprecedented direct physical loss or damage to Meritage's insured properties. Yet when Meritage turned to its insurance carrier to cover significant losses resulting from that direct physical loss or damage, NAEIC, in blatant violation of its contractual obligations under the insurance policy at issue, denied the claim.

4. Left with no other option, Meritage files this lawsuit against NAEIC seeking a declaratory judgment that the subject insurance policy provides coverage for the losses incurred by Meritage, including that the Orders of Civil Authority caused direct physical loss or damage to its insured properties.

PARTIES

5. Plaintiff Meritage Hospitality Group Inc. is a Michigan corporation with its corporate headquarters in Grand Rapids, Michigan. It operates 346 fast-food and sit-down restaurants throughout Arkansas, Connecticut, Florida, Georgia, Indiana, Massachusetts,

Michigan, Missouri, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, and Virginia.

6. Defendant North American Elite Insurance Company is, upon information and belief, a New Hampshire corporation with a principal place of business in New York. NAEIC provides insurance products and services throughout the United States, including throughout the state of New York.

JURISDICTION AND VENUE

7. This Court has jurisdiction over NAEIC pursuant to CPLR §§ 301, 302, as NAEIC's principal place of business is in New York and NAEIC is licensed to sell insurance products and services in New York. Further, upon information and belief, NAEIC sells insurance products and services in Albany County, New York.

8. Venue in Albany County is proper pursuant to CPLR § 501 and the forum selection clause contained in Section IX of the insurance policy¹ at issue in this case, which provides in part that the parties "do irrevocably submit to the exclusive jurisdiction of the Courts of the State of New York." **Exhibit 1**, § IX, ¶ F(2). As Albany County, New York is a Court of the State of New York, the contractual forum selection clause in the policy is satisfied and venue is proper.

9. Venue in Albany County is also proper as NAEIC is currently a named defendant in litigation pending in Albany County, New York, styled *Mac Parent, LLC v. North American Elite Insurance Company*, bearing Index No. 906489-20, in the Commercial Division before Hon. Richard Platkin. Upon information and belief, that case arises out of NAEIC's denial of an insurance claim substantially similar to that made by Meritage involving the same insurance policy provisions at issue in this case.

¹ A copy of the Policy is attached to this Complaint as **Exhibit 1**.

FACTUAL ALLEGATIONS

Meritage Purchases All-Risk Commercial Insurance from NAEIC

10. NAEIC issued a policy of insurance to Meritage, bearing Policy No. NAP 2002260-02, for the policy period of December 31, 2019 through December 31, 2020 (the “Policy”). The Policy’s limits total \$50,000,000.

11. The Policy is of the type commonly referred to in the insurance industry as an “all-risk” policy. Under this type of insurance, coverage extends to all risks unless specifically limited or excluded by the express terms of the insurance policy. Unlike “enumerated perils” property insurance, which covers only specified causes of loss, all-risk property insurance covers even unprecedented and unanticipated risks of loss, thereby providing purchasers of insurance with comfort that all possible risks of loss – unless specifically excluded in the policy – are covered.

12. Given the scope of coverage provided by the Policy, Meritage paid nearly \$900,000 in premiums for the one-year policy period at issue to purchase this type of comprehensive insurance coverage.

13. The all-risk Policy includes a form labeled “Leading Edge All-Risk Form,” with its Insuring Agreement providing as follows:

Subject to the terms, conditions, exclusions and limitations contained herein or endorsed hereon and in consideration of the premium paid, this POLICY, of which this page forms a part, insures all risks of direct physical loss or damage to INSURED PROPERTY while on INSURED LOCATION(S) provided such physical loss or damage occurs during the term of this POLICY.

14. Among other things, direct physical loss or damage related to Orders of Civil Authority is clearly within the scope of risks covered by the Policy. Upon information and belief, NAEIC accepted the premiums for the Policy with no intention of providing any coverage for business losses or extra expense under the Orders of Civil Authority extension.

15. The Policy provides for property damage coverage for “Communicable Disease Response,” which insures reasonable and necessary costs incurred by Meritage at insured locations as a result of access to insured locations being limited, restricted, or prohibited by order of an authorized governmental agency or officer of Meritage as a result of the actual not suspected presence of a communicable disease, under certain circumstances.

16. The Policy also provides for property damage coverage for “Protection and Preservation of Property – Property Damage,” which insures reasonable and necessary costs incurred for actions to temporarily protect or preserve insured property, provided such actions are necessary due to actual – or to prevent immediately impending – direct physical loss or damage insured by the Policy to such insured property.

17. Further, the Policy contains a number of specifically enumerated “Time Element” coverages, which provide for lost business income and extra expenses resulting from direct physical loss or damage. These coverages insure against losses incurred as a result of, among other things, (1) the prevention of direct ingress to or direct egress from insured locations, regardless of damage, (2) interruption by communicable disease, (3) closures or limitations due to orders of civil authority, and (4) reasonable action taken by Meritage for the temporary protection and preservation of property insured by the Policy to prevent immediately impending direct physical loss or damage.

The Covid-19 Pandemic

18. A novel coronavirus, named Severe Acute Respiratory Syndrome coronavirus 2 (SARS-CoV-2), was identified as the cause of an outbreak of respiratory illness first detected in Wuhan, China in late 2019. The illness caused by this virus is referred to as Covid-19. Throughout this Complaint, both the SARS-CoV-2 virus and the resulting disease will be collectively referred to as “Covid-19.”

19. On January 30, 2020, the World Health Organization declared the Covid-19 outbreak a “Public Health Emergency of International Concern.”² Covid-19 quickly spread internationally, and by mid-March, 2020, there were thousands of confirmed Covid-19 cases throughout the United States.

20. On March 11, 2020, the World Health Organization declared the Covid-19 outbreak a global pandemic. That same day, President Trump declared a national emergency in the face of a growing public health and economic crisis due to the global Covid-19 pandemic.

21. According to research from the National Institute of Health published in March, 2020, SARS-CoV-2 remains stable and transmittable for up to three hours in aerosols, up to four hours on copper, up to twenty-four hours on cardboard, and up to two to three days on plastic and stainless steel.³

22. Emerging research indicated the virus to be primarily transmitted from infected symptomatic and asymptomatic people to others who are in close contact through respiratory droplets, and/or by contact with contaminated objects and surfaces.

23. Without a vaccine to protect against Covid-19 when the pandemic began, control of the outbreak relied on measures designed to reduce human-to-human and surface-to-human exposure. Such measures are commonly referred to as “social distancing.”

24. Human-to-human and surface-to-human exposure is particularly acute in enclosed spaces where the public gathers to eat and socialize, like all 346 Meritage restaurants operated throughout the United States.

² [https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)) (last visited February 23, 2021).

³ <https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days> (last visited February 23, 2021).

***States Begin to Issue Closure Orders to Stop Community Spread of Covid-19
(Orders of Civil Authority)***

25. Beginning in March 2020, states across the country rapidly began to issue shut down and “stay home” orders, impacting every state in which Meritage owns and operates restaurants. While a significant number of Meritage’s restaurants were able to continue to serve carry-out meals, physical access to their dining rooms was blocked by the promulgation of the Orders of Civil Authority.

26. March 15, 2020:

- a. Ohio Governor Mike DeWine announced that the Ohio Department of Health had issued a Director’s Order which restricted food and beverage sales to carry-out and delivery only, with no onsite consumption permitted.⁴
- b. Commonwealth of Massachusetts Governor Charles D. Baker issued an “Order Prohibiting Gatherings of More Than 25 People and On-Premises Consumption of Food or Drink.”⁵ According to that Order, “[a]ny restaurant, bar, or establishment that offers food or drink shall not permit on-premises consumption of food or drink; provided that such establishments may continue to offer food for take-out and by delivery provided that they follow the social distancing protocols set forth in Department of Public Health Guidance.”
- c. Meritage has 15 restaurants in Ohio and 13 restaurants in Massachusetts. As a result of the March 15, 2020 Orders of Civil Authority, physical access to the dining rooms of 28 of their restaurants was precluded, impacting the functionality of those restaurants.

27. March 16, 2020:

- a. Governor Ned Lamont of Connecticut issued Executive Order No. 7D, entitled “Protection of Public Health and Safety During Covid-19 Pandemic and Response – Crowd Reduction and Social Distancing.”⁶ Pursuant to that

⁴ See Ohio Department of Health Director’s Order dated March 15, 2020.

https://content.govdelivery.com/attachments/OHOOD/2020/03/15/file_attachments/1401428/Health%20Director%20Order%20Limit%20Food,%20Alcohol%20Sales%20to%20Carry%20Out%20Delivery%20Only.pdf.

⁵ <https://www.mass.gov/doc/march-15-2020-large-gatherings-25-and-restaurants-order/download>.

⁶ <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive->

order, restaurants, eating establishments, and bars that serve food were required to move to take-out and delivery services only. Physical access to the dining rooms at Meritage's 32 Connecticut restaurants was blocked.

- b. Governor Eric J. Holcomb of Indiana issued Executive Order 20-04, which provided in part that restaurants providing in-person dining services were required to close to in-person patrons and could proceed with drive-thru, take-out and delivery services only. As a result, the dining rooms of Meritage's 12 restaurants in Indiana were closed.
- c. Michigan Governor Gretchen Whitmer issued Executive Order 2020-09, which specifically provided that restaurants were "closed to ingress, egress, use, and occupancy by members of the public" for "on-premises consumption."⁷ Given Governor Whitmer's Executive Order, all 61 Meritage restaurants in Michigan were forced to close their dining rooms to the public. This included seven sit-down restaurants that were not previously equipped with infrastructure to continue to accommodate customers with drive-thru service.

28. March 17, 2020:

- a. South Carolina Governor Henry McMaster issued Executive Order No. 2020-10, which provided in part that, beginning the following day, all restaurants or other food-service establishments which prepare, produce, or otherwise offer to sell food or beverages of any kind of on-premises consumption within the state must suspend services.⁸ The dining room in Meritage's lone restaurant in South Carolina closed.
- b. Governor Roy Cooper of North Carolina released Executive Order No. 118, declaring that all North Carolina restaurants and bars would be closed to sit-down service beginning that evening,⁹ impacting Meritage's two North Carolina restaurants.

29. March 19, 2020:

- a. Texas Governor Greg Abbott issued Executive Order No. GA-08 relating to Covid-19 preparedness and mitigation, requiring Texans to avoid eating

Orders/Executive-Order-No-7D.pdf.

⁷ https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521789--,00.html.

⁸ <https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-03-17%20FILED%20Executive%20Order%20No.%202020-10%20-%20Directing%20Additional%20Emergency%20Measures%20re%20COVID-19.pdf>.

⁹ <https://files.nc.gov/governor/documents/files/EO118.pdf>.

or drinking at bars, restaurants, and food courts.¹⁰ 12 Meritage restaurants in Texas were affected.

- b. Governor Asa Hutchinson of Arkansas directed the Arkansas department of health to ban sit-down service at all restaurants and bars effective immediately, impacting Meritage's nine Arkansas locations.

30. March 20, 2020:

- a. Florida Governor Ron DeSantis issued Executive Order 20-71, which directed all restaurants and food establishments within the state to suspend on-premises food consumption for customers.¹¹ Meritage's 56 restaurants in Florida had direct physical access to their dining rooms prohibited as a result.

31. March 21, 2020:

- a. Missouri Governor Mike Parson directed the Missouri Department of Health and Senior Services Director Dr. Randall Williams to order statewide social distancing. That order included a prohibition on eating and drinking at restaurants, bars, or food courts, but permitted the continued use of drive-thru, pickup, or delivery options.¹² Meritage's three Missouri locations were impacted as a result.

32. March 22, 2020:

- a. Tennessee Governor Bill Lee signed Executive Order 17 precluding restaurants from offering any food service other than drive-thru, take-out or delivery options.¹³ Meritage's 34 restaurants in Tennessee thus were forced to close their dining rooms.

33. In one week's time, Orders of Civil Authority had resulted in access being prohibited to the dining rooms of 250 of Meritage's restaurants across 12 states. The Orders of Civil Authority continued unabated.

¹⁰ https://gov.texas.gov/uploads/files/press/EO-GA_08_COVID-19_preparedness_and_mitigation_FINAL_03-19-2020_1.pdf.

¹¹ https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-71.pdf.

¹² <https://governor.mo.gov/press-releases/archive/governor-parson-directs-dhss-director-require-social-distancing-statewide>.

¹³ <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee17.pdf>.

34. March 23, 2020:

- a. Virginia Governor Ralph S. Northam issued Executive Order No. 53 (2020), requiring closure of dining rooms throughout the state, and thereby limiting Meritage's 13 Virginia locations to delivery and take-out services.¹⁴
- b. At the direction of Missouri Governor Mike Parson, the Missouri Department of Health and Senior Services issued an Order imposing statewide limitations, including a prohibition on dine-in food service at restaurants and bars, though carry-out service was permitted to continue. Access to the dining rooms in Meritage's three Missouri restaurants was prohibited.

35. March 24, 2020:

- a. Mississippi Governor Tate Reeves issued Executive Order No. 1463, which prohibited dine-in services at restaurants (unless the restaurants were able to reduce capacity to allow no more than 10 people to be gathered in a single space).¹⁵ Meritage's seven Mississippi locations were impacted.

36. April 1, 2020:

- a. Oklahoma Governor J. Kevin Stitt issued a state-wide "Stay Home" Order precluding access to Meritage's 28 Oklahoma restaurant dining rooms.¹⁶

37. April 2, 2020:

- a. Georgia Governor Brian Kemp issued a state-wide "Stay Home" Order precluding access to Meritage's 48 Georgia restaurant location dining rooms.¹⁷

38. In just 18 days, Orders of Civil Authority drastically impacted Meritage's ability to conduct its business and resulted in direct physical damage or loss to insured locations.

39. Since the first round of closure orders, each state in which Meritage's insured locations are located has gone through processes of renewing, extending, amending, or otherwise

¹⁴ [https://www.governor.virginia.gov/media/governorviriniagov/executive-actions/EO-53-Temporary-Restrictions-Due-To-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorviriniagov/executive-actions/EO-53-Temporary-Restrictions-Due-To-Novel-Coronavirus-(COVID-19).pdf).

¹⁵ <https://www.sos.ms.gov/content/executiveorders/ExecutiveOrders/1463.pdf>.

¹⁶ <https://www.sos.ok.gov/documents/executive/1926.pdf>.

¹⁷ <https://gov.georgia.gov/executive-action/executive-orders/2020-executive-orders>.

continuing the Orders of Civil Authority. And when closure orders were lifted and replaced with restrictive partial reopening orders, though a respite from complete dining room closure, they were still significant physical restrictions on the use of the physical space of Meritage's dining rooms. The restrictive partial reopening orders by and large continue to this day.

Direct Physical Loss or Damage

40. Meritage's restaurants outside the state of Michigan, and all but seven of its Michigan-based restaurants, are Wendy'sTM fast-food restaurants.

41. While the drive-thru dining option continued at Meritage's fast-food locations, they were forced to close their once-busy dining rooms, where Meritage would serve thousands of guests daily at its over 300 Wendy's locations.

42. As a direct result of the Orders of Civil Authority, Meritage's fast-food restaurants suffered direct physical loss or damage and were rendered non-functional or partially functional as restaurants.

43. The hardest hit were Meritage's sit-down restaurants. For example, a Meritage restaurant formerly known as Wheelhouse, located at 67 Ottawa Avenue in Grand Rapids, Michigan, served hundreds of guests daily, offering a high-end dining experience next door to Grand Rapids' Van Andel Arena, the premier concert and professional sporting venue and event center in West Michigan. The image below depicts a typical event at Wheelhouse prior to the Orders of Civil Authority:

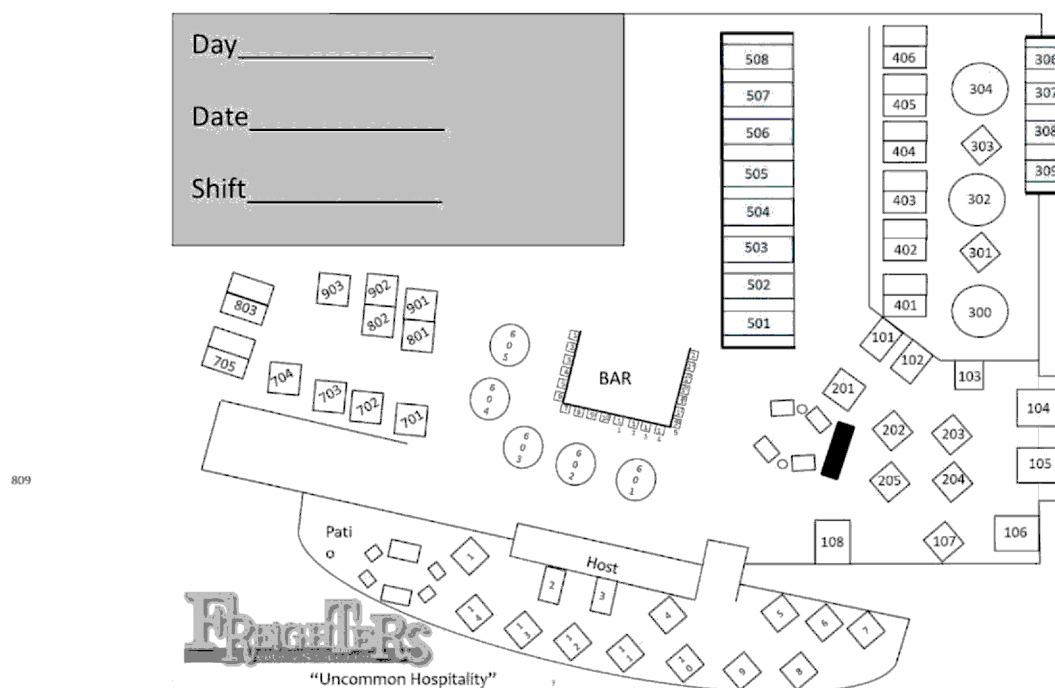


44. As a direct result of the Orders of Civil Authority, Wheelhouse incurred direct physical loss and damage and was rendered non-functional as a restaurant. Wheelhouse closed its doors when Michigan's closure orders were initially executed in March of 2020. As a result of the closure orders and resulting economic conditions, Meritage has permanently closed the Wheelhouse restaurant.

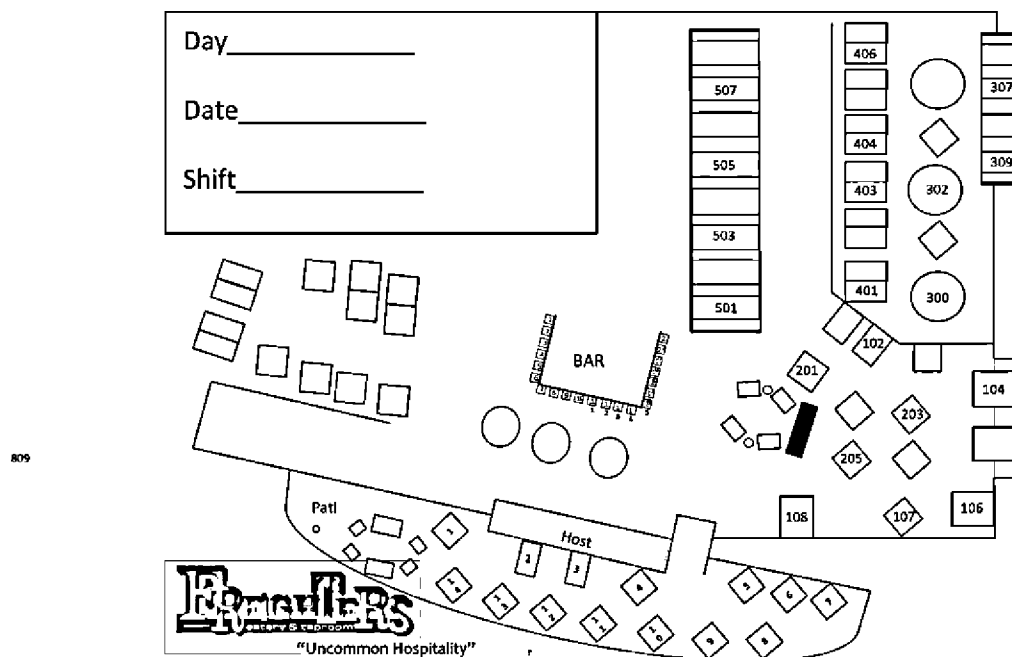
45. As the closure orders were lifted and restrictive partial reopening orders were adopted across the country, Meritage's restaurants continued to experience direct physical loss or damage to their premises. For example, once restaurants were permitted to reopen, many had to install plexiglass to create physical barriers for customers coming inside the restaurants, cordon off certain areas to prevent access to those physical spaces, revise floor plans and layouts to accommodate social distancing rules required by the reopening orders, and designate tables as nonfunctioning.

46. As an example of the direct physical loss or damage the Orders of Civil Authority had on Meritage's restaurants, consider Freighters Eatery & Taproom ("Freighters") in Port Huron,

Michigan. Before the Orders of Civil Authority, Freighters restaurant layout permitted customers to occupy all of the numbered spaces in the diagram below:



47. For a period of time, as a direct result of the Orders of Civil Authority, the Freighters dining room was closed to customers and sat empty. Once the restrictive partial reopening orders permitted limited in-person dining again, Freighters was required to operate at a fraction of its total capacity (with tables available to customers identified with numbers below):



48. As can be seen, a significant number of tables and seats have been rendered nonfunctional due to the impairments caused by the Orders of Civil Authority. This is common for all Meritage locations.

49. NAEIC's anticipated position is that Meritage's insured locations did not sustain "direct physical loss or damage" sufficient to trigger coverage because no property was physically destroyed or disfigured. But the Policy does not contain language requiring such a narrow construction. Under any reasonable interpretation, the terms "direct physical loss or damage" to property are much broader and would include detrimental physical effects, like those caused by the Orders of Civil Authority, which altered – and impaired the functioning of – tangible, material dimensions of Meritage's property and insured locations, particularly where the Orders of Civil Authority have rendered Meritage's restaurants partially or completely non-functional for their intended purposes due to the altered appearance and configuration of dining rooms.

50. NAEIC chose not to define the terms "direct physical loss" or "damage" in the Policy. Instead, NAEIC intentionally left those terms undefined, even though it knew, or should

have known, that such terms could be reasonably construed, and have been construed by courts, more broadly than the narrow self-serving definition that it is anticipated to argue governs.

51. In the Policy, “loss” is used in the alternative to “damage.” Thus, there is coverage provided for both “loss” and “damage,” either alternatively or collectively, because “loss” coverage is different from, and is in addition to, “damage” coverage. Property “loss” refers to, among other things, being deprived of a property’s function, while “damage” refers to, among other things, the impairment of property or a reduction in its efficacy and/or functionality. The adjective “physical,” among other things, distinguishes between the tangible, material aspects of an object and those that are purely intangible, such as sentiment, emotion, or imagination. In addition, under a plain grammatical reading of the phrase, “direct physical loss or damage” to property, the words “direct” and “physical” can be reasonably construed as modifying only “loss” coverage – not “damage” coverage. To the extent that any language in the Policy is ambiguous, standard canons of construction provide that it should be construed against NAEIC as drafter and in favor of coverage.

52. Whether considered independently or together, moreover, the terms “loss” and “damage” both point in the same direction here: the Orders of Civil Authority caused both property loss and property damage by directly, physically, and seriously impairing the functionality of Meritage’s restaurants and dispossessing Meritage of its tangible spaces. Physical manifestations of the direct physical loss and damage to Meritage’s properties include, among other things, dining rooms closed or limited, areas blocked off, barriers erected, appearances altered, furniture moved, fixtures altered, spaces shuttered, floors marked, plexiglass mounted.

53. As of March 2, 2021, a total of 377 Meritage employees had tested positive for Covid-19. These positive tests occurred at 183 different restaurants. And, nine employees that

traveled between Meritage locations, as multi-unit district managers and maintenance and information technology employees tested positive as well.

54. Meritage's restaurants are not a closed environment, and because people – staff, customers, community members, and others – constantly cycle in and out of the restaurants, there is an ever-present risk that the insured locations are contaminated and would continue to be contaminated.

55. Restaurants like Meritage's are highly susceptible to being or becoming contaminated, as both respiratory droplets and fomites are more likely to be retained on insured property and remain viable for far longer as compared to facilities with open-air ventilation.

56. Meritage's restaurants are also highly susceptible to rapid person-to-property transmission of Covid-19, and vice-versa, because the service nature of the restaurant business places staff and customers in close proximity to the property and to one another.

57. The direct physical loss or damage suffered by Meritage as a result of the pandemic and Orders of Civil Authority have forced Meritage to suspend or significantly limit its operations.

Meritage's Business Interruption Claim is Improperly Denied by NAEIC

58. Meritage first submitted a claim under the Policy for Covid-19 related business interruption losses and extra expenses on or around March 24, 2020.

59. On June 9, 2020, NAEIC, through third-party administrator Sedgwick CMS ("Sedgwick") responded, noting the "continuing nature of the investigation" into Meritage's claims. That correspondence set forth fourteen areas of inquiry related to the claim, and Sedgwick invited Meritage to provide additional information related to those subjects.

60. In connection with its June 9, 2020 correspondence, Sedgwick indicated that NAEIC, while continuing its investigation, was proceeding under a full and complete reservation of rights regarding the terms, conditions, exclusions, and limitations of the Policy and the law.

61. Meritage supplied the information requested by NAEIC to aid in its continued review and investigation of Meritage's claim, and has continued to supply NAEIC with such information.

62. On October 13, 2020, nearly seven months after Meritage submitted its claim, NAEIC, through Sedgwick, issued a letter to Meritage indicating that, with the possible exception of the Communicable Disease Response and Interruption by Communicable Disease coverages in the Policy, the Policy does not provide coverage for other aspects of Meritage's claim. It indicated that its evaluation with respect to the Communicable Disease Response and Interruption by Communicable Disease coverages continued.

63. In response, through counsel, Meritage contacted NAEIC on October 28, 2020, seeking to invoke the dispute resolution portion of the policy.

64. Specifically, that portion of the Policy provides as follows:

D. Dispute Resolution / Optional Arbitration Provision

Upon the mutual agreement of the Company and the Insured, any controversy or dispute arising out of or relating to this POLICY, or the breach, termination or validity thereof, shall be resolved in accordance with the procedures specified herein.

1. Negotiation and Mediation

The Insured and the Company shall attempt in good faith to resolve any controversy or dispute arising out of or relating to this POLICY promptly by negotiations between representatives who have authority to settle the controversy. If the dispute cannot be resolved by negotiation, the parties shall endeavor to settle the dispute through confidential mediation with the assistance of a mediator mutually selected by the parties. To the extent the parties are unable to select a mutually agreeable mediator, each party will propose

three mediators. Each party then shall strike two of the mediators proposed by the other, leaving one mediator as proposed by each party. A coin then shall be tossed, with the Insured calling head or tails, with the prevailing party in the coin toss having its remaining proposed mediator jointly engaged by the parties to mediate the dispute, with the cost being split equally among the parties.

65. On November 20, 2020, NAEIC declined Meritage's request to engage in the dispute resolution procedures articulated in the Policy.

66. Meritage has continued to supply information requested by NAEIC and required under the Policy for NAEIC's evaluation of Meritage's claim, first filed March 24, 2020. Nearly a year has elapsed, and NAEIC has still not made a determination regarding Meritage's claim as it relates to coverage under the Communicable Disease Response and Interruption by Communicable Disease portions of the Policy. Accordingly, it has expressly and constructively denied Meritage's claim in its entirety.

67. Upon information and belief, NAEIC has similarly denied coverage nationwide for lost income and extra expenses as a result of direct physical loss or damage related to the Orders of Civil Authority.

68. Meritage understood, expected, and believed that its Policy would cover the circumstances presented here. This understanding and expectation is both subjectively and objectively reasonable. NAEIC cannot now redefine or narrow the meaning of physical loss or damage, or any other undefined terms in the Policy, to support a denial of coverage in these unprecedented circumstances. Yet that is exactly what it has done.

69. Because there is a reasonable construction of these terms that provides coverage to Meritage for its business interruption claims, and based on long-standing insurance law principles requiring policy terms to be construed broadly in favor of coverage for Meritage, NAEIC must pay Meritage's claim.

70. In bringing this case, Meritage asserts its full entitlement to coverage under all applicable Policy provisions, independently or alternatively as appropriate, including but not limited to all relevant extensions of coverage. Meritage does not waive any claims for NAEIC's wrongful denial of coverage for the substantial losses it has incurred to date.

COUNT I: DECLARATORY JUDGMENT PURSUANT TO CPLR §3001

71. Meritage restates and realleges the preceding paragraphs of the Complaint as though fully set forth herein.

72. The Policy is a valid and fully enforceable insurance contract. The Policy provides for coverage for business income losses and extra expenses Meritage incurred as a result of the interruption of business caused by a covered cause of loss.

73. Meritage submitted a claim for covered losses sustained as a direct result of the Orders of Civil Authority, a covered cause of loss.

74. Meritage was denied business interruption coverage based on NAEIC's denial, consistent with insurers' nearly blanket approach of issuing denials to policyholders claiming losses caused by the Orders of Civil Authority based on the wholly incorrect contention that Meritage's claims did not result from "direct physical loss or damage" to insured property, as required by the Policy.

75. An actual, justiciable controversy exists between the parties covering the construction of the terms of "direct physical loss or damage" to covered property.

76. As a result of this controversy, Meritage seeks a declaration from the Court that the Orders of Civil Authority caused direct physical loss or damage to Meritage's insured properties.

COUNT II: BREACH OF CONTRACT

77. Meritage restates and realleges the preceding paragraphs of the Complaint as though fully set forth herein.

78. Meritage and NAEIC have an enforceable insurance coverage agreement pursuant to which NAEIC agreed to provide “all-risk” insurance coverage to Plaintiff, including Leading Edge All-Risk General Property (Policy No. NAP2002260-02). Meritage agreed to, and in fact did, pay insurance premiums under the agreement, and in return NAEIC agreed to insure “all risks of direct physical loss or damage” to any insured property, and further agreed to cover Meritage for “Actual Loss Sustained” due to the necessary interruption of Meritage’s business resulting from “direct physical loss or damage” at any of the Policy’s covered locations. In addition, NAEIC also agreed to pay for Meritage’s “Extra Expense.”

79. Meritage has sustained direct physical loss and/or damage from a covered cause of loss under the parties’ agreement.

80. Meritage performed all of its obligations under the parties’ agreement, including paying premiums, notifying NAEIC of a covered cause of loss under the agreement, and any conditions precedent have been satisfied, waived, excused, or are otherwise inapplicable.

81. NAEIC breached the parties’ agreement by denying its coverage obligations under the agreement as expressly required under the agreement.

82. Meritage has sustained significant damages as a result of NAEICs breach of contract in an amount to be proven at trial.

83. Meritage respectfully requests that this Honorable Court enter judgment in its favor and against NAEIC on the breach of contract claim set forth above, in an amount to be proven at trial, plus pre-judgment interest.

COUNT III: UNJUST ENRICHMENT

84. Meritage restates and realleges the preceding paragraphs of the Complaint as though fully set forth herein.

85. In the alternative, if NAEIC's denial of coverage for Meritage's claim for business interruption coverage is upheld, then NAEIC has been unjustly enriched in the amount of excess premium for business interruption coverage it has charged and retained while Meritage's properties have been shut down or functionally impaired as a result of the Orders of Civil Authority.

86. NAEIC has priced and charged premiums for Meritage's Policy on the basis of Meritage's insured properties operating as fully functional restaurants, according to the available square footage at the outset of the policy period. Accordingly, the insured risks included the prospect of having to pay claims for lost business at levels commensurate with fully operational businesses.

87. During the time period while Meritage's properties have been lost, damage, shut down, or otherwise functionally impaired by the Orders of Civil Authority, NAEIC's risk of having to pay other business interruption claims has been reduced in many instances to zero and in all instances by substantial amounts of money. The Policy contains provisions making NAEIC liable to pay business interruption loss only to the extent it would not have been incurred anyway.

88. NAEIC knows all of this, yet has intentionally charged and collected as "earned" – and Meritage has paid – premiums for which NAEIC, according to its own self-serving justifications for denying coverage, assumed no commensurate risk.

89. NAEIC has been unjustly enriched, at Meritage's expense, and should be required to disgorge to Meritage the full amount of excess premium for business interruption coverage

NAEIC has unlawfully charged, collected, and retained, as equity and good conscience require.

90. NAEIC's misconduct in this respect has been willful, wanton, and in bad faith.

RELIEF REQUESTED

WHEREFORE, Meritage respectfully requests this Honorable Court issue an Order as follows:

- a. Declare, as set forth in Count I, that the Closure Orders caused direct physical loss or damage to Meritage's insured properties;
- b. Enter judgment in Meritage's favor and against NAEIC on the breach of contract claim set forth in Count II, in an amount to be proven at trial, plus pre-judgment interest;
- c. In the alternative, enter judgment in Meritage's favor and against NAEIC on the unjust enrichment claim set forth in Count III, in an amount to be proven at trial, plus pre-judgment interest; and
- d. Grant any other relief deemed appropriate under the circumstances.

Dated: March 12, 2021
Troy, New York

E. STEWART JONES HACKER MURPHY, LLP

By: 

James E. Hacker, Esq.
Attorneys for Plaintiff
28 Second Street
Troy, New York 12180
(518) 274-5820
Email: jhacker@joneshacker.com