

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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HUDSON VALLEY BONE  
AND JOINT SURGEONS, LLP,

Civil Action No.: 7:20-cv-6073

**COMPLAINT**

Plaintiff,

**JURY TRIAL  
DEMANDED**

-against-

CNA FINANCIAL CORPORATION and  
NATIONAL FIRE INSURANCE  
COMPANY OF HARTFORD,

Defendants.

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Plaintiff, HUDSON VALLEY BONE AND JOINT SURGEONS, LLP (“HUDSON VALLEY” or “Plaintiff”), by and through its undersigned attorneys, as and for its Verified Complaint against CNA FINANCIAL CORPORATION (“CNA”) and NATIONAL FIRE INSURANCE COMPANY OF HARTFORD (“NFICH”), upon information and belief, alleges as follows:

**INTRODUCTION**

1. This action for breach of contract arises out of Defendants’ denial of Plaintiff’s claim for insurance coverage under its “all risk” policy for its significant business interruption losses and extra expenses suffered as a direct result of the statewide disaster emergency orders, Department of Health, CDC, and other health guidelines, and other measures taken in sound medical judgement designed to mitigate the COVID-19 pandemic by severely reducing and restricting the insured’s business at the insured premises in order to save lives and protect property.
2. The losses, including the loss of use of the insured premises and loss of business income therefrom, were caused by these disaster emergency orders and necessary health guidelines

designed to mitigate the imminent threat to person and property posed by COVID-19, which is an unexcluded covered cause of loss under an all risk policy. Covered cause of loss being defined by the policy as “risks of direct physical loss” unless excluded or otherwise limited.

3. HUDSON VALLEY also purchased with the policy coverage for business income and extra expense losses.
4. HUDSON VALLEY purchased commercial property insurance from CNA and NFICH, namely a CNA “Connect Policy,” policy No. B 6021604197 (the “Policy” attached as **Exhibit A**), for which it paid significant monthly premiums, and is in effect from August 1, 2019 to August 1, 2020. The Policy covers business income and extra expenses losses for 12 months, and provides coverage for business income lost due to the necessary suspension of the business operations at the insured premises and the loss of business income due to civil authority actions that prohibit access to the premises. For the convenience of the Court and easier reference, the pages of the Policy have been numbered.
5. By way of brief introduction, HUDSON VALLEY is a group of orthopedic surgeons and orthopedic specialists who treat patients in their two insured locations, at 24 Saw Mill River Road, Hawthorne, New York 10532 and 819 Yonkers Avenue, Yonkers, New York 10704. Importantly, before the pandemic, HUDSON VALLEY was a high-volume and intensive orthopedic practice where patients received a full range of orthopedic treatments and procedures. HUDSON VALLEY employs 10 physicians in addition to 26 full time support staff, all of whom have been retained despite severely diminished volume and lost profits.
6. As a result of Governor Cuomo’s Executive Orders and New York State Department of Health (“DOH”) guidance, HUDSON VALLEY completely shut down its main office (Hawthorne) from March 16, 2020 to approximately April 13, 2020 while Plaintiff could devise a safety protocol for the safe reintroduction of patients into the premises and secure the necessary and

required personal protective equipment (“PPE”), UV lights, other disinfectants, and other required materials to be able to reopen in a safe manner compliant with emergency disaster order, DOH guidelines and other health guidelines, sound medical judgement, and professional guidance in light of the pandemic emergency disaster response. HUDSON VALLEY could not reopen the Yonkers location until May as it could not secure enough required materials for both locations as there was a shortage of supply in the beginning of the Pandemic. On reopening, HUDSON VALLEY functioned, and continues to function, on a severely restricted basis in that Plaintiff has greatly limited the number of patients it sees and allows on the premises per day pursuant to its safety protocols designed to minimize contact and proximity and to ensure patient and employee safety.

7. The thrust of the emergency disaster orders and health guidelines that directed essential businesses in New York to follow physical distancing rules, restrict in person gathering in enclosed spaces as much as possible, and to clean, sanitize, and disinfect the premises was to severely reduce the daily patient encounter volume and to deprive Plaintiff the ability to use the covered properties for their primary business purposes, which is to provide various forms of intensive and hands-on orthopedic treatment at the insured premises at a high daily volume.
8. Based on preliminary information available, HUDSON VALLEY has already suffered millions in dollars of lost proceeds as well as other costs in connection with executive orders and health guidelines designed to mitigate the imminent risk to person and property posed by the COVID-19 pandemic. Depending on how long these conditions last, those losses could increase substantially.
9. Regardless of what one may think about the efficacy or necessity of the emergency government orders, DOH guidelines, sound medical judgement, or professional guidance it was reasonable and necessary for HUDSON VALLEY to comply with these measures in order to mitigate

the effects of a pandemic disaster and imminent risks of danger that COVID-19 posed to person and property at the insured locations.

10. HUDSON VALLEY promptly made a claim for coverage of these losses under the Policy and was notified by NFICH via a six-page letter dated April 24, 2020, that its claim was denied. Denial Letter attached as **Exhibit B**. NFICH presented portions of the policy and stated there was no coverage without attempting to integrate all policy terms; judicial or regulatory interpretations of relevant language, without presenting the facts correctly, without adhering to well settled rules of construction, including reading the policy as a whole, and without investigating the property or investigating properly in general.
11. For example, NFICH in the Denial Letter stated that the basis for the denial was that the Policy does not provide coverage for the interruption of the business functions and that there was no “direct physical loss or damage to” the insured locations. *See* Exhibit B, page 2 (emphasis added). Both are blatant misstatements of the Policy’s terms and coverages. First, the Policy covers for the “direct physical loss of” property in addition to damage or loss *to* the property. *See e.g.* Exhibit A, pages 18 and 40. Next, NFICH incorrectly stated that there was no coverage for an interruption of Plaintiff’s business functions. *See* Exhibit B, page 2. The Policy has a specific coverage for the business income losses that arise from the suspension of Plaintiff’s business operations where “suspension” is defined under the Policy to include the partial cessation of business activities. *See* Exhibit A, page 38 and 40. It is unjust for Defendants to pretend that the policy only provides coverage for physical loss or damage “*to*” property and to simply ignore provisions of the Policy that provide coverage for the “loss of” property and for losses arising from the partial suspension of business operations. Further, it is unjust for Defendants to summarily deny Plaintiff’s claim without investigating the necessary mitigation practices undertaken at the insured locations, their connection to the imminent risk to person

and property posed by the COVID-19 pandemic, and how the mitigation practices deprived Plaintiff the ability to use the insured premises for regular operations and normal patient encounter volume.

**PARTIES**

12. HUDSON VALLEY is a domestic corporation formed under the laws of the State of New York, with its principal place of business in Hawthorne, New York.
13. Upon information and belief, CNA is a company formed under the laws of the State of Delaware with its principle place of business in Chicago, Illinois. Upon information and belief, at all relevant times hereto, CNA was authorized to underwrite insurance policies covering risks in the State of New York. Upon information and belief, CNA has, at all relevant times, conducted business in the State of New York, including engaging in the business of selling insurance, including the Policy, and investigating claims dealing with policyholders, property, or activities located in the State of New York.
14. Upon information and belief, NFICH is a foreign corporation with its principal place of business in Chicago, Illinois. Upon information and belief, NFICH is a wholly owned subsidiary of CNA that underwrites and sells insurance on behalf of CNA. Upon information and belief, at all relevant times hereto, NFICH was authorized to underwrite insurance policies covering risks in the State of New York. Upon information and belief, NFICH has, at all relevant times, conducted business in the State of New York, including engaging in the business of selling insurance, including the Policy, and investigating claims dealing with policyholders, property, or activities located in the State of New York.
15. Upon information and belief, CNA and NFICH issued the Policy to HUDSON VALLEY together, shared and assumed the risks and liabilities accruable under the Policy together with each Defendant having a certain percentage of the total risk of the Policy, shared the premiums

paid by HUDSON VALLEY for the insurance provided by the Policy, and both profited directly from the premiums paid by HUDSON VALLEY for the insurance provided by the Policy.

### **JURISDICTION AND VENUE**

16. Plaintiff repeats, realleges, and reiterates paragraphs “1” through “14” with the same force and effect as if more fully set forth herein at length.
17. Jurisdiction of this Court is based upon 28 U.S.C.S. § 1332(a)(1), as it involves claims between citizens of different States and there is complete diversity of citizenship and the amount in controversy exceeds the sum of \$75,000.00.
18. Venue is based upon 28 U.S.C. §1391(b)(2), in that the event which gives rise to the claim occurred in the County of Westchester within the State of New York, and thus the within action is thereby properly brought in the United States District Court for the Southern District of New York.
19. Defendants committed breach of contract of this insurance contract, namely the Policy, and caused Plaintiff HUDSON VALLEY to suffer damages when Defendants wrongfully declined to provide coverage for HUDSON VALLEY’s losses, for which Defendants were contractually obligated to pay pursuant to the Policy.

### **FACTUAL ALLEGATIONS**

#### **A. Introduction**

20. This case is about whether Plaintiff’s insurance policy provides coverage for the damages sustained and expenses incurred by Plaintiff as a result of unprecedented emergency orders by state officials and guidelines from government agencies restricting and reducing Plaintiff’s on-premises business activities.
21. Plaintiff, like other people and businesses, bought insurance to help when disaster occurs.

22. During such times, individuals and businesses (including Plaintiff) are at their most vulnerable and desperate, a fact of which insurance companies (including Defendants) are keenly aware.
23. Essentially, insurance companies promise, warrant, and sell “peace of mind” that in the unlikely event of a catastrophe or disaster, the policyholder will be fully and promptly indemnified.
24. The contract of insurance carried with it a duty of utmost good faith on the part of the insurer, because of the vulnerability of policyholders during and following a disaster.
25. This duty includes Defendants’ obligation to fairly and quickly adjust Plaintiff’s insurance claims, determine coverage and amount of loss, and provide prompt payment.
26. Here no such good faith investigation or adjustment occurred because Defendants reached a pre-determined conclusion to deny coverage.
27. Indeed, Defendants have apparently adopted a ‘company line’ to deny all business interruption claims similar to Plaintiff’s, despite different circumstances, different executive orders, and differences in policies that can “make or break” coverage.
28. This one size fits all approach to policy interpretation and claims adjustment has led to the improper denial of countless business interruption claims, including Plaintiff’s.

**B. Plaintiff’s Business**

29. Plaintiff’s business consists of providing orthopedic treatment, evaluation, and consultation for patients at the insured premises. Plaintiff also performs office procedures or surgeries in a hospital setting where indicated. Plaintiff is able to generate profits in two main ways, both of which are inextricably connected to the use of the insured premises and putting high numbers of patients and employees in close proximity to each other. First, Plaintiff derives substantial income by billing for seeing patients and performing treatments, evaluations, and consultations for patients at the insured premises. Second, Plaintiff derives substantial income by billing for

patients that are first seen, evaluated, and treated at the insured premises before ultimately performing an in-office procedure or a surgery in a hospital setting.

30. Plaintiff has two insured locations under the Policy. The main office is an approximately 8,500 square foot building located in Hawthorne, New York. The second location is located in Yonkers, New York in a building that is about 2,200 square feet.
31. Plaintiff has 26 fulltime employees in addition to ten physicians on staff. Before the pandemic, the Hawthorne location had capacity for four physicians and between 20 to 26 employees stationed in the premises. Each physician had three exam rooms of their own and the exam rooms would be filled with a number of patients. The physicians would go from room to room, patient to patient, for consultations, treatments, and various other medical appointments, creating a dynamic environment and a high-volume, busy practice.
32. During a normal week before the pandemic, each physician could see a total of 70 patients. In total, during a normal week before the pandemic, HUDSON VALLEY would often see hundreds of patients enter the premises on a given week, and each separate patient encounter was a separate billing event and source of revenue. For example, in 2019 HUDSON VALLEY had 3,000 patient encounters during the ten weeks from March 16 to May 30. However, in 2020, Plaintiff's patient encounters during these ten weeks were vastly limited as the main office was completely closed from March 16 to April 13, and elective procedures were prohibited until May 30.
33. Accordingly, the effect of the mitigation practices severely reducing the number of staff and patients in response to executive orders and DOH guidelines designed to mitigate the imminent risks of harm to person and property was to deprive Plaintiff the use of the insured premises by preventing Plaintiff the opportunity to maximize patient encounters at the insured location.



34. Because the profits derived from these types of operations are what determines HUDSON VALLEY's success or failure as a business, insuring against the slowdown or cessation of these operations due to unforeseen perils and risks is of critical importance. This concept is nothing new, as business interruption insurance has been around for hundreds of years.

**C. History of "BI" Insurance**

35. At its core, business interruption insurance (or 'business income' insurance as it is known today) ("BI") is meant to return an insured's business the amount of profit it would have earned had there been no interruption of business or suspension of operations. To better understand its context and role in Plaintiff's overall Policy, what follows is some background information as to BI.
36. BI was developed in the United Kingdom in the early 19th century as a supplement to fire insurance, whereby insurers would compensate commercial building owners not only for the physical damage, but for the insured's inability to utilize the building to collect rent (the primary business of the insured). The first 'loss of 'rent' coverage was offered by the English Hamburg Fire Office in 1817.
37. BI continued to evolve, and by the mid-19<sup>th</sup> century insurers in Europe began offering 'stoppage or cessation' insurance that provided coverage for lost business income due to the inability to utilize property, typically a fixed percentage of what the company's stock on hand would have generated for the business during that time.
38. By the late 19th century, BI had come to the United States. In 1880, Boston-based insurer Dalton introduced 'Use and Occupancy' insurance, which insured the loss of production following a covered peril. Typically, the policy provided for a set dollar amount or recovery for each day the insured was prevented from conducting operations. "Use and Occupancy" continued to be the nomenclature adopted by American insurers up until the 1940s

39. In the late 1930s, insurers began offering “Gross Earnings” insurance. This was an iteration of BI which compensated insured for the reduction in gross earnings due to a business interruption caused by a covered peril
40. In 1986, the Insurance Services Office (“ISO”) recommended replacing the “Gross Earnings” policy form with the “Business Income Coverage” form, which, although modified and varied in particular policies, is still frequently used today.
41. The emergence of coverage in certain policies, such as Plaintiff’s, tied to the insured’s interest in its income stream, gave protection to business losses tied to a particular policy’s language and covered causes of loss.
42. Though it has evolved over centuries, and varies between policies, the crux of BI insurance has always been to return to insureds (such as Plaintiff) the losses of business income resulting from the slowdown or cessation of their business.

**D. The Policy Provide Coverage for Business Income Separate and Apart from the Property and Building**

43. In order to protect its property, business, *and* income from losses, Plaintiff obtained the Policy issued by Defendants.
44. At all relevant times, the Policy was in full effect as Plaintiff faithfully paid the premiums, which Defendants accepted.
45. The premiums Plaintiff paid included coverages for, *inter alia*, buildings and personal property, business income and extra expense, and commercial liability. It also included additional coverage for ‘extended’ business income, and actions of a civil authority that prohibited access to the premises due to physical loss of or damage at another property.
46. The Policy is an “all risk” commercial policy, which means that it provides coverage for all risks unless expressly excluded by language in the body of the policy or through a separate exclusion.

There is no exclusion in Plaintiff's Policy for lost business income caused by emergency orders, disaster responses, or health guidelines restricting the services or amount of services (i.e., business activities) it could provide at its property. Further, there are no virus or pandemic exclusions of any kind.

47. The Policy is unique in that the declarations show that the main coverage is provided for business income, as opposed to the property and building. Indeed, the coverage for business income is the first coverage listed in the declaration pages, before the building and liability coverages. See the Policy at page 10-12, attached hereto as Exhibit A. Further, while the declarations divide different types of property coverage limits by insured location, the coverage limit for business income and extra expense is listed on its own and not limited or differentiated by location. See pages 10-12 of 140, Exhibit A. Accordingly, the Policy treats business income as an insurable interest in and of its own, separate and apart from the physical structure or building at the insured locations.

**PROPERTY COVERAGE**

**LIMIT OF INSURANCE**

The following deductible applies unless a separate deductible is shown on the Schedule of Locations and Coverage.

Deductible: \$1,000

Business Income and Extra Expense Coverage  
Business Income and Extra Expense

12 Months Actual Loss Sustained

**THE DEVASTATING SLOWDOWN AND/OR CESSATION  
OF PLAINTIFF'S BUSINESS ACTIVITIES**

**A. Pandemic Dangers**

48. From the first reported case in the United States in January 2020 through the present, the impact of the coronavirus has been devastating. More than 1,500,000 Americans have had confirmed cases of COVID-19, and more than 100,000 have died.

49. Notably, the City and State of New York have suffered more confirmed COVID-19 cases and deaths than any other city and state, respectively. In New York State there have been approximately 400,000 cases and almost 25,000 deaths. There have been more than 215,000 cases and 17,000 deaths in New York City alone. In the City and State of New York, the evidence indicates pervasive presence of the virus.
50. Severe acute respiratory syndrome coronavirus 2 (“COVID-19”) has spread, and continues to spread, rapidly across the United States and has been declared a pandemic by the World Health Organization. See <https://www.health.harvard.edu/diseases-and-conditions/coronavirus-resource-center>.
51. The global COVID-19 pandemic is exacerbated by the fact that the deadly virus physically infects and stays on surfaces of objects or materials for many days, and its airborne component permeates the insured property and premises. Studies indicate that COVID-19’s spread is, in part, because of its aerosol transport in and throughout buildings and their airways. See <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7293495/>
52. Notably, the virus manifests differently in different people. Some infected persons display symptoms, ranging from minor to severe, while others are asymptomatic and never show symptoms of the disease. Symptoms may appear 2-14 days after exposure to the virus. See <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>.
53. According to a study published in *The New England Journal of Medicine*, COVID-19 is widely accepted as a cause of real physical loss and damage. It remains stable and transmittable in aerosols for at least three hours, up to four hours on copper, up to 24 hours on cardboard, and up to two to three days on plastic and stainless steel. See <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces>

54. According to a study conducted by Tulane National Primate Research Center, the virus was able to survive in air for 16 hours.

See <https://www.medrxiv.org/content/10.1101/2020.04.13.20063784v1.full.pdf>

55. Business establishments like the Plaintiff's insured locations and covered property are highly susceptible to being or becoming contaminated, as both respiratory droplets and fomites are likely to be retained on the Covered Property and remain viable for an extended period of time.
56. Plaintiff's business is also highly susceptible to rapid person-to-person and person-to-property transmission of the virus, because the nature of a large, dynamic orthopedic practice necessarily places large numbers of people in close proximity to the property, to one another, and to the existing load of COVID-19 presence on surfaces or in aerosol's. This imminent risk to person and property is what the emergency executive orders aimed to mitigate.
57. It is well recognized that a pandemic is a disaster. In upholding the Governor of Pennsylvania's Proclamation of a state-wide disaster and the Executive Orders mandating the closure of businesses within Pennsylvania, the Pennsylvania Supreme Court noted the significant risk of the spread of the COVID-19 virus, even in locations where the disease has not been detected, based on the virus' ability to attach onto surfaces and survive in the air:

COVID-19 does not spread because the virus is "at" a particular location. Instead it spreads because of person-to-person contact, as it has an incubation period of up to fourteen days and that one in four carriers of the virus are asymptomatic. Respondents' Brief at 4 (citing Coronavirus Disease 2019, "Symptoms," CDC, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last accessed 4/9/2020)). The virus can live on surfaces for up to four days and can remain in the air within confined areas and structures. *Id.* (citing National Institutes of Health, "Study suggests new coronavirus may remain on surfaces for days," (Mar. 27, 2020) <https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days> and Joshua Rabinowitz and Caroline Bartman, "These Coronavirus Exposures Might be the Most Dangerous," The New York Times (Apr. 1, 2020) <https://www.nytimes.com/2020/04/01/opinion/coronavirus-viral-dose.html>).

See *Friends of DeVito v. Wolf*, \_\_\_ A. 3d \_\_\_, 2020 WL 1847100, \*15-16 (April 13, 2020).

**B. State and Local Emergency Orders**

58. On March 7, 2020, Governor Cuomo declared a “Disaster Emergency” in the State of New York by Executive Order. *See* <https://www.governor.ny.gov/news/no-202-declaring-disaster-emergency-state-new-york>. As part of the disaster emergency, Governor Cuomo authorized “all necessary State Agencies to take appropriate action to assist individuals in containing, preparing for, responding to, and recovering from this state disaster emergency, to protect state and local property, and provide such other assistance as is necessary to protect the public health, welfare, and safety.” *See id.*
59. Non-essential businesses were at first required to reduce in-person workforce to fifty-percent, then seventy-five percent to one hundred percent, mandating a maximum effort of telecommuting and work from home procedures. But even businesses classified as “essential” have been severely impacted. For example, essential businesses have had to increase the frequency of cleaning, reduce staff, reduce hours of operation, shut premises to the public and eventually limit the number of customers allowed on the premises, install new protective barriers, and provide personal protective equipment to their workforce.
60. Essential business, while permitted to remain open, were also urged to maintain social distance and required to follow industry-specific Department of Health guidelines in an official guidance to State Executive Order 202.6. *See* <https://esd.ny.gov/guidance-executive-order-2026>.
61. HUDSON VALLEY is an essential business as it is a medical practice/doctor’s office. However, HUDSON VALLEY received guidelines from the Department of Health and other health organizations, as well as professional organizations and hospitals, which severely decreased patient volume at the insured premises and limited Plaintiff’s ability to maximize the premises for its business practices.

62. Specifically, Plaintiff, pursuant to sound medical judgement and professional and various health organization guidelines, as well disaster emergency orders, was instructed and required to, among other things, implement disinfection protocols, reduce office hours of operations, reduce the number of employees present at the premises, reduce patient to patient proximity, reduce human proximity in general, eliminate waiting rooms, eliminate unescorted ingress and egress to and from the offices, eliminate unescorted movement about the offices, and a number of other measures designed to mitigate the imminent risk of danger to person and property that undermined Plaintiff's ability to use the premises for business purposes. Further, Plaintiff completely closed down its two insured locations until it could secure the necessary PPE for its staff, UV lights and other disinfectants, shields, barriers, and other necessary materials for the safe reopening of the insured premises in compliance with the disaster emergency orders, DOH and other health guidelines, sound medical judgement, and professional guidance. The main office was completely closed from March 16 to April 13, 2020, and the Yonkers location was completely closed until May while Plaintiff could secure the PPE and other necessary materials, of which there was a shortage at the outset of the State and National pandemic disaster responses.
63. The New York State Department of Health adopted many of the guidelines for essential physicians' offices issued by the Centers for Disease Control and Prevention, examples of which can be found at the following DOH and CDC webpages:  
<https://coronavirus.health.ny.gov/information-healthcare-providers>.  
<https://www.cdc.gov/coronavirus/2019-nCoV/hcp/index.html>.
64. Some examples of the guidelines issued by various organizations and professional associations are publicly available here:  
<https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-infection-control->

[outpatient.pdf](#). In addition, one publically available example of a checklist issued to help primary care and specialty practices in reopening is available here:

<https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-outpatient-checklist.pdf>.

65. On March 23, 2020, Governor Cuomo directed that all elective surgeries be cancelled in order to free up hospital beds for corona-virus patients. *See* <https://www.governor.ny.gov/news/no-20210-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

This prohibition on elective surgeries was extended until May 29, 2020 in Executive Order 202.25. *See* <https://www.governor.ny.gov/news/no-20225-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

66. Mayor Bill de Blasio also issued an executive order on March 12, 2020 in which he declared a state of emergency for the City of New York “due to the threat posed by COVID-19 to the health and welfare of City residents.” Then on March 16, 2020 Mayor de Blasio, *inter alia*, extended the state of emergency period declared for the City of New York due to the threat of COVID-19 spreading from person to person and “because the virus physically is causing property loss and damage.” *See* Emergency Executive Order No. 100.

67. The City of New Orleans, similarly, in a March 16, 2020 proclamation acknowledged COVID’19’s “propensity to attach to surfaces for prolonged periods of time, thereby spreading from surface to person and causing property loss and damage in certain circumstances.” *See* <https://nola.gov/mayor/executive-orders/emergency-declarations/03162020-mayoral-proclamation-to-promulgate-emergency-orders-during-the-state-of-emergency-due-to-co/>.

68. New Jersey was among the first states to declare a state of emergency, with Governor Phil Murphy declaring a state of emergency and a public health emergency on March 9, 2020. On March 16, 2020, Governor Murphy, in conjunction with New York Governor Andrew Cuomo and Connecticut Governor Ned Lamont, ordered that as of 8 p.m. that evening, all gyms, movie



theaters, bars, and casinos were to be closed. Restaurants were limited to take-out and delivery orders only. Governor Murphy issued a “stay at home” order, ordering New Jersey residents to stay at home except for necessary travel, and mandated that all non-essential businesses close until further notice.

69. On March 19, 2020, the City of Los Angeles issued its “Safer at Home” order “because, among other reasons, the COVID-19 virus can spread easily from person to person and it is physically causing property loss or damage due to its tendency to attach to surfaces for prolonged periods of time.” *See* Public Order Under City of Los Angeles Emergency Authority, Issue Date March 19, 2020.
70. On March 31, 2020, Dallas County, Texas issued an order stating that “the COVID-19 virus causes property loss or damage due to its ability to attach to surfaces for prolonged periods of time...” *See* Amended Order of County Judge Clay Jenkins, Issue date March 31, 2020.
71. As to non-essential businesses, on March 12, 2020, Governor Cuomo issued Executive Order 202.1, which directed, among other things, that “[a]ny place of business or public accommodation, and any gathering or event for which attendance is anticipated to be fewer than five hundred people, shall operate at no greater than fifty percent occupancy, and no greater than fifty percent of seating capacity, for thirty days effective Friday, March 13, 2020”. *See* <https://www.governor.ny.gov/news/no-2021-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.
72. On March 18, 2020, Governor Cuomo issued Executive Order 202.6, which required that all businesses utilize telecommuting or work from home procedures to the maximum extent possible, as well as reduce in-person workforce by fifty percent (50%) no later than March 20th at 8 p.m. *See* <https://www.governor.ny.gov/news/no-2026-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>. On March 19, 2020, Executive Order 202.

7 required in-person workforce to be reduced by seventy-five percent (75%) (*See* <https://www.governor.ny.gov/news/no-2027-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>), and on March 20th, in-person workforce was to be reduced by one reduced by one hundred percent (100%) by March 22nd. *See* <https://www.governor.ny.gov/news/no-2028-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

73. On March 22, 2020, New York Governor Andrew Cuomo issued the “New York State on PAUSE” executive order, ordering the closure of all non-essential businesses, prohibiting non-essential gatherings, and implementing a minimum 6 foot social distance requirement statewide. Governor Cuomo, through a series of executive orders, extended “New York State on PAUSE” and effectively shut down every non-essential business in New York State indefinitely. Further, the Empire State Development Cooperation forbid indefinitely in-person property showings on April 2, 2020 until June 22, 2020.
74. On March 27, 2020, Governor Cuomo issued Executive Order 202.11, which made any violation of an Order limiting operation of a type of facility or limiting the number of persons who may occupy any space a violation of law subject to police enforcement and ticketing. *See* <https://www.governor.ny.gov/news/no-20211-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.
75. On March 30, 2020, Governor Cuomo issued Executive Order 202.13, which announced that all prior Orders restricting businesses were extended until April 15, 2020. This date was extended to April 29, 2020, extended a second time to May 15, 2020, and extended a third time to May 28, 2020. On May 28, 2020, the New York on PAUSE was extended indefinitely, including the closure of all non-essential business and the prohibition of all non-essential

gatherings of more than ten people. <https://www.governor.ny.gov/news/no-20234-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

**C. Plaintiff's Losses**

76. Plaintiff derives income primarily from conducting and billing for treatment, evaluations, procedures, and other medical, orthopedic, and pain management services at its insured locations. Plaintiff also derives substantial income from billing for the evaluations and workups that occur at its insured premises for office procedures and for surgeries performed in a hospital setting. Accordingly, revenue generation depends largely on maximizing the number of patient encounters achieved per day at the insured locations. Thus, the success of Plaintiff's business hinges on exploiting the insured premises to maximize the amount of patients and patient encounters at the insured premises. As an illustration, from April 13, 2019 to May 30, 2019, Plaintiff generated 3,000 patient encounters.
77. However, as result of the executive orders, DOH guidelines, sound medical judgement, and professional guidelines, Plaintiff completely closed down its main location (Hawthorne) from March 16 to April 13, 2020, while it attempted to secure personal protective equipment for its staff and physicians, UV lights to disinfect the premises, other required disinfectant and protective equipment, and to devise a safety protocol for the safe reopening of the premises. The Yonkers location was completely closed down into May as Plaintiff was unable to secure the necessary equipment before then. Further, Plaintiff could not perform any elective surgeries until May 30 when the prohibition was lifted.
78. Upon reopening the Hawthorne location, Plaintiff implemented a safety protocol designed to reduce the amount of patients and staff that could be on the premises at any given moment and to mitigate the imminent risk of danger to people and property at the insured locations. However, the safety protocol, by severely reducing the amount of patients at the insured

premises, also severely reduced the total number of patient encounters and Plaintiff's ability to generate revenue.

79. As part of this safety protocol, Plaintiff eliminated waiting rooms, reduced office operating hours, implemented staggered hours for the physicians, and implemented a strict limit on physicians of seeing a maximum of one patient per 30 minutes. Further, every patient would be escorted into the building from the parking lot. Upon entering the building, the patient would go through a health screen including a temperature check. Each patient would be escorted out of the building along a designated path. After each patient visit, the horizontal surfaces would be disinfected as well as the area with which the patient came in contact. This, along with the one patient per every 30 minutes limit, slowed the practice and limited ability and opportunity to generate revenue.
80. To illustrate, Plaintiff generated approximately four million dollars less revenue in April of 2020 than in April of 2019, and generated over two million dollars less revenue in May of 2020 compared to May of 2019, as a result of the aforescribed mitigation measures that reduced Plaintiff's patient encounters at the insured premises.
81. As a direct result of the emergency orders and health guidelines described herein, Plaintiff has incurred a physical loss of (or alternatively, damage to) the property for regular business operations.
82. Specifically, Plaintiff lost the ability to use the insured premises in that it could not use the property in accordance with its best business practices with regard to the volume of patient encounters at the property and its patients were prevented from physically occupying the property to a certain extent, causing the property's function to be partially eliminated and causing a suspension of business operations.

83. This loss of (or alternatively, damage to) the property resulted in Plaintiff's actual loss of business income and resulted in Plaintiff incurring extra expenses.
84. Absent the emergency orders, Plaintiff believes that based on its knowledge of the market, recent earnings, and knowledge of the orthopedic practice, its business income losses would have been minimal at most.
85. Further, the mitigation measures and cessation of the business operations were reasonable and necessary in mitigating the risk to person and property posed by the COVID-19 pandemic.
86. Plaintiff continues to implement its safety protocol in compliance with executive orders and continues to suffer losses as a result. With no current timetable regarding the lifting of the mitigation measures, the period of restoration will be substantial.

#### **RELEVANT POLICY PROVISIONS**

87. The losses incurred to Plaintiff's business operations are covered under various policy provisions, as described in greater detail below.
88. First, the Policy affirmatively states "We will pay for direct physical loss of or damage to the Covered Property...caused by or resulting from a covered cause of loss." See Policy at page 18, Exhibit A:

##### **A. COVERAGE**

**We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from a Covered Cause Of Loss.**

89. Plaintiff's insured premises, 24 Saw Mill River Road, Hawthorne, New York 10532 and 819 Yonkers Avenue, Yonkers, New York 10704, are specifically listed in the location schedule in the declarations pages of the Policy and are covered property within the meaning of the Policy. See Exhibit A, page 11.

90. “Covered Cause of Loss” is defined as “RISKS OF DIRECT PHYSICAL LOSS unless the loss is:” excluded or limited by the Policy. See Exhibit A, page 19-20 (emphasis original):

**3. Covered Causes of Loss**

**RISKS OF DIRECT PHYSICAL LOSS unless the loss is:**

- a. Excluded in section B. EXCLUSIONS;**
- b. Limited in paragraph A.4. Limitations; or**

91. Further, no structural damage to the premises is expressly raised as a requirement for coverage under the policy.
92. Next, the Policy affirmatively states it will pay for the loss of business income due to the necessary suspension of business operations when the suspension results from a loss of property caused by a covered cause of loss. See page 24 of 90, Exhibit A:

**b. We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 1,000 feet of the site at which the described premises are located.**

93. Accordingly, Defendants are liable for their insured’s business income losses when: (1) there is a suspension of business operations; (2) the suspension is necessary; (3) the suspension is caused by a direct physical loss of property or damage to the property or an imminent risk of direct physical loss of or damage to the property; and (4) the loss of or damage to property is caused by a covered cause of loss.
94. Here, all conditions are satisfied. As set forth above, as part of emergency disaster response, the premises were partially closed for business purposes and the business operations therein were partially suspended, which all occurred during the Policy terms, and HUDSON VALLEY

was forced to completely cease and continues to partially cease all business activities at the insured premises.

95. Plaintiff has thus suffered the actual loss of business income during the policy term which were caused by the loss of (or alternatively, damage to) their property at the covered locations.
96. Plaintiff's lost business income is covered under the Policy and has not been excluded from coverage. Plaintiff is entitled to payment for these business income losses.
97. The Policy has a "Civil Authority" endorsement that provides coverage for business income losses and extra expenses incurred when (1) a covered cause of loss causes a direct physical loss of or damage to (2) a property other than the insured premises, and (3) a civil authority prohibits access to the insured premises (4) as a result of this direct physical loss of or damage at the other premises. See Exhibit A, page 62.
98. All four requirements are met here for both of Plaintiff's insured locations. If, as alleged, COVID-19 was physically present within the Phelps Memorial Emergency Room, which is approximately five miles from Plaintiff's Hawthorne location. In addition, if, as alleged, COVID-19 was physically present within the Montefiore Mount Vernon Hospital Emergency Room, which is approximately two miles from Plaintiff's Yonkers location. Due to the imminent risk of danger posed to people and property by the COVID-19 pandemic, access to the insured premises was severely restricted as a result of the disaster emergency response.
99. Alternatively, the imminent and substantial risks of loss and damage justifies actions to avoid or mitigate such risks.
100. Civil authority orders, viruses, DOH and other health organization guidelines, professional guidance, and mitigation measures taken as part of the pandemic disaster response are unexcluded causes of loss under the Policy.

**BREACH OF CONTRACT**

101. Plaintiff repeats and realleges the allegations set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.
102. The Policy constitutes a valid and enforceable contract between Plaintiff and Defendants.
103. Plaintiff provided prompt notice of all losses, performed all obligations required under the Policy, and cooperated fully with the investigation of the claims.
104. Defendants are liable to Plaintiff for the losses described herein.
105. Defendants have refused to issue any payments in connection with Plaintiff's claims and have denied all of Plaintiff's claims.
106. Defendants, by and through their agents and adjusters, have breached the terms of the Policy by failing to pay any amounts due to Plaintiff pursuant to the terms of the Policy, in that Defendant improperly denied all of Plaintiff's claims, did not adequately investigate the entire scope of damages, and did not properly determine the correct value of the damages.
107. Plaintiff provided Defendants with all information necessary to properly evaluate the claims and pay adequate benefits to the insured.
108. Defendants disregarded the information provided by the Plaintiff and continued to rely on the incorrect and flawed opinions of its adjusters and/or agents as a basis to deny the claims.
109. Defendants and/or its agents failed to properly adjust the claims and Defendants denied the claims without an adequate investigation, even though the Policy provided coverage for damages and losses such as those suffered by Plaintiff.
110. Such improper conduct allowed Defendants to financially gain by wrongfully denying Plaintiff's claims.
111. To date, Plaintiff has not been properly paid for the covered damages and losses sustained to its property, business, and business income.

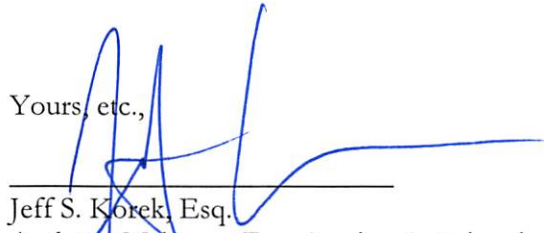


112. Defendants misrepresented to Plaintiff that the damages and losses to the insured premises and Business were not covered under the Policy, even though the damages and losses were caused by covered occurrences.
113. Defendants' failure and refusal, as described above, to pay the adequate compensation as it is obligated to do under the terms of the Policy in question and under the laws of the State of New York, constitutes a breach of Defendants' contract with Plaintiff.
114. As a result of this breach of contract, Plaintiff has suffered damages and the losses described herein.
115. The damages and losses incurred by Plaintiff were a direct and foreseeable consequence of Defendants' above described wrongful conduct in that such wrongful conduct by Defendants could cause additional business and monetary loss was reasonably foreseeable and contemplated by the parties at the time of contracting under the Policy.

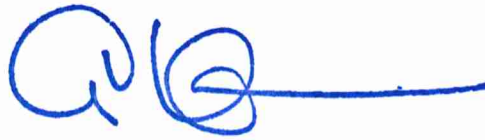
WHEREFORE, the Plaintiff, HUDSON VALLEY BONE AND JOINT SURGEONS demands judgment against the Defendants on the aforesaid cause of action in respective sums which exceed the jurisdictional limits of all lower courts, together with the costs and disbursements of the within action, together with such other and further relief the Court deems just, proper, and equitable.

Dated: New York, New York  
August 3, 2020

Yours, etc.,



\_\_\_\_\_  
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A handwritten signature in black ink, appearing to read 'Andrew Finkelstein'.

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