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George L. Christenson  
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2022CV001294  
Honorable Kevin E.  
Martens-27  
Branch 27

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

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EDINBURGH FUND, LLC  
1500 Sand Lake Road  
Orlando, Florida 32809

Plaintiff,

-vs.-

Case No.: \_\_\_\_\_

LIBERTY MUTUAL FIRE INSURANCE  
COMPANY  
2000 Westwood Drive  
Wausau, Wisconsin 54401

Case Code: 30303

Case Classification: OTHER CONTRACTS

-and-

LIBERTY MUTUAL HOLDING COMPANY, INC.  
d/b/a LIBERTY MUTUAL GROUP INC.  
175 Berkeley Street  
Boston, Massachusetts 02116

Defendants.

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## COMPLAINT

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**NOW COMES** the above-named Plaintiff, EDINBURGH FUND, LLC, by its attorneys, Schott, Bublitz & Engel s.c., and as and for the Complaint against the Defendants, LIBERTY MUTUAL FIRE INSURANCE COMPANY and LIBERTY MUTUAL GROUP INC., alleges and shows to the Court as follows:

### I. INTRODUCTION

1. This action arises from Defendants' failure to provide insurance coverage for the losses sustained and expenses incurred by two hotels—the Hyatt Regency in

Austin, Texas (“Hyatt”) and the Florida Hotel in Orlando, Florida (“Florida Hotel”)<sup>1</sup> – due to the ongoing Coronavirus pandemic (“COVID-19 Pandemic”).<sup>2</sup>

2. Federal, state, and local officials have recognized the acute risks associated with COVID-19. According to top infectious disease specialists and the Centers for Disease Control and Prevention (the “CDC”), COVID-19 is a highly transmittable respiratory virus that is spread most often by close contact with an infected person. The spread and presence of COVID-19 in the United States is pervasive. Epidemiologically, COVID-19 has been detected in every major city in the U.S. Over 885,000 people have died from COVID-19 in the U.S. since February 2020. Millions more have been hospitalized, treated for, or infected with the virus. During the early months of the COVID-19 Pandemic, the U.S. was reporting over 100,000 cases of COVID-19 each day. In the past few months, the U.S. was reporting over 500,000 new cases each day. While states and healthcare workers have worked to vaccinate Americans over the past months, the CDC continues to encourage individuals to socially distance, wear a mask, wash their hands frequently, and stay home as much as possible due to the dangerous conditions created by COVID-19. Moreover, COVID-19 has continued to mutate into numerous variants—some of which spread more easily and quickly than other variants and, according to the CDC, may lead to more cases of COVID-19. See **Exhibit 1**, attached hereto

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<sup>1</sup> Plaintiff sold the Hyatt property on March 15, 2021. Prior to this, the hotel was owned by Tantallon Austin Hotel, LLC, which is wholly owned by Plaintiff. The Florida Hotel property is currently owned by Tantallon Orlando Hotel, LLC, which is also wholly owned by Plaintiff.

<sup>2</sup> The COVID-19 Pandemic means the ongoing pandemic of the novel SARS-CoV-2 coronavirus, and all attenuated effects thereof, including but not limited to, the physical presence of the virus on property, all resultant declarations of public health emergencies / national emergencies / disasters, closure orders, state and local governmental COVID-19 guidance / orders restricting operations of businesses, etc.

(information published by the CDC regarding COVID-19 variants). In fact, experts recently detected the new COVID-19 Omicron variant, which the European Center for Disease Prevention and Control recently classified as a Variant of Concern due to concerns “regarding immune escape and potentially increased transmissibility compared to the Delta variant.” See **Exhibit 2**, attached hereto (CDC science brief regarding the Omicron variant). Due to the recent Omicron variant, COVID-19 infection rates have recently risen to all-time highs.

3. The COVID-19 Pandemic has caused extreme financial turmoil among many businesses, with tens of thousands forced out of business in the past year. The hospitality industry has suffered staggering losses and has proven to be one of the hardest hit industries in the world; between COVID-19’s physical presence in hotel locations and government stay at home and/or closure orders (“Closure Order(s)”), the pandemic has physically and materially altered business properties, including Plaintiff’s Hyatt and Florida Hotel, and stripped hotel owners like Plaintiff of their ability to employ properties for income generating purposes. This is especially true for hotel owners – like Plaintiff – that operate large, luxury hotels that employ their properties to host weddings, large parties, and corporate conferences.

4. Before the COVID-19 Pandemic, both the Hyatt and Florida Hotel operated at high occupancy and served thousands of guests each year; respectively, both hotels are located in the heart of Austin and Orlando, which are busy urban areas that have been hotbeds for the spread of COVID-19 in and on properties. However, beginning in early March 2020, the Hyatt and Florida Hotel experienced a significant drop in occupancy due

to mandatory Closure Orders and COVID-19's uncontrolled spread and physical presence of the virus at, on, in, and around the hotels. Occupancy fell as low as 3% at the Hyatt and as low as 8% at the Florida Hotel. Consequently, both hotels served only a fraction of the number of customers compared to pre-pandemic operations.

5. Additionally, in March of 2020, many hotel facilities and services (restaurants, room service, stores, gyms, pools, meeting spaces, and ballrooms) closed completely. In order to comply with Closure Orders and due to the physical presence of the virus at, on, in, and around the Hyatt and Florida Hotel, the Hyatt and Florida Hotel were required to cancel all group events beginning in March 2020.<sup>3</sup> These closures have been devastating to Plaintiff's business income. Plaintiff has lost tens of millions of dollars to date—losses that will continue to accrue for years due to the impact the COVID-19 Pandemic has had—and continues to have—on travel and event planning.<sup>4</sup> In fact, regarding event and meeting cancellations at the Hyatt, Plaintiff estimates that there was a loss of approximately 49,160 room nights—which equates to a loss of approximately \$16.53 million. And regarding event and meeting cancellations at the Florida Hotel, Plaintiff estimates that there was a loss of approximately 18,156 room nights—which equates to a loss of approximately \$2.7 million.

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<sup>3</sup> Closure Orders and the physical presence of the virus in and on these properties also prohibited and/or closed top income generating events and attractions surrounding Plaintiff's properties such as SXSW, Austin City Limits, seasonal sports, and Disney World.

<sup>4</sup> Importantly, however, Plaintiff's losses are not the result of an economic downturn. For example, many businesses have thrived during the COVID-19 Pandemic (*i.e.*, cleaning services, delivery services (such as Amazon), meal prep delivery services (such as HelloFresh and Blue Apron), fitness equipment manufacturers, furniture manufacturers and retailers, landscaping businesses, homebuilders / construction companies / remodeling companies, and home health care companies).

6. Thus, the verifiable physical presence of the virus at, on, in, and around the Hyatt and Florida Hotel properties and the Closure Orders (1) materially and physically infected and altered the Hyatt and Florida Hotel properties and (2) prevented Plaintiff and its guests, staff and suppliers from accessing the Hyatt and Florida Hotel properties for their intended income-generating purposes (and otherwise dispossessed Plaintiff of the Hyatt and Florida hotel)—both of which caused physical loss and damage to the Hyatt and Florida Hotel properties, thereby triggering Plaintiff's coverage under the Policy.

7. In anticipation of a peril of this nature, during 2019 to 2020 and 2020 to 2021, Plaintiff purchased a broad, "all risks" commercial insurance policy (the "Policy") from Defendants. Plaintiff dutifully paid the hundreds of thousands of dollars in premiums for this coverage. The Policy requires Defendants to afford Plaintiff protection from "direct physical loss or damage to covered property" unless expressly excluded. Specifically, the Policy also provides protection to Plaintiff for loss of business income and extra expenses that flow therefrom, in addition to business income losses due to civil authority Closure Orders that prohibit Plaintiff and customers from fully accessing hotels.

8. Although well before the COVID-19 Pandemic, it was common for insurance companies to include an exclusion for viruses, the Policy contains no exclusion for loss or damage caused by communicable diseases, viruses, pandemics, or any other causes of loss of this nature that would exclude coverage for Plaintiff's losses. No other exclusion excuses coverage under the Policy. Despite this, Defendants refuses to provide



coverage for the losses Plaintiff has sustained due to the verifiable physical presence of the virus at, on, in, and around the Hyatt and Florida Hotel properties and the Closure Orders – both of which physically and materially altered Plaintiff's properties.

9. Accordingly, Plaintiff seeks a declaration from the Court that the losses it has sustained during the COVID-19 Pandemic fall within the Policy's protection. Plaintiff also seeks damages due to Defendants' breach of the Policy.

## II. PARTIES

10. Plaintiff Edinburgh Fund, LLC is a Delaware limited liability company with its principal place of business is 1500 Sand Lake Road, Orlando, Florida 32809.

11. Defendant Liberty Mutual Fire Insurance Company is upon information and belief, a Wisconsin insurance corporation engaged in the business of, among other things, issuing policies of property and casualty liability and other insurance within the State of Wisconsin, and elsewhere, whose statutory home office address is 2000 Westwood Drive, Wausau, Wisconsin 54401 and whose registered agent for service of process is Corporation Service Company, 8040 Excelsior Drive, Suite 400, Madison, Wisconsin 53717. This Defendant does substantial business within Milwaukee County, Wisconsin.

12. Defendant Liberty Mutual Holding Company, Inc. d/b/a Liberty Mutual Group Inc. is an insurance company organized under Massachusetts law and whose principal place of business is 175 Berkeley Street, Boston, Massachusetts and whose registered agent for service of process in Wisconsin is Corporation Service Company,

8040 Excelsior Drive, Suite 400, Madison, Wisconsin 53717. Defendant Liberty Mutual Group Inc. is a wholly owned subsidiary of Liberty Mutual Holding Company Inc.

### **III. JURISDICTION AND VENUE**

13. Subject matter jurisdiction in this Court is proper under Wisconsin Statute Section 801.04.

14. Personal jurisdiction in this Court is proper under Wisconsin Statute Section 801.05.

15. Venue in this County is proper under Wisconsin Statute Section 801.50.

### **IV. FACTUAL BACKGROUND**

16. When the pandemic began in the spring of 2020, Plaintiff owned two hotels (through its subsidiaries): (1) the Hyatt, which is located in Austin, Texas and (2) the Florida Hotel, which is located in Orlando, Florida. The Hyatt is a 448-room hotel with 37,000 square feet of meeting space, two grand ballrooms, and two restaurants. The Hyatt is located on Lady Bird Lake in the heart of downtown Austin. The Florida Hotel is a 511-room hotel located near Universal Studios and Disney World; the Florida Hotel is connected to one of Orlando's largest malls and features 50,000 square feet of meeting space and multiple restaurants. Due in part to Defendants' failure to pay the claim at issue in this lawsuit, Plaintiff was forced to sell the Hyatt on March 15, 2021 to Host Hotels & Resorts Inc. Through its subsidiary, Plaintiff is the current owner of the Florida Hotel and the policy holder for both hotels during the relevant time periods.

A. The Policy

17. On or before the effective date of the Policy, Defendants issued the “all risks” commercial insurance Policy to Plaintiff, which covers a term from March 31, 2019 to March 31, 2020. The Policy is attached hereto as **Exhibit 3**. Defendants issued a substantially similar policy covering a term from March 31, 2020 to March 31, 2021 (*see Exhibit 4*, attached hereto).

18. In total, Plaintiff paid \$339,359.00 in premiums under the Policy for the 2019-2020 policy year.

19. The Policy, which Defendants exclusively drafted, provides the following coverage:

Subject to all the terms and conditions of this **policy**, we will pay for direct physical loss or damage to **covered property** as a result of an **occurrence**, unless excluded.

Policy, Declarations, Ex. 3 at Page 12 of 106 (emphasis in original).

20. The Policy does not define “physical loss” or “damage.”

21. The Policy further provides for “Business Income” coverage (“BI Coverage”). Generally speaking, BI Coverage provides an insured with coverage for the loss of income when it experiences certain events or disasters that require it to suspend normal business operations. Importantly, BI Coverage differs from property casualty insurance, which addresses damage to the covered property itself.

22. The Policy’s BI Coverage states Defendants will pay for:

1. The actual loss of **business income**, you incur during a **period of restoration** directly resulting from a **covered loss**.



2. The necessary expenses **you** incur, in excess of **your** normal operating expenses that reduces **your** loss of **business income**. **We** will not pay more than **we** would pay if **you** had been unable to make up lost production or continue operations or services.

Policy, Coverages (B)(1-2), Ex. 3 at Page 17 of 106 (emphasis in original). The Policy further provides for BI Coverage if Plaintiff is denied access pursuant to a civil or military order or is otherwise unable to access its property:

[W]e will pay up to a limit of liability in any one (1) occurrence of \$5,000,000 for:

3. The actual loss of **business income** **you** incur, if **you** are denied access to a **covered location** by order of civil or military authority if:
  - (a) the order results from a **covered loss**; or
  - (b) the order results from damage by a **peril insured against** to the type of property covered by this policy, within one (1) statute mile(s) of a **covered location** and is within the jurisdiction of the authority issuing the order.

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4. The actual loss of **business income** **you** incur during a **period of restoration**, if **your** ingress to or egress from a **covered location** is prevented:

As the direct result of a **peril insured against** to the type of property covered by this policy, within one (1) statute mile of a **covered location**.<sup>5</sup>

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*Id.*, Endorsements RM1525 09-04 and RM1526 09-04, Ex. 3 at Page 17 of 106 (emphasis in original).

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<sup>5</sup> The Policy also provides for an "Extended Period of Restoration" for the loss of business income *Id.* at Extensions of Coverage (A)(9), Ex. 3 at Page 23 of 106.

23. The Policy also states that Defendants will pay for extra expense incurred by Plaintiff from a covered loss or from denial of access to a covered location due to a civil or military order or due to an inability to ingress to and egress from the covered property. *Id.* Coverages (C)(1-4), Endorsements RM1523 09-04 and RM1622 03-05, Ex. 3 at Pages 80 & 83 of 106.

24. The Policy specifies a blanket business income Policy limit of \$58,469,043.00, in addition to other delineated limits for personal property and real property.

25. The Policy also provides for Contingent Business Interruption coverage (“Contingent BI Coverage”), which generally refers to coverage against revenue-related losses that are the result of an interruption suffered by a third party (*e.g.*, suppliers, distributors, or customers), which directly impacts the insured’s ability to produce a product or provide a service.

26. The Policy states:

We will pay for your loss of Business Income or Extra Expense:

- A. Caused by a **peril insured against** which prevents a direct supplier from delivering goods or materials to **you** or to **your** customers for your account, and
- B. Which results from direct physical loss to property of the type covered by this policy at a location shown on the Schedule of this endorsement.

*Id.* at Endorsement RM1112 01-04, Ex. 3 at Page 62 of 106 (emphasis in original).

27. The Policy contains no exclusion for viruses, contagions, or pandemics.

28. After the SARS epidemic of 2003, the Insurance Services Office (“ISO”) promulgated CP 01 40 07 06 (the “Form Virus Exclusion”) for use in commercial property policies. The Form Virus Exclusion states: “We 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.”

29. Defendants did not include the Form Virus Exclusion, or any iteration thereof, in the Policy. Defendants also did not include a pandemic exclusion or any other exclusion that would apply to Plaintiff’s losses. As a direct result, all of Plaintiff’s losses complained of herein are related to the COVID-19 Pandemic and are covered under the Policy.

**B. The COVID-19 Pandemic**

30. COVID-19 is a highly communicable disease that has battered hotel properties and the industry as a whole.

31. According to the CDC, COVID-19 was first reported in the U.S. in January 2020. On February 26, 2020, the first case of community transmission was reported in California. Community spread of the virus in and on properties was uncontrolled and rampant thereafter.

32. On March 11, 2020, the World Health Organization (the “WHO”) declared COVID-19 a global pandemic. On March 13, 2020, President Trump declared a state of national emergency, and on March 15, 2020, the CDC began to warn Americans of gathering in large groups.

33. Around the same time, many state and local leaders issued the first round of Closure Orders. The effect of the Closure Orders varied from state-to-state and from county-to-county, but generally speaking, they shuttered non-essential businesses, imposed capacity and social distancing restrictions on establishments and/or required citizens to remain at home if not conducting essential, permitted activities.

34. By March 17, 2020, all fifty states had reported cases of the virus, and by the end of that month (March 2020), the U.S. had more reported COVID-19 cases than any other country in the world.

35. Research on COVID-19 demonstrates the virus is transmitted by symptomatic and asymptomatic people who come into close, or even moderately close, contact with others. The virus spreads through respiratory droplets that are common when an individual talks, sneezes, coughs, sings, or breathes heavily. The CDC has found the virus can also spread through “airborne transmission” (*i.e.*, through small respiratory droplets that linger in the air and by contact with objects and surfaces of properties). Aerosolized droplets exhaled by normal breathing can travel significant distances and stay suspended in air and infective for sixteen hours, until gravity ultimately forces them to the nearest surface.<sup>6</sup> Because of this tendency for the droplets to linger in the air, scientists have likened aerosolized virus droplets to smoke—which has an obvious physical presence.<sup>7</sup> These droplets physically and materially alter the air and airspace in

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<sup>6</sup> See Leslie Tate, *Virus Survives In Air For Hours*, TULANIAN (Fall 2020), <https://tulanian.tulane.edu/fall-2020/virus-survives-in-air-for-hours> (last visited Dec. 3, 2021).

<sup>7</sup> See “Airborne Transmission of SARS-CoV-2,” *Science* (Oct. 16, 2020), available at <https://www.science.org/doi/10.1126/science.abf0521> (last visited Dec. 3, 2021).

which they are present and the surfaces of properties to which they attach. In fact, recent scientific studies confirm that COVID-19 exposure causes tangible physical alteration and damage to property by, *inter alia*, adhering to cells of surfaces through surface proteins and turning them into vectors of infection, which scientists call “fomites.”<sup>8</sup> Moreover, COVID-19 can live on hard surfaces for days, physically and materially altering the properties by adhering to the surface proteins and also rendering property unusable for its intended purpose and function. The physical presence of the virus on the property also requires further physical and material alterations to the property, such as the installation of physical barriers restricting the movement and spread of COVID-19. Additionally, scientists have recently confirmed that cleaning and/or disinfection is not necessarily effective in eradicating COVID-19 from physical surfaces of properties, further showing that the virus can, and does, physically and materially alter the property and does cause direct physical loss or damage to property by adhering to layers of the actual surfaces in a property such as Plaintiff’s properties.<sup>9</sup> See Exhibit 5, attached hereto (June 2020 Journal of Medical Virology article regarding environmental and decontamination issues for human coronavirus and their potential surrogates) (“While

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<sup>8</sup> Scientists have also gained a better understanding of the manner in which COVID-19 attaches and thus damages covered property. A January 2021 study published by the Royal Society Publishing titled “Surface interactions and viability of coronaviruses” notes that “[t]he physico-chemical adherence and the persistence of SARS-CoV-2 differ with the characteristics of the inanimate surfaces and the virus outer surface proteins, as well as on the surrounding environmental conditions, such as air temperature, relative humidity (RH) and sunlight.”

<sup>9</sup> In any event, the Hyatt and Florida Hotel are properties where COVID-19 was continually reintroduced to such properties due to, *inter alia*, the constant new foot traffic in and out of the hotels. Thus, any attempt to prevent or remedy the virus from physically damaging and causing loss to the Hyatt and Florida Hotel would have been unsuccessful.

there are considerable viral reductions, some assessments do not necessarily find complete inactivation especially when the initial starting point is a high titer.”).

36. Experts state COVID-19 is of particular concern in indoor areas of properties due to poorer air ventilation; thus, businesses that open broadly to the public and operate indoors can (and are likely to) create a dangerous environment for COVID-19 spread. This is especially true for the hotel industry where customers spend days eating, sleeping, touching surfaces, and living in a shared indoor space, in addition to interacting with hotel representatives and vendors.

37. Because COVID-19 is widespread in the U.S., particularly in busy urban areas where the Hyatt and Florida Hotel properties are located, it is often impossible for an individual to identify how or when they contracted the virus.

38. To date, over 75 million Americans have been infected with COVID-19 and over 885,000 Americans have died. As of late, the U.S. continues to report hundreds of thousands of new cases each day. At the virus’s prior peak in 2020, the U.S. was also reporting hundreds of thousands of cases each day.

39. The exceptional infection and death rate is due, in part, to the year-long absence of a preventative medicinal treatment (vaccine) for COVID-19; per the CDC, before the development of a COVID-19 vaccine, the only countermeasures to slow the virus’s spread were to stay home, avoid crowds and poorly ventilated spaces, socially distance, hand wash, attempt to sanitize and clean surfaces of the properties, and wear face masks.



40. The first COVID-19 vaccines became available to the public in December 2020. To date, less than two thirds of Americans have been fully vaccinated. Although a vaccine is now available, it does not account for the period of time when the vaccine was not available. Moreover, experts are unsure whether the current vaccines protect against new variants.

C. **The Impact of the Closure Orders and Uncontrolled COVID-19 Spread on Plaintiff.**

41. Prior to the COVID-19 Pandemic, the Hyatt and Florida Hotel properties, which are strategically located in large cities near the city center, served hundreds, if not thousands, of customers daily. The Hyatt is located just south of downtown Austin, on the shores of Lady Bird Lake. The Hyatt has two large ballrooms and additional meeting space that was regularly used for weddings, dinners, proms, holiday celebrations, and large corporate conferences. The Florida Hotel is located in Orlando and is connected to one of the city's most popular malls and shopping centers and a short drive from Universal Studios and Disney World. Similar to the Hyatt, the Florida Hotel hosts a wide array of events. The CDC has made clear that bustling locations like these were a breeding ground where the virus could attach to surfaces within the properties and thereafter cause COVID-19 to spread, especially in the early days of the pandemic before face coverings and social distancing became commonplace.

42. As of the filing of this Complaint, Texas ranks second only to California for the total number of COVID-19 cases while it lags in vaccination progression. Florida has

the third most infections of any other state. The two states combined make up nearly 12 million confirmed COVID-19 diagnoses.

43. In order to combat the risks associated with COVID-19 spread in these and similar cities/states, and due to the physical loss and damage COVID-19 has caused to property, local and state authorities issued states of emergency and myriad Closure Orders. For example, on March 6, 2020, officials in Travis County, Texas (where the Hyatt is located) issued a Declaration of Disaster Due to Public Health Emergency. A week later, on March 13, 2020, Texas Governor Greg Abbott declared a State of Disaster, and shortly thereafter, on March 19, issued an executive order prohibiting people from gathering in groups larger than ten people and closed restaurant dining rooms and gyms. Under Governor Abbott's mandate, essential businesses were allowed to operate with social distancing requirements. On March 21, 2020, Travis County officials prohibited people from gathering in groups larger than ten people. Also on March 21, Austin Mayor Steve Adler issued a similar order limiting social gatherings to no more than 10 people and further closing on-premises dining at bars and restaurants. On March 24, Mayor Steve Adler issued an order requiring residents to stay at home, and all non-essential businesses and operations to cease operations, subject to certain exceptions. The City of Austin and Travis County Judge, Sarah Eckhardt issued similar orders on March 25. *See Exhibit 6*, attached hereto (Texas Closure Orders). In April 2020, some Texas establishments were allowed to reopen at a very limited capacity.

44. Comparable to the Texas Closure Orders, on March 9, 2020, Florida Governor Ron DeSantis declared a State of Emergency for the State of Florida. On March

26, 2020, Orange County officials (where the Florida Hotel is located) shuttered non-essential businesses and urged social distancing requirements. On April 3, 2020, Governor DeSantis issued a stay-at-home order prohibiting individuals in Florida from conducting non-essential activities outside of their homes. See **Exhibit 7**, attached hereto (Florida Closure Orders).

45. Subsequent local, county, and state Closure Orders followed in both Texas and Florida.

46. All Closure Orders that affected the Hyatt and Florida Hotel properties resulted from physical loss or damage to (1) the Hyatt and Florida Hotel properties; and (2) other business properties within one statute mile of the Hyatt and Florida Hotel properties. Just like the virus was physically present at, in, on and around the Hyatt and Florida Hotel properties, the virus was also present at, in, on and around the business properties immediately surrounding (*i.e.*, within one statute mile of) Plaintiff's hotels. See, *e.g.*, **Exhibits 19 & 20**, attached hereto (Orange County, FL and Travis County data regarding new COVID-19 cases and COVID-19 death rates since March 2020). Moreover, the Hyatt and Florida Hotel properties and the business properties within one statute mile of Plaintiff's hotels were all within the jurisdiction of the Closure Orders that affected such properties.

47. Due to the Closure Orders and the physical presence of COVID-19 at, in, on, and around the hotels, the Hyatt and Florida Hotel closed their restaurants, lounges, shops, and pools. Even worse, the hotels were required to close their meeting spaces and cancel (with very limited exception) every event the hotel was to host beginning in March

of 2020. The result of this was catastrophic. The Closure Orders – which were issued due to the physical presence of COVID-19 at, on, in, and around Plaintiff’s hotels and business properties within one statute mile of Plaintiff’s hotels – denied Plaintiff and its guests, staff and suppliers access to the Hyatt and Florida Hotel.

48. Further, the Closure Orders and the physical presence of COVID-19 at, on, in, and around Plaintiff’s hotels and business properties within one statute mile of Plaintiff’s hotels prevented ingress and egress to and from the Hyatt and Florida Hotel by Plaintiff and its guests, staff and suppliers. Moreover, the Closure Orders and the physical presence of COVID-19 at, on, in, and around Plaintiff’s hotels and business properties within one statute mile of Plaintiff’s hotels also prevented direct suppliers from delivering goods or materials to Plaintiff or Plaintiff’s customers. For example, Plaintiff’s main food suppliers (Gordon Food Service with respect to the Hyatt, and U.S. Foods with respect to the Florida Hotel) were prevented from delivering goods and materials to Plaintiff. This is merely one example. Numerous other direct suppliers were similarly prevented from delivering goods and materials to (and accessing) the Hyatt and Florida Hotel due to the Closure Orders and the physical presence of COVID-19 at, on, in, and around Plaintiff’s hotels and business properties within one statute mile of Plaintiff’s hotels.<sup>10</sup>

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<sup>10</sup> Other direct suppliers that were also prevented from delivering goods and materials to Plaintiff include GuestSupply, Ecolab, Courtesy Products, Pepsi Cola, Brown Distributor, Southern Glazers, Starbucks Distribution, American Hotel, Coke-a-Cola, HD Supply, Florida Supply, City Beverages, Crowne Linen, and Fresh Point.

49. The physical presence of the virus at, in, on, and around the Hyatt and Florida Hotel properties, as well as the closures and capacity restrictions themselves constitute and caused direct physical loss and damage to Plaintiff's properties under the Policy. The Closure Orders imposed a *physical limit*: Plaintiff and its guests, staff and suppliers were physically unable to occupy the hotels for their intended income-generating purposes.

50. The Closure Orders that affected Plaintiff's properties (and properties within one statute mile of Plaintiff's properties) were issued due to the fact that COVID-19 causes physical loss or damage to the Plaintiff's properties. For example, numerous governmental bodies across the country specifically found COVID-19 physically impacts and/or causes physical loss or damage to property when issuing states of emergency and Closure Orders, including governmental bodies in Texas and Florida. *See, e.g.,* City of Oakland Park Fla. Local Public Emergency Action Directive, at 2 (Mar. 19, 2020) (**Exhibit 10**, attached hereto) ("This Order is given because of the propensity of the virus to spread person to person and also because the virus physically is causing property damage due to its proclivity to attach to surfaces for prolonged periods of time."); Panama City Fla. Resolution No. 20200318.1 (Mar. 18, 2020) (**Exhibit 11**, attached hereto) ("conditions continue to exist requiring the extension of the initial Declaration because of the propensity of the virus to spread person to person and also because the virus physically is causing property damage due to its proclivity to attach to surfaces for prolonged periods of time"); Exec. Order of the Hillsborough Cty. Fla. Emergency Policy Group, at 2 (Mar. 27, 2020) (**Exhibit 12**, attached hereto) ("COVID-19 is spread amongst the

population by various means of exposure, including the propensity to spread person to person and the propensity to attach to surfaces for prolonged periods of time thereby creating a dangerous physical condition spreading from surface to person and causing increased infections to persons, and also creating property or business income loss and damage in certain circumstances"); City of Key West Fla. State of Local Emergency Directive 2020-03, at 2 (Mar. 21, 2020) (**Exhibit 13**, attached hereto) ("COVID-19 is spread amongst the population by various means of exposure, including the propensity to spread person to person and the 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"); Harris Cty. Tex. Office of Homeland Security & Emergency Mgmt., Order of Cty. J. Lina Hidalgo, at 2 (Mar. 24, 2020) (**Exhibit 14**, attached hereto) ("the COVID-19 virus causes property loss or damage due to its ability to attach to surfaces for prolonged periods of time"); City of Durham NC, Second Amendment to Declaration of State of Emergency, at 8 (effective Mar. 26, 2020) (**Exhibit 15**, attached hereto) (recognizing "the virus's propensity to physically impact surfaces and personal property"); Napa Cty. Cal. Health & Human Service Agency, Order of the Napa Cty. Health Officer (Mar. 18, 2020) (**Exhibit 16**, attached hereto) ("This Order is issued based on evidence of increasing occurrence of COVID-19 throughout the Bay Area, increasing likelihood of occurrence of COVID-19 within the County, and the physical damage to property caused by the virus."); Colorado Dep't of Pub. Health & Env't, Updated Public Health Order No. 20-24, at 1 (Mar. 26, 2020) (**Exhibit 17**, attached hereto) ("COVID-19 also physically contributes to property loss ... and damage due to its propensity to attach



to surfaces for prolonged periods of time.”); Sixth Supp. to San Francisco Mayoral Proclamation Declaring the Existence of a Local Emergency, 26 (Mar. 27, 2020) (**Exhibit 18**, attached hereto) (“This order and the previous orders issued during this emergency have all been issued because of the propensity of the virus to spread person to person and also because the virus physically is causing property loss or damage due to its proclivity to attach to surfaces for prolonged periods of time”); Indiana Exec. Order No. 20-22, at 8 (April 20, 2020) (**Exhibit 19**, attached hereto) (recognizing “the virus’s propensity to physically impact surfaces and personal property”); New Orleans Mayoral Proclamation No 2020-02602, at 2 (Mar. 16, 2020) (**Exhibit 20**, attached hereto) (“COVID-19 may be spread amongst the population by various means of exposure, including the propensity to spread person to person and the 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”); Los Angeles Mayoral Public Order, at 1-2 (April 27, 2020) (**Exhibit 21**, attached hereto) (“This Order is given 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.”); and N.Y.C. Emergency Exec. Order No. 100, at 2 (Mar. 16, 2020) (**Exhibit 22**, attached hereto) (“this order is given because of the propensity of the virus to spread person to person and also because the virus physically is causing property loss and damage”).

51. In addition to Closure Orders, top health officials urged Americans to stay home and avoid non-essential activities due to uncontrolled community spread. Given

COVID-19's rampant contagion level, confirmed cases among hotel employees and guests,<sup>11</sup> and epidemiological evidence demonstrating how COVID-19 can be spread (including asymptomatic and airborne transmission), COVID-19 widely infiltrated and was physically present at, on, in, and around both the Hyatt and the Florida Hotel. This is particularly true considering both hotels are located in cities that were once virus hotspots. According to CDC data, of the more than 75 million COVID-19 cases reported in the United States, nearly 12 million have been in Texas and Florida.

52. Further, the CDC reports individuals with COVID-19 who are "asymptomatic" can spread the virus, even if they are not showing any symptoms. Thus, it is a demonstrable certainty (provable through epidemiological evidence) that customers, representatives, and/or employees entered (a) the Hyatt or Florida Hotel, (b) other retail properties within one statute mile of the hotel locations, (c) and other places of business of the Hyatt's and the Florida Hotel's direct suppliers, both before the Closures Orders and following the reopening of stores, while they were actively shedding and spreading the virus onto surfaces and into the air, even if they did not later develop symptoms of, or test positive for, COVID-19.

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<sup>11</sup> The Hyatt and Florida Hotel had numerous confirmed COVID-19 cases, which further shows that the virus was present at, in, on and around the Florida Hotel and Hyatt. For example, an employee tested positive with COVID-19 at the Hyatt on August 14, 2020—and at least nine staff members were subsequently confirmed positive with COVID-19. An employee also tested positive with COVID-19 at the Florida Hotel on December 29, 2020—and at least nine staff members were subsequently confirmed positive with COVID-19. These are just the known and confirmed and known cases and do not account for the countless other employees and guests that entered Plaintiff's hotels while they were positive for COVID-19 and actively shedding the virus onto Plaintiff's properties.

53. The pervasive spread of the virus, and its physical presence at, in, on, and around the Hyatt and Florida Hotel properties and other business properties within one statute mile of such properties (a presence which physically and materially altered the properties by attaching to surfaces of the properties and living in the air), including those properties referenced above, constitutes and caused direct physical loss or damage to property under the Policy and interrupted Plaintiff's business at both hotel locations. The virus and its physical presence at, in, on, and around the Hyatt and Florida Hotel caused physical loss and damage to the Hyatt and the Florida Hotel in the very same way the virus damages and causes physical loss and damage to the human immune, respiratory, cardiovascular, musculoskeletal systems and the brain. *See Exhibit 23*, attached hereto (June 2020 Sports Medicine and Health Science article regarding the COVID-19 pandemic and physical activity) (recognizing that "[t]he foremost damage of the virus is on human health, including direct injury to the respiratory system, compromise of the immune system, exacerbation of the underlying medical conditions, and eventually systematic failure and death." Also noting that "[e]vidence is accumulating that SARS-CoV-2 invades and damage[s] multiple organs, such as the respiratory system, cardiovascular system, central nervous system, kidneys, and liver.").<sup>12</sup>

54. As a result, in much of 2020 and still today, Plaintiff has only served a fraction of the customers it once did due to various Closure Orders and the physical presence of COVID-19 on property. Room sales and occupancy have plummeted; some

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<sup>12</sup> Also available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7261095/> (last visited Dec. 3, 2021).

months, Plaintiffs saw both hotels sit virtually empty. All events were canceled, a loss by itself that totals millions of dollars per year. On top of this, Plaintiff has incurred expense by, but not limited to, maintaining employees on payroll who could not work, implementing increased cleaning of high touch points, and the installation of sanitation stations and physical barriers.

55. These are the exact types of business losses for which Plaintiff purchased the Policy.

**D. Despite Incurring Direct Physical Loss or Damage to Property under the Policy, Defendants Denied the Claim**

56. On April 8, 2020, in accordance with the duties of the insured under the Policy, Plaintiff noticed a claim (the "Claim") under the Policy for direct physical loss or damage to its covered property caused by the COVID-19 Pandemic.

57. At all relevant times, Plaintiff mitigated its damages and performed all reasonable mitigation measures; unlike many hotels that closed temporarily, the Hyatt and Florida Hotel continued to attempt to clean the virus from the surfaces of the properties and to restore the surfaces to a safe virus level.

58. Despite this and the broad coverage afforded by the Policy, on April 15, 2020, Defendants issued notice of its denial of Plaintiff Claim for coverage (the "Denial").

59. In the Denial, Defendants stated both business income coverage and civil authority business income coverage required "physical damage by a peril insured against." Defendants further stated: "[a]s there was no physical damage there is no coverage provided for your business interruption loss."

60. Defendants did not specifically assert that Plaintiff's claim was barred by a Policy exclusion.

61. Defendants are systematically denying COVID-19 claims despite the fact the Closure Orders and COVID-19's physical presence on and in the surfaces of the Plaintiff's covered properties constitute "direct physical loss or damage to property" under the Policy.

## V. CAUSES OF ACTION

### Count I

#### (Request for Declaratory Judgment)

62. Plaintiff incorporates the above allegations as if fully set forth herein.
63. An actual controversy exists between the parties.
64. Plaintiff has a legally protectable interest in this dispute.
65. Defendants have an opposing interest in this dispute.
66. The issue in controversy and the application of the facts of this case to the insurance Policy at issue are ripe for determination by this Court.

67. Accordingly, pursuant to the Wisconsin Uniform Declaratory Judgments Act, Plaintiff seeks a declaration from the Court that, under the Policy, Defendants are obligated to reimburse Plaintiff for the losses and expenses it has incurred arising from "direct physical loss or damage to" its covered property due to (1) the governmental Closure Orders and/or (2) the physical presence of COVID-19 (or risks thereof) at, in, on, and around (a) Plaintiff's covered property, (b) other properties within one statute mile

of Plaintiff's covered property, and (c) places of business of Plaintiff's direct suppliers, which physically and materially altered such properties.

## Count II

### (Breach of Contract - At Law)

68. Plaintiff incorporates the above allegations as if fully set forth herein.

69. The Policy is a valid and enforceable contract between the parties for both applicable years.

70. Plaintiff has fully performed under the terms of the Policy, including paying significant premiums in exchange for the coverage afforded under the Policy, putting Defendants on notice of its losses, and fully performing all "duties" assigned to Plaintiff under the Policy.

71. Under the Policy, Defendants agreed and contracted to reimburse Plaintiff for losses arising from direct physical loss or damage to covered property. This coverage extended to physical loss or damage to property due to Plaintiff's (1) general business interruption, (2) business interruption due to denial of access by civil authorities and ingress-egress to covered locations, (3) contingent business interruption, and (4) extra expenses incurred.

72. Plaintiff has suffered losses arising from "direct physical loss or damage to" its covered property due to (1) the governmental Closure Orders and/or (2) the physical presence of COVID-19 (or risks thereof) at, in, on, and around (a) Plaintiff's covered property, (b) other properties within one statute mile of Plaintiff's covered property, and



(c) places of business of Plaintiff's direct suppliers, which physically and materially altered such properties.

73. By refusing to reimburse for these losses and expenses, Defendants have breached the Policy.

74. As a result of this breach, Plaintiff has suffered millions of dollars in damages, as well as damages resulting from Defendants' improper withholding of insurance benefits that are due and owing under the Policy, and attorneys' fees in this action.

#### **VI. DEMAND FOR JURY TRIAL**

75. Plaintiff hereby demands a trial by jury on all matters so triable.

**WHEREFORE**, Plaintiff Edinburgh Fund LLC respectfully requests the Court enter judgment in its favor and against Defendants as follows:

- a. For a judgment against Defendants for the causes of action alleged against them;
- b. For compensatory damages in an amount to be proven at trial;
- c. For a declaration that Defendants' conduct as alleged herein is unlawful and in material breach of the Policy;
- d. For a declaration that Defendants are obligated to reimburse Plaintiff for the losses and expenses it has incurred arising from direct physical loss or damage to its covered properties due to the physical presence of COVID-19 (or risks thereof) at, in, on and around its hotels and due to governmental Closure Orders, both of which physically and materially altered such properties;

e. For pre-judgment and post-judgment interest at the maximum rate permitted by law;

f. For Plaintiff's attorneys' fees and costs incurred; and

g. For all such other and further relief as the Court deems just and proper.

Dated this 28<sup>th</sup> day of February, 2022.

Respectfully submitted,

/S/ Electronically signed by Patrick J. Schott

Patrick J. Schott

State Bar #: 1001913

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