

presence of the COVID-19 virus at surrounding businesses and ordered COVID-19 restrictions. As a result, Plaintiffs suffered losses that fell within the coverage terms of their AFM Policy.

4. Despite having promised that the insurance policy it sold to Plaintiffs was "broad," "comprehensive," and "certain," and would provide coverage against "all *risks* of physical loss or damage," AFM has conducted an improper investigation of Plaintiffs' claim and has wrongly failed to provide the promised coverage.

II. **PARTIES**

5. Plaintiff 20 TSQ Lessee, LLC is a domestic limited liability company, formed under the laws of the State of New York and located at 20 Times Square (aka 701 Seventh Avenue), New York, NY, 10036. At all relevant times, 20 TSQ Lessee, LLC was the Lessee of 20 TSQ and the party responsible for running 20 TSQ.

6. Plaintiff 20 TSQ Groundco, LLC is a domestic limited liability company, formed under the laws of the State of New York and located at 20 Times Square (aka 701 Seventh Avenue), New York, NY, 10036. At all relevant times, 20 TSQ Groundco, LLC was the fee simple owner of the land and building at 701 Seventh Avenue. 20 TSQ Groundco, LLC leased the property to 20 TSQ Lessee, LLC.

7. Plaintiff 20 TSQ F&B, LLC is a domestic limited liability company, formed under the laws of the State of Delaware and located at 20 Times Square (aka 701 Seventh Avenue), New York, NY, 10036. At all relevant times, the Restaurants and Bars were leased to, and operated by 20 TSQ F&B, LLC (defined below).

8. Plaintiff 20 TSQ Sign, LLC is a domestic limited liability company, formed under the laws of the State of New York and located at 20 Times Square (aka 701 Seventh Avenue), New York, NY, 10036. At all relevant times, 20 TSQ Signs, LLC was owner of the large LED sign

on the outside of 20 TSQ and responsible for renting the sign to companies for advertising purposes.

9. Defendant Affiliated FM Insurance Company ("AFM") is incorporated under the laws of Rhode Island, with a principle place of business at 270 Central Avenue, Johnston, Rhode Island 02919. AFM is authorized to do business and issue insurance policies in the State of New York. AFM may be served with process at 270 Central Avenue, Johnston, Rhode Island 02919.

III.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this action because AFM is incorporated under the laws of Rhode Island, with a principle place of business at 270 Central Avenue, Johnston, Rhode Island 02919, and under Rhode Island General Laws § 8-2-14 because the amount in controversy exceeds the sum of ten thousand dollars (\$10,000).

11. Venue is proper in this Court, pursuant to Rhode Island General Laws § 9-4-4, because AFM is located in Providence County.

12. All conditions precedent to recovery by Plaintiffs have been performed or occurred.

13. To the extent any facts or claims alleged herein are inconsistent, they are respectfully asserted in the alternative.

IV.

FACTS

A. Plaintiffs' Insured Property.

14. The Marriott Edition 20 TSQ is a 5-Star hotel and retail space in the center of New York's famed Time Square. 20 TSQ opened in March of 2019.

15. At all relevant times, Plaintiffs owned, operated and managed a group of related business -- consisting most prominently of a Hotel, restaurants and bars on property, retail spaces,

meeting spaces, and exterior signage on the building -- that shared a common location at 701 Seventh Avenue – The 20 TSQ hotel location.

16. To protect their businesses against property damage or business interruptions, on or about October 1, 2019, Plaintiffs entered into a contract of insurance with AFM bearing Policy Number KN132 (the "Policy"). The Policy was in effect from October 1, 2019 through October 1, 2020. The Policy is attached hereto as ***Exhibit A*** and incorporated herein by reference.

17. The Policy covers property at 701 Seventh Avenue, New York, New York 10036.

18. The location encompasses the 452-room Times Square Edition hotel, the 701 West restaurant, The Terrace restaurant, several bars and a lounge and an 18848 square foot exterior sign directly on the Times Square Bow Tie.

19. In exchange for AFM's agreement to take on Plaintiffs' risk of loss, Plaintiffs paid AFM significant annual premiums.

B. The COVID-19 Pandemic.

20. COVID-19 is a deadly communicable disease that has infected nearly nine million people in the United States and caused over 220,000 deaths in the United States.¹ The World Health Organization has declared the COVID-19 outbreak a pandemic. President Donald Trump has declared a nationwide emergency due to the public health crisis caused by the COVID-19 outbreak in the United States. Mayor Bill DeBlasio issued an Emergency Executive Order on March 16, 2020.

COVID-19 was present at Locations Near the Property.

¹ See <https://covid.cdc.gov/covid-data-tracker/#cases>

21. COVID-19 was prevalent in New York City during the period from early March 2020 to present. New York City, and particularly Manhattan, was considered a significant hot spot from that time.

22. The existence and presence of COVID-19 on properties in proximity to 20 TSQ has triggered coverage under the Policy. Based upon news reports and information that is publicly available and accessible via the internet,² COVID-19 cases were reported at several locations within five statute miles of 20 TSQ including, but not limited to, Mary Manning Walsh Nursing Home. In particular, the early spread of COVID-19 amongst nursing homes was a significant factor in the Mayor issuing a series of orders which became progressively more restrictive, until finally issuing both shelter-in-place orders for all residents, complete closure of restaurants and bars for in-person dining, all of which caused 20 TSQ to have to shut down.

23. Several of these facilities have had significant and reported COVID-19 outbreaks, including deaths. For example: Mary Manning Walsh Nursing Home, located 2.8 statute miles from 20 TSQ had thirty-two (32) resident deaths by mid-April of 2020.³

24. As COVID-19 was spread throughout the nursing homes, including Mary Manning Walsh, New York government officials took the extraordinary step of effectively shutting down all entertainment, food and other activities, including all museums, Broadway, restaurants, bars, theaters and clubs in and around Times Square.

COVID-19 has caused physical loss and damage to property.

25. The COVID-19 virus is a tangible, physical object that has caused: (a) physical damage at multiple locations within 5 statute miles of 20 TSQ, (b) physical loss of use and

² See <https://www.nbcnews.com/news/us-news/nursing-homes-overwhelmed-coronavirus-it-impossible-us-stop-spread-n1174171>

³ See <https://patch.com/new-york/upper-east-side-nyc/ues-nursing-home-tops-manhattan-coronavirus-deaths-state>

functionality of the 20 TSQ property, and (c) a *risk* of physical loss or damage at 20 TSQ and the surrounding locations within Manhattan and New York City.

26. The World Health Organization ("WHO") has confirmed that COVID-19 can exist on objects or surfaces and that the transmission of COVID-19 can occur by indirect contact with surfaces in the immediate environment or with objects that were touched by an infected person hours before.⁴ The persistent physical presence of the COVID-19 virus has been affirmed by a study documented in The New England Journal of Medicine establishing that COVID-19 can remain present in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard, and up to three days on plastic and stainless steel.⁵ The study's results further confirmed that individuals can become infected with COVID-19 through indirect contact with surfaces or objects contacted by an infected person - whether or not the infected person was symptomatic.⁶

27. The March 16 Emergency Executive Order issue by Mayor DeBlasio expressly states that the order is given "because the virus physically is causing property loss and damage" Emergency Executive Order No. 100 (issued March 16, 2020). A subsequent Emergency Executive Order No. 126, issued on June 18, 2020, states that the Order "is given because of the propensity of the virus to spread person-to-person and also because the actions taken to prevent such spread have led to property loss and damage." Emergency Executive Order No. 100 and

⁴ See <https://www.who.int/publications/i/item/cleaning-and-disinfection-of-environmental-surfaces-inthe-context-of-covid-19>

⁵ van Doremalen, N., Bushmaker, T., Morris, D.H., Holbrook, M.G., Gamble, A., Williamson, B.N., et al., 2020. Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1. N Engl J Med 382, 1564–1567. (<https://doi.org/10.1056/NEJMc2004973>, accessed 6 May 2020)

According to the World Health Organization ("WHO"): "People can catch COVID-19 from others who have the virus. The disease can spread from person to person through small droplets from the nose or mouth, which are spread when a person with COVID-19 coughs or simply exhales. These droplets land on objects and surfaces all around the person. Other people then catch COVID-19 by touching these objects or surfaces, then touching their eyes, nose or mouth. People also catch COVID-19 if they breathe in droplets from an infected person who coughs out or exhales droplets." The time from exposure (infection) to the development of COVID-19 symptoms - the incubation period - can be up to fourteen days. During this period (the "pre-symptomatic" period), those infected can be contagious and transmit the disease before they show any symptoms or have any reason to believe they are sick.⁶

Emergency Executive Order No. 126 are attached hereto as ***Exhibit B***, and incorporated herein by reference.

28. The Policy also recognizes that the presence of communicable disease causes physical loss or damage to property because the Policy covers the costs of "cleanup, removal and disposal of such presence of communicable disease..." *See* Exhibit A, All Risk Coverage Form, at 7 of 44. Further, if it did not produce "physical loss or damage," then the coverage would be illusory.

29. The presence of the COVID-19 virus in proximity to 20 TSQ, and throughout Manhattan and New York City caused a physical loss to 20 TSQ which was deprived of its functionality and rendered unusable.

30. Because of the restrictions imposed by civil authority orders issued due to the presence and spread of the virus, Plaintiffs suffered a physical loss. Plaintiffs were required to cease operation at 20 TSQ. More specifically, customers were directly prohibited from accessing the Restaurants, Bars and Retail businesses within the 20 TSQ premises. Additionally, Plaintiffs lost the use and function of the property when the virus and civil authority orders rendered the Hotel, Retail Spaces, Meeting Spaces, Restaurants, and Bars unusable for their full, intended purposes.

31. The Policy does not clearly and unambiguously require physical *deformation* or *structural alteration* of property for there to be physical loss or damage that comes within the coverage terms.

Actions and Orders of Civil Authorities.

32. COVID-19 is widespread in the state of New York and, more specifically, in Manhattan and New York City.

33. The widespread physical presence of the virus in New York City -- including in proximity to the 20 TSQ -- and the virus' propensity to cause actual physical loss or damage and to present a *risk* of physical loss or damage, caused civil authorities to prohibit access to 20 TSQ where the virus was presumed to exist and to pose a risk of transmission, illness and even death, if access to the public were permitted.

34. On March 7, 2020, the Governor of New York issued a proclamation declaring a state disaster for all counties in the State of New York. *See Exhibit C*, Collected Relevant Orders of Civil Authorities.

35. In the following months, the State of New York and New York City (like most cities, counties and states across the nation) issued a series of orders (collectively the "Shutdown Orders"). The purpose of the Shutdown Orders was to "flatten the curve" of the virus and allow our healthcare systems to prepare for anticipated increases in the demand for medical care, ventilators, and personal protective equipment.⁷ The Shutdown Orders included (but are not limited to) the following:

- Executive Order 202 (March 7, 2020)
 - declared Covid-19 a state of disaster emergency for the entire State of New York
- Executive Order 202.1 (March 12, 2020)
 - required the cancellation or postponement of any event with more than 500 persons expected in attendance
 - limited all places of business and public accommodation to no greater than 50% occupancy.
- Executive Order 202.3 (March 16, 2020)
 - ordered restaurants and bars to cease all on-premises service of food or beverages
 - required the cancellation or postponement of any event with more than 50 persons expected in attendance
- City of New York Emergency Executive Order No. 100 (March 16, 2020).
 - required restaurants and bars to close all in-person dining.

⁷ Exec. Order No. 13,909, 85 C.F.R. 16227 (2020), <https://www.whitehouse.gov/presidential-actions/executive-order-prioritizing-allocating-health-medical-resources-respond-spread-COVID-19/>.

- ordered closure of all entertainment venues with seating capacity below 500.
- Executive Order 202.5 (March 18, 2020)
 - closed all indoor common portions of retail shopping malls.
 - closed all places of public amusement including, but not limited to, amusement parks, carnivals, aquariums, zoos, arcades, bowling alleys, children's attractions, and theme parks.
- Executive Order 202.7 (March 19, 2020)
 - instructed non-essential businesses to reduce their in-person workforces by 75%
- Executive Order 202.8 (March 20, 2020)
 - instructed non-essential businesses to reduce their in-person workforces by 100%
- Executive Order 202.10 (March 23, 2020)
 - prohibited non-essential gatherings "of any size for any reason."
- Executive Order 202.38 (June 6, 2020)
 - modified the prohibition on on-premises dining to allow limited dining in outdoor spaces only.
 - required postponement or cancellation of gatherings of more than 10 persons.
- Executive Order 202.42 (June 15, 2020)
 - required postponement or cancellation of gatherings of more than 25 persons.
- City of New York Emergency Executive Order No. 126 (June 18, 2020).
 - allowed outdoor seating options for restaurants, bars and other establishments
- Executive Order 202.45 (June 26, 2020)
 - required postponement or cancellation of gatherings of more than 50 persons.
- Executive Order 205 (June 24, 2020)
 - imposed 14-day quarantine restrictions on travelers arriving in New York from areas with positive test rates that exceed limits set in the order.

See Exhibit C, Collected Relevant Orders of Civil Authorities.

36. The Shutdown Orders, some of which remain in effect as of the date of this filing, caused Plaintiffs to suspend or limit their businesses at 20 TSQ and/or rendered the property unusable for its intended purpose.

37. In addition, New York and many other cities and states issued orders that discouraged travel to and from New York, including imposing quarantine restrictions on travelers returning from New York. For example:

- State of New York Executive Order: Quarantine Restrictions on Travelers Arriving in New York (June 24, 2020);
- Order of the Commissioner of Health of the City of Chicago, Order No. 2020-10 (Quarantine Restrictions on Persons Entering Chicago from High Incidence States);
- Government of the District of Columbia, Mayor's Order 2020-081: Requirement to Self-Quarantine and Non-Essential Travel During the Covid-19 Public Health Emergency (July 24, 2020).⁸

38. Quarantine requirements or recommendations have also been in effect in Alaska, Hawaii, Maine, Maryland, Massachusetts, New Hampshire, New Mexico, Ohio, and Pennsylvania. To avoid the quarantine requirement, travelers were advised by government officials to cancel or postpone travel to impacted states such as New York. *E.g.* New Jersey Department of Health, Self-Quarantine for Travelers FAQ (updated Sept. 22, 2020)

39. Several Presidential proclamations restricted international travelers who had been in certain countries -- including China, the United Kingdom, the Republic of Ireland, Austria, Belgium, Spain, France, Germany, Italy, Brazil and others -- from entering into the United States. *E.g.* Proclamation 9984, Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus (Jan 31, 2020).⁹ These

⁸ <https://coronavirus.dc.gov/page/mayor's-order-2020-081-requirement-self-quarantine-after-non-essential-travel-during-covid-19>

⁹ The full text of the presidential proclamations are available on the White House website at:

- China: <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-persons-pose-risk-transmitting-2019-novel-coronavirus/>
- Iran: <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-coronavirus/>
- Schengen Area: <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-2019-novel-coronavirus/>

government travel restrictions have prevented tens of thousands of international travelers from entering the United States each day.

40. As businesses that rely upon customers, both locally and from across the country and around the world, Plaintiffs are directly affected by the Shutdown Orders and by similar orders issued by other counties, states, and countries.

41. Plaintiffs' Property has lost its functionality and has been impaired by the risk of COVID-19 and the resultant Shutdown Orders.

42. Plaintiffs have suffered physical loss or damage at the property based on the Civil Authority orders which increasingly tightened restrictions on Plaintiffs' core business – hospitality – in response to the unfolding communicable disease disaster at nursing homes, including Mary Manning Walsh Nursing Home.

43. The Shutdown Orders, and the property loss and property damage caused by both the actual presence and spread of COVID-19 at the nursing homes and the risk of COVID-19 spreading uncontrollably beyond the nursing homes, has had a devastating impact on Plaintiffs' businesses.

C. Coverage Under the AFM Policy.

44. The Policy issued to Plaintiffs was AFM's proVison 4100 “all risks” policy. As an all risks Policy, the perils insured against are defined by the proVision 4100 Policy's exclusions

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- United Kingdom and Ireland: <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-coronavirus-2/>
 - Brazil: <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-novel-coronavirus/>
 - Brazil Amendment: <https://www.whitehouse.gov/presidential-actions/president-amendment-proclamation-president-may-24-2020/>
 - Immigrants: <https://travel.state.gov/content/travel/en/News/visas-news/Proclamation-Suspending-Entry-of-Immigrants-Who-Present-Risk-to-the-US-labor-market.html>

and limitations -- not by positive grants of coverage for damage due to particular perils as is provided by a "named peril" policy. All risk policies cover all losses to the covered property unless the loss is excluded elsewhere within the policy.

45. The Policy contains numerous different coverage parts, each with an applicable limit or sublimit of liability. The majority of the coverage parts are not mutually exclusive. Thus, a policyholder's loss may trigger several different coverage parts.

46. The Policy was drafted by AFM.

The Policy's Basic Insuring Provision

47. The Policy's basic insuring provision states as follows:

INSURANCE PROVIDED:

This Policy covers property, as described in this Policy, against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded, while located as described in this Policy.

See Exhibit A, All Risk Coverage Form, p. 1 of 44.

48. The Policy's basic insuring provision differs from many business insurance policies. While many policies define coverage in terms of "direct physical loss or damage," the Policy provides coverage against "all *risks* of physical loss or damage." In so doing, the Policy expands coverage beyond actual physical loss and damage to "all risks" of physical loss and damage. In addition, the Policy omits the requirement that the physical loss or damage be "direct."

49. The Policy expressly recognizes that property is physically damaged by the presence of communicable disease. Under a heading titled "Communicable Disease - Property Damage," the Policy expressly states that it covers, among other things "the reasonable and necessary costs incurred for the (a) Cleanup, removal and disposal of...communicable disease from insured property." See Exhibit A, All Risk Coverage Form, at 7 of 44. Accordingly, because the

Policy specifically covers remediation of the damage caused by communicable disease, the presence of communicable disease is "physical damage of the type insured" under the Policy."

Business Interruption Coverage

50. The Policy affords coverage for Plaintiffs' business interruption losses. The Policy includes a Business Interruption provision which states:

A. LOSS INSURED

This Policy insures Business Interruption loss, as provided in the Business Interruption Coverage, as a direct result of physical loss or damage of the type insured:

1. To property as described elsewhere in this Policy and not otherwise excluded by this Policy.

See Exhibit A, All Risk Coverage Form, p. 19 of 44.

51. COVID-19 has caused Plaintiffs to suffer business interruption loss as a direct result of physical loss and damage of the type insured under the Policy. It will also cause Plaintiffs to incur extra expenses in the event it is able to reopen to even limited operations, that are beyond those expenses that would have normally been incurred in conduct business absent the presence of COVID-19. These losses and expenses trigger coverage under the Policy's Business Interruption provisions including, but not limited to, coverage for Rental Income Loss and Extra Expense loss.

Attraction Property Coverage Extension

52. In addition to the general Business Insurance Coverage Provision, the Policy provides certain Additional Coverages or Coverage Extensions. These additional coverages and coverage extensions, for which Plaintiff paid an increased premium, do not reduce other coverages available under the Policy. They are additive. The sublimits applicable to any particular coverage

provision do not limit the amount of coverage available under the Policy through other provisions that might also apply. Applicable extensions supplying additional coverage include the following:

53. The Policy's "Attraction Property" endorsement provides coverage for losses directly resulting from physical loss, damage, or destruction (of the type insured by the insured's property policy) to property not owned or operated by the insured that attracts business to the insured. To come within the coverage terms, the Attraction Property must be located within one mile of the insured's property. Specifically, the Policy states:

1. Attraction Property

This Policy covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability directly resulting from physical loss or damage of the type insured to property of the type insured that attracts business to a described location and is within one (1) statute mile of the described location.

See Exhibit A, All Risk Coverage Form, p. 24 of 44.

54. COVID-19 has caused, and is continuing to cause, physical loss and damage to properties within one mile of the Locations that attract business to Plaintiffs' Properties.

55. COVID-19 and the Shutdown Orders closed businesses and also resulted in the cancellation (or postponement) of numerous events that were scheduled at venues that would have attracted customers to the Properties. Based upon information that is publicly available via the internet, entities located within one mile of the Locations with COVID-19-related closures, cancellations, and restrictions that impacted the Properties include, but are not limited to, the following: Museum of Modern Art, Radio City Music Hall, Top of the Rock Observation Deck at Rockefeller Center, and Times Square Plaza. Upon information and belief, each of these

entities suffered physical loss or damage of the type insured due to the actual presence of the COVID-19 virus or due to the risk of physical loss or damage from the COVID-19 virus.

56. Plaintiffs have sustained, and will continue to sustain, business interruption loss as a direct result of physical loss and damage of the type insured under the Policy to properties within one statute mile of the Properties which attracted business to the Properties.

Civil of Military Authority Coverage Extension

57. The Policy's "Civil or Military Authority" extension provides coverage to an insured for the actual loss of business income it sustains during the length of time when access to its premises is prohibited by order of civil authority as a direct result of physical damage—as insured against in the policy—to property of the type insured. Specifically, the Policy provides:

2. Civil or Military Authority

This Policy covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability if an order of civil or military authority prohibits access to a location provided such order is the direct result of physical damage of the type insured at a location or within five (5) statute miles of it.

See Exhibit A, All Risk Coverage Form, p. 24 of 44.

58. The Policy provides coverage where, as here, a Civil Authority has issued an order prohibiting customer access to the insured property as a direct result of physical damage. The physical damage must be within five statute miles of the insured property and must be "of the type insured" (which under the Policy is "*all risks* of physical loss or damage"). The Civil Authority Provision also applies a 30-day time limitation to the damages recoverable, extended to 365 days by the Extended Period of Coverage extension coverage in the policy.

59. As a direct and proximate result of the Shutdown Orders, access to Plaintiffs' insured Property has been prohibited or limited. Plaintiffs were required by Civil Authority orders to close their doors to customers and cease certain businesses, particularly Restaurants, Bars and Retail. Restrictions on travel, gathering size, and "shelter-in-place" orders effectively prohibited access to the Hotel by eliminating the functions for which the Property would be used and/or the guests ability to use them.

60. The New York City Shutdown Orders were issued as the direct result of the loss or damage and the *risk* of loss or damage posed by the COVID-19 virus' physical presence throughout New York City -- including at and near 20 TSQ.

61. Plaintiffs have sustained, and will continue to sustain, business interruption loss due to orders issued by civil authorities directly resulting from physical damage of the type insured under the Policy to properties within five statute miles of the Properties.

**Communicable Disease-Property Damage Additional Coverage and
Communicable Disease - Business Interruption Coverage Extension**

62. Under the Policy, AFM must cover Plaintiffs for the actual presence of "communicable disease", pursuant to two sections in the Policy: the "Communicable Disease - Property Damage" provision and the "Communicable Disease - Business Interruption" provision.

¹⁰ The Policy includes the following provisions and definition relating to Communicable Disease:

¹⁰ The Communicable Disease - Property Damage provision is listed as an "Additional Coverage" in connection with the All Risk Coverage Provision. . See Exhibit A, All Risk Coverage Form, at 7 of 44. The Communicable Disease - Business Interruption provision is listed as a coverage extension under the Business Interruption coverage section. See Exhibit A, All Risk Coverage Form, at 25 of 44. Because of the overlap in subject matter between the two provisions, they are addressed collectively in this section of Plaintiffs' Complaint.

3. Communicable Disease - Business Interruption

If a described location owned, leased or rented by the Insured has the actual not suspected presence of communicable disease and access to such described location is limited, restricted or prohibited by:

- a) An order of an authorized governmental agency regulating such presence of communicable disease; or**
- b) A decision of an Officer of the Insured as a result of such presence of communicable disease,**

See Exhibit A, All Risk Coverage Form, at 25 of 44.

Communicable Disease - Property Damage

If a described location owned, leased or rented by the Insured has the actual not suspected presence of communicable disease and access to such described location is limited, restricted or prohibited by:

- a) An order of an authorized governmental agency regulating or as a result of such presence of communicable disease, or**
- (b) A decision of an Officer of the Insured as a result of such presence of communicable disease,**

See Exhibit A, All Risk Coverage Form, at 7 of 44.

Communicable disease means disease which is

- 1. Transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges.**

See Exhibit A, All Risk Coverage Form, at 42 of 44.

63. The actual presence of COVID-19 at other businesses within a 5 statute mile radius of 20 TSQ caused physical loss and damage and led authorized governmental agencies to issue orders prohibiting, restricting or limiting access and use of area properties, including 20 TSQ, due to the presence of, or risk of, communicable disease.

64. The actual presence and spread of COVID-19 at Mary Manning Walsh and other nursing homes, in particular, directly led to the government shutdown orders which effectively closed Plaintiffs' businesses. As such, Plaintiffs meet the requirements for Civil or Military Authority coverage under the policy.

Ingress/Egress Coverage Extension

65. The Policy's "Ingress/Egress" extension provides coverage for business interruption losses incurred when ingress to or egress from a location is totally or partially prevented as a direct result of physical loss or damage of the type insured whether or not at the described location. The Policy specifically states:

8. Ingress/Egress

This Policy covers the Business Interruption Coverage loss incurred by the Insured due to the necessary interruption of the Insured's business when ingress to or egress from a described location(s) is physically prevented, either partially or totally, as a direct result of physical loss or damage of the type insured to property of the type insured whether or not at a described location.

See Exhibit A, All Risk Coverage Form, p. 27 of 44.

66. Coverage is triggered under the Ingress/Egress provision because Plaintiffs sustained business interruption losses when state and local officials mandated that access to portions of the Property be totally or partially denied due to the presence of COVID-19.

Protection and Preservation of Property - Business Interruption Coverage Extension

67. The Policy includes a provision for Protection and Preservation of Property which states as follows:

13. Protection and Preservation of Property - Business Interruption

This Policy covers the Business Interruption Coverage loss incurred by the Insured for a period of time not to exceed 48 hours prior to and 48 hours after the Insured first taking reasonable action for the temporary protection and preservation of property insured by the Policy provided that such action is necessary to prevent immediately impending insured physical loss or damage to such insured property.

See Exhibit A, All Risk Coverage Form, p. 30 of 44.

68. In addition to the steps taken in compliance with civil authority orders, Plaintiffs implemented reasonable restrictions regarding the physical use of and access to their Property to prevent immediately impending physical loss or damage caused by the COVID-19 virus. These restrictions included, but are not limited to, closing the Property for a period of time when the risk of COVID-19 exposure escalated in mid-March, 2020, even before full restaurant shutdown and resident “shelter-in-place” orders were in effect.

69. Plaintiffs' preventative measures aligned with the spirit and intent of various civil authority directives and were also independently necessary. Plaintiffs' actions were taken to protect and preserve Plaintiffs' Insured Property.

Extended Period of Liability

70. The Policy includes a provision for Extended Period of Liability which states as follows:

7. Extended Period of Liability

The Gross Earnings and Rental Income coverage is extended to cover the reduction in sales resulting from:

- a) The interruption of business as covered by Gross Earnings or Rental Income;**
- b) For such additional length of time as would be required with the exercise of due diligence and dispatch to restore the Insured's business to the condition that would have existed had no loss happened, ...**

See Exhibit A, All Risk Coverage Form, p. 26 of 44.

71. This provision applies to extend the coverage available to Plaintiffs to cover the rental income and extra expense losses resulting from business interruptions for such additional length of time (up to 365 days) as is required to restore Plaintiffs' businesses to the condition that would have existed if no loss had happened.

No Exclusion In the Policy Impacts Coverage

72. No exclusion in the Policy applies to preclude or limit coverage for the actual presence of COVID-19 at or away from the Property, the physical loss and damage to the Property, and/or the business interruption losses that have, and will continue to, result from the physical loss and/or damage to property. To the extent that AFM contends any exclusion(s) do apply, such exclusions are unenforceable.

73. The Policy has three types of exclusions: Group I, Group II and Group III. Group I excludes coverage for all business interruption losses caused by particular events (primarily nuclear reactions, war, terrorism, and theft). To accomplish this broad exclusion, the Policy's preface to the Group I exclusions states: "This Policy excludes loss or damage directly or indirectly caused by or resulting from any of the following regardless of any other cause or event,

whether or not insured under this Policy, contributing concurrently, or in any other sequence to the loss or damage." *See* Exhibit A, All Risk Coverage Form, at 2 of 44. Group II and Group III exclusions, however, do not include prefatory language categorically excluding "loss" and do not include the causation expanding language, including anti-concurrent cause language, that applies to the Group I exclusions. *See* Exhibit A, All Risk Coverage Form, at 3 of 44.

74. The Contamination exclusion is a Group III exclusion.

75. Thus, while the Policy excludes loss or damage both *caused by* and *resulting from* Group I exclusions, no such language exists for the Group III contamination exclusion -- demonstrating that only damage directly *caused by* contamination is subject to exclusion. Here, "contamination" at 20 TSQ did not cause Plaintiffs to shut down operations, the government shutdown orders did.

76. The Policy includes the following provision and definition regarding Contamination:

GROUP III. THIS POLICY EXCLUDES:

8. CONTAMINATION

Contamination, and any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy. If contamination due only to the actual not suspected presence of contaminant(s) directly results from other physical damage not excluded by this Policy, then only physical damage caused by such contamination may be insured. This exclusion does not apply to radioactive contamination which is excluded elsewhere in this Policy.

See Exhibit A, All Risk Coverage Form, p. 4-5 of 44 (emphasis added).

"Contamination means any condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold or mildew."

See Exhibit A, All Risk Coverage Form, p. 42 of 44 (emphasis added).

77. In 2006, the Insurance Services Office ("ISO"), an entity charged with drafting standard form policy language for use by the insurance industry, developed a standard form and broadly worded "virus exclusion" numbered CP 01 40 0706 and titled "loss due to Virus or Bacteria." AFM did not include that exclusion in the Policy.

78. The "Contamination" exclusion AFM chose to use in the Policy does not, itself, exclude coverage for business interruption losses. It does not exclude coverage for costs and expenses incurred to protect or preserve insured property from impending physical loss or damage.

79. The Policy expressly provides insurance coverage for loss and damage caused by Communicable Disease. Thus, the term "virus" as used in the Contamination exclusion is best understood as referring to food-borne viruses (such as E.coli or salmonella) but not viruses that are transmitted from human-to-human so as to fall within the meaning and coverage afforded to communicable disease.

80. Most importantly, the Contamination exclusion does not exclude losses based on acts of civil authorities at the subject property due to a communicable disease loss at another property like Mary Manning Walsh Nursing home.

81. To the extent that AFM contends that any of the Policy's provisions do not provide coverage or otherwise bar or limit coverage for the losses and damage alleged herein, the Policy is, at best, ambiguous and must therefore be construed in favor of coverage.

D. AFM's Bad Faith Conduct

82. AFM is a subsidiary of FM Global and is under its control. Based on information and belief, FM Global and AFM are, in fact, engaged in a calculated scheme to ensure that AFM's adjusters reached the same conclusion for all COVID-19 claims.

83. Claims personnel were instructed to follow FM Global's internal memo entitled "Talking Points on the Novel 2019 Coronavirus." without regard to any individual investigation of each claim. Pursuant to the Talking Points, AFM instructed its claims personnel to deny coverage under several pertinent coverage provisions regardless of what the claims handler's investigation revealed. *See Exhibit D*, "Talking Points."

84. Upon information and belief, AFM follows FM Global's Talking Points.

85. The Talking Points incorrectly and summarily state that the Policy coverages for Civil or Military Authority, Contingent Time Element Extended, and Ingress/Egress do not apply because "[a] virus will typically not cause physical damage" and because "the presence of a communicable disease does not constitute physical damages and is not of the type insured against..." *See Exhibit D*, Talking Points.

86. AFM's bad faith position that the virus does not cause physical damage is contrary to the Policy's acknowledgement that the presence of communicable disease causes physical damage to property because it provides coverage for the resulting "cleanup, removal and disposal of...communicable disease."

87. The Talking Points document is an effort to maneuver and limit the investigation and impending decision on coverage to only the Communicable Disease coverages -- which have lower sublimits. Inclusion of only the Communicable Disease coverage in its Talking Points causes AFM's adjusters to request information tied only to Communicable Disease coverage.

88. Consistent with the approach set forth in the Talking Points, AFM conducted an inadequate and improper investigation of Plaintiffs' claim. AFM intentionally conducted a pretextual investigation. In response to Plaintiffs' request for loss, AFM cited only the communicable disease provisions of the policy and made informational requests calculated solely to relate to and support AFM's predetermined decision that only the sublimited Communicable Disease provisions could possibly afford coverage. AFM failed to request or consider relevant facts relating to Plaintiffs' *entire* claim under the Policy language.

89. The Talking Points instruct claims adjusters, including AFM adjusters, to reach conclusions without considering the specific facts relating to an insured's particular claim, and without considering the applicable law which controls the insurance policy's interpretation.

90. AFM's actions, including but not limited to the Talking Points, are in direct opposition to the accepted practices of good faith insurance claims handling.

91. AFM's explicit practice and procedure on COVID-19-related claims constitute an unfair or deceptive act or practice and bad faith.

92. AFM's actions in using the Talking Points demonstrates an intentional, conscious disregard of Plaintiffs' rights under the Policy.

93. AFM has intentionally failed to apply its own Policy language in good faith.

94. AFM intentionally placed, and continues to place, arbitrary requirements on the coverage provided by Plaintiffs' Policy. AFM's intentional imposition of arbitrary requirements upon Plaintiffs' ability to recover under the Policy is unreasonable.

95. AFM has effectively denied Plaintiffs' claim and in so doing has knowingly or recklessly failed to conduct a reasonable investigation of Plaintiffs' entire claim, and has issued a

denial lacking a reasonable basis. Therefore, the basis for AFM's effective denial of the entire claim is unreasonable.

96. Plaintiffs have suffered and continue to suffer substantial damages due to AFM's wrongful denial and bad faith conduct.

E. Plaintiffs' Losses.

97. The continuous presence of the coronavirus around 20 TSQ has created the risk of a dangerous condition and rendered the Property unsafe and unfit for its intended use.

98. As a direct result of (1) the COVID-19 virus' actual presence in the state of New York and the area within 5 statute miles of the insured property (2) the risk posed by the COVID-19 virus, and (3) Civil Authorities' issuance of Shutdown Orders that prohibited, limited, or otherwise interfered with Plaintiffs' businesses, Plaintiffs have suffered physical losses and/or damage.

99. The COVID-19 virus and the Shutdown Orders have caused direct physical loss of Plaintiffs' insured property in that the Property has been rendered useless and/or uninhabitable by the risk of virus and the related Shutdown Orders. The Property's functionality for its ordinary and intended uses has been prevented.

100. As a result of COVID-19 and the Shutdown Orders, 20 TSQ has suffered direct physical loss and/or damage. Plaintiffs have been forced to suspend their operations resulting in substantial business interruption and losses of business revenue which are ongoing and continue to increase every day.

V.
CAUSES OF ACTION

COUNT ONE:
DECLARATORY RELIEF

101. Plaintiffs repeat and re-allege each and every allegation in this Petition and incorporate each allegation into this Count, as if fully set forth herein.

102. Pursuant to Rhode Island Superior Court Rule of Civil Procedure 57 and the Rhode Island Uniform Declaratory Judgment Act, R.I.G.L. 1956 § 9-30-1, 90-30-2, a person interested under a written contract or other writing or whose rights, status or other legal relations are affected by a statute or ordinance may have determined any question of construction or validity arising under the contract or ordinance and obtain a declaration of the rights, status and other legal relations thereunder.

103. An actual and justiciable controversy has arisen between Plaintiff and AFM regarding the availability of coverage under the Policy for Plaintiffs' claims.

104. Accordingly, Plaintiffs seek a Declaratory Judgment to determine the following:

- (a) that the COVID-19 virus caused physical loss or damage to properties within 5 statute miles of 20 TSQ;
- (b) that the Shutdown Orders prohibited access or ingress to the Insured Property as a direct result of physical damage of the type insured at a location, or locations within five statute miles of the Insured Property;
- (c) that Business Interruption coverage exists for losses incurred due to *the risk* of physical loss or damage due to the presence of COVID-19 in the area around 20 TSQ;
- (d) that the loss of use of the insured Property for its intended purpose and the monetary and other losses and damages resulting therefrom, due to government Shutdown Orders, constitutes physical loss or damage to the Insured Property under the Policy;
- (e) that the Policy's coverage provisions are triggered by the facts set forth herein;
- (f) that no Policy exclusion applies to bar or limit coverage for Plaintiffs' claims;
- (g) that the Policy provides coverage for Plaintiffs' claim.

COUNT TWO:
BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

106. Plaintiffs repeat and re-allege each and every allegation in this Petition and incorporate each allegation into this Count, as if fully set forth herein.

107. AFM has failed to pay Plaintiffs' claim for coverage under the Policy relating to its losses due to the risk posed by the Covid-19 virus and government orders put in place to address the spread of Covid-19.

108. AFM's effective denial of Plaintiffs' full claim lacks any reasonable basis.

109. AFM failed to conduct a reasonable investigation to determine whether the losses and damage being claimed by Plaintiffs were covered under the Policy. AFM also failed to conduct a reasonable investigation to determine whether the losses and damage being claimed by Plaintiffs were subject to an exclusion under the Policy. Without having performed a reasonable investigation, AFM's basis for denying Plaintiffs' claim is unreasonable.

110. Upon information and belief, AFM employed a systematic, one-size-fits-all approach to denying coverage for all COVID-19 claims, including Plaintiffs' claim.

111. AFM knew, or was actually or implicitly aware, of the lack of any reasonable basis to deny coverage.

112. AFM acted with reckless disregard as to the reasonableness of its refusal to pay claims, such as Plaintiffs, that were within the coverage terms of the Policy AFM sold.

113. AFM breached its duty of good faith and fair dealing by failing to reasonably investigate Plaintiffs' entire claim and by failing to pay Plaintiffs' claim without a reasonable basis for doing so.

114. AFM's denial of full coverage under the Policy constitutes bad faith.

115. The physical loss and damage caused by the risk of COVID-19 and the civil authority orders put in place to address COVID-19 are ongoing and causing undue burden and hardship on Plaintiffs. The failure of AFM to promptly accept Plaintiffs' entire claim under the Policy have caused (and will continue to cause) Plaintiffs to incur direct and consequential damages.

116. As a result of AFM's bad faith, Plaintiffs have suffered, and continue to suffer, damage including but not limited to: (a) loss of rental income; (b) loss of use of property; (c) damage to property; (d) extra expenses incurred, (e) economic hardship, (f) reasonable and necessary attorney's fees, (g) consequential damages; and (h) reasonable and necessary costs.

COUNT THREE:
INSURER'S BAD FAITH REFUSAL TO PAY A CLAIM
PURSUANT TO R.I.G.L. 9-1-33

117. Plaintiffs repeat and re-allege each and every allegation in this Petition and incorporate each allegation into this Count, as if fully set forth herein.

118. The acts and omissions of AFM as set forth herein, and also yet to be discovered in this matter, constitute bad faith under R.I.G.L. § 9-1-33.

119. Plaintiffs sustained physical loss and damage due to the ongoing threat of COVID-19 and the civil authority orders restricting Plaintiffs' businesses, but AFM has failed to comply with its obligation and has failed to compensate Plaintiffs for their claim.

120. Plaintiffs are entitled to compensatory damages and punitive damages as a result of AFM's bad faith.

121. Plaintiffs have been required to retain the services of attorneys to commence this action and are further entitled to attorney's fees and costs.

VI.
REQUESTED RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against AFM as follows:

1. For a declaration from the Court that:
 - a. that the COVID-19 virus caused physical loss or damage to properties within 5 statute miles of the Insured Property;
 - b. that the Shutdown Orders prohibited access or ingress to the Insured Property as a direct result of physical damage of the type insured at a location, or locations within five (5) statute miles of the Insured Property
 - c. that Business Interruption coverage exists for losses incurred due to *the risk* of physical loss or damage due to the presence of COVID-19 in the area around the Insured Property;
 - d. that the loss of use of the Insured Property for its intended purpose and the monetary and other losses and damages resulting therefrom, due to government Shutdown Orders, constitutes physical loss or damage to the Insured Property under the Policy;
 - e. that the Policy's coverage provisions are triggered by the facts set forth herein;
 - f. no Policy exclusion applies to bar or limit coverage for Plaintiffs' claims;
 - g. the Policy affords coverage for Plaintiffs' claim.
2. That AFM breached its duty of good faith, including refusing in bad faith to pay a claim;
3. For all damages, including actual, compensatory, special, consequential and punitive damages against AFM in an amount to be proven at trial, in excess of \$10,000;

4. For statutory damages, including pre- and post-judgment interest, as permitted by law;
5. For an award of attorneys' fees and costs of suit incurred;
6. For any other and further relief, either in at law or in equity, to which Plaintiffs may show themselves to be justly entitled.

VII.
JURY DEMAND

Plaintiffs hereby demand a trial by jury on all claims so triable.

Respectfully Submitted,

MCINTYRE TATE LLP

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