

businesses and by order of Nevada Governor Steve Sisolak issued under a series of Emergency Directives to facilitate the state's response to the COVID-19 pandemic. As a result, Plaintiff suffered losses that fell within the coverage terms of their insurance policies sold by AFM.

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

II. **PARTIES**

5. LAS VEGAS RESORT HOLDINGS, LLC, d/b/a SAHARA LAS VEGAS, f/k/a SLS LAS VEGAS is a limited liability company, formed under the laws of the State of Delaware, with its principal place of business at 2535 Las Vegas Blvd., Las Vegas NV 89109. At all relevant times Plaintiff was the owner and operator of the Sahara Las Vegas Hotel and Casino.

6. Defendant AFFILIATED FM INSURANCE COMPANY ("AFM") is incorporated under the laws of Rhode Island, with a principal 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**

7. This Court has jurisdiction over this action because AFM is incorporated under the laws of Rhode Island, with a principal 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).

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

9. All conditions precedent to recovery by Plaintiff has been performed or occurred.

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

IV. FACTS

A. Plaintiff's Insured Property.

11. At all relevant times, Plaintiff owned and operated the Sahara Las Vegas Hotel and Casino.

12. AFM issued Sahara commercial property policy No. SS740 ("the Policy") with a policy period of June 26, 2019 to June 26, 2020. *Attached as Exhibit A and incorporated herein by reference.*

13. The Policy provided coverage to the Sahara for, among other things, Business Interruption, Extra Expense, Attraction Property, Civil or Military Authority, Expediting Costs, Extended Period of Liability, Communicable Disease-Business Interruption, and Ingress/Egress.

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

B. The Hotels

15. Each covered property, described below, suffered direct physical loss of or damage to its property, and associated Business Interruption, Extra Expense and other losses as a result of COVID-19 and the attendant government shutdown orders.

Sahara Las Vegas

16. Sahara Las Vegas is a Casino and Hotel on the Las Vegas strip which combines over fifty-thousand square feet of gaming and over sixteen hundred hotel rooms across three towers: the Alexandria, the Marra and the Blanca.

17. Sahara features several award-winning restaurants, including Bazaar Meat by Jose Andres, Uno Mas Street Tacos + Spirits, Northside Café and Chinese Kitchen, among a host of additional food and beverage options including the Tangier Cocktail lounge and the Casbar lounge.

18. Sahara also includes on-premises pools, a full-service spa, and meeting rooms and event spaces.

C. The COVID-19 Pandemic.

19. COVID-19 is a deadly communicable disease that has infected nearly thirty million people in the United States and caused over 550,000 deaths in the United States.¹ The World Health Organization has declared the COVID-19 outbreak a pandemic. Former President Donald Trump declared a nationwide emergency due to the public health crisis caused by the COVID-19 outbreak in the United States.

20. Governor Sisolak issued a series of government orders regarding business closures and “stay-at-home” orders for citizens starting in mid-March, 2020.

Nevada Government Orders

21. On March 12, 2020 Nevada Governor Steve Sisolak issued an Order declaring a State of Emergency. *Relevant Nevada Orders are attached as Exhibit B and incorporated herein by reference.*

22. Just prior to the Emergency Declaration, another Casino on the Las Vegas strip, The Mirage Hotel and Casino Resorts International released a statement announcing that the

¹ See U.S. Centers for Disease Control and Prevention, *United States COVID-19 Cases and Deaths by State*, <https://covid.cdc.gov/covid-data-tracker/#cases> (last visited April 12, 2021).

Southern Nevada Health District had confirmed that one of their guests staying at The Mirage had tested positive for COVID-19.

23. On March 18, 2020, Governor Sisolak signed Emergency Directive 002 which included a command that “[t]he Nevada general public shall cease gathering at gaming establishments, and all gaming devices, machines, tables, games and any equipment related to gaming activity shall cease operations effective March 17, 2020 at 11:59 p.m., for the duration that this Directive shall be in effect.”²

24. Emergency Directive 002 also established that gaming facilities with hotels could remain open only if needed to avoid displacement of guests or for “essential or emergency purposes.”

25. On or about March 18, 2020, in compliance with the government orders and mitigation efforts Sahara closed down its gaming facilities and began removing hotel guests.

26. On March 20, 2020, the Nevada Health Response COVID-19 Risk Mitigation Initiative put out a guidance document based on Governor Sisolak’s March 17, 2020 Press Conference.³

27. The March 20 guidance stated, among other things, that the implementation of the “aggressive strategies” therein would “[p]rotect those most likely to experience severe symptoms, such as older Nevadans and those with underlying chronic conditions.

28. The guidance also stated that “all gatherings should be postponed or canceled” and identified non-essential services and sectors including “entertainment & hospitality, including but not limited to . . . casinos, concert venues, . . . large conference rooms, meeting halls and cafeterias.” Restaurants and bars were also instructed to close their dine-in facilities.

² Nevada Government Orders are attached as *Exhibit B* and incorporated fully herein.

³ *Id.* (Nevada Health Response COVID-19 Risk Mitigation Initiative) at p.7.

29. With respect to gaming, the March 20 guidance reaffirmed the Governor's announcement that all "gaming machines, devise, tables, games and any equipment related to gaming activity" would be shutdown.

30. On March 20, 2020, Governor Sisolak issued Emergency Directive 003, which echoed information in the guidance initiative, and clearly commanded that non-essential businesses "shall close" as of March 20, 2020 at 11:59 p.m.⁴

31. On April 1, 2020, Governor Sisolak issued a "Stay at Home directive" in which he noted that the directive "strengthens the imperative that Nevadans must not leave their homes for nonessential activities. . ." and extended such restrictions through April 30, 2020. A document put out by the Nevada Health Response that same day, which sought to make clear what businesses were considered Essential and Non-essential, clearly delineated Casinos, Dine-in Restaurants, Live entertainment venues, and bars as non-essential businesses.

32. On April 29, 2020, Governor Sisolak signed Emergency Directive 16 which identified significant basis for the Directives to that point, stating that "the ability of the novel coronavirus that causes COVID-19 to survive on surfaces for indeterminate periods of time renders some property unusable and contributes to contamination, damage, and property loss. . ." and that "the propensity of the COVID-19 disease to spread via interpersonal contact precipitated the widespread closure of certain businesses and the imposition of limitations on other businesses. . ."

33. On May 7, 2020, Governor Sisolak signed Emergency Directive 018 which, among other things, defined "vulnerable persons" as "those who are at heightened risk of complications from COVID-19 disease" to include those 65 years or older; those with serious hearth conditions and asthma, and those who are immunocompromised.

⁴ *Id.* (Governor Sisolak Declaration of Emergency for COVID-19 – Directive 003).

34. Directive 018 continued to encourage Nevadans to stay in their residences and continued to ban gatherings of groups 10 or larger, commanded that businesses adopt measures to minimize the risk of spread of COVID-19, including encouraging employees to work from home, to wear protective gear and to return to work in phases.

35. Directive 018 amended the prohibition on on-site dining to 50% capacity. Bars, entertainment venues, and spas were to remain closed.

36. Casino gaming operations were to remain closed under Directive 018, through phase one.

37. On May 10, 2020 Governor Sisolak signed a Declaration of Fiscal Emergency which noted that “the propensity of COVID-19 disease to spread via interpersonal contact precipitated the widespread closure of certain businesses and the imposition on other businesses. . .” The accompanying remarks by Governor Sisolak revealed that he believed clearly states that “the closure of Nevada businesses, including the gaming industry, [] was necessary to protect the health of Nevadans. . . .” furthering the comments made in Directive 018.

38. On May 28, 2020, Governor Sisolak signed Emergency Directive 021 which included a “Phase Two Reopening Plan” which, among other things, allowed the phased and incremental reopening of gaming operations on June 4, 2020.

39. Sahara was able to partially re-open on June 4, 2020, subject to significant limitation and mitigation measures including social distancing, hand sanitizer stations, plexi-glass shields, additional signage and reconfiguration of certain spaces at the property.

40. On July 10, 2020, the Nevada Health Response “Guidance on Directive 027” stated that restaurants, bars and other food service was ordered to close again on that day, with a reevaluation on July 24, 2020.

41. On October 1, 2020, Emergency Directive 033 increased event gathering sizes to 250 attendees, but no greater than 50% capacity, 10% or 250 attendee capacity for live music and entertainment and sports venues.

42. On November 24, 2020, Emergency Directive 035 reduced occupancy from 50% to 25%, including for restaurants, bars and casino gaming operations. On February 14, 2021, this restriction was raised to only 35% for gaming areas under Emergency Directive 037.

43. As of March of 2021, Nevada continued with certain capacity and social distancing restrictions for entertainment venues, as well as, restaurants, bars and casino gaming operations.

COVID-19 was present at Locations Near the Insured Property.

44. COVID-19 was prevalent in or around the property made the basis of this complaint in mid-March of 2020, and the spread of the communicable disease amongst vulnerable senior citizens at nursing and long-term care homes was a major cause of the ever-increasing government orders. Sahara is located within 5 statute miles of long-term care facilities, assisted living facilities, nursing homes and/or memory care facilities that housed older, more vulnerable residents and suffered COVID-19 outbreaks in March and April of 2020.

45. Nevada officials expressed significant concern over the safety of the elderly, vulnerable population occupying assisted living facilities and nursing homes in March of 2020 at or before the time that Civil Authority orders restricting gatherings, closing restaurants and bars, closing gaming facilities, and ordering people to stay at home, were instituted.

46. Several facilities with early COVID-19 outbreaks were located within 5 statute miles of Sahara. For example, by April 15, 2020, Horizon Health and Rehabilitation, located less than 3 miles from Sahara, had reported at least 38 positive cases.⁵

47. By May 28, 2020, Silver Ridge Health Care Center, which is about 4.5 statute miles from Sahara, had reported over 100 coronavirus cases with multiple deaths.⁶ These two facilities represent a partial list of affected locations.

48. Nevada recognized the necessity to enact measures related to closures, stay at home orders and social distancing because of the threat to vulnerable populations from the beginning of the COVID-19 declared state of emergency. One Nevada Health Response report, reflecting on Nevada's response to COVID-19, stated that:

Nevadans have made enormous sacrifices in order to slow the spread of COVID-19. The necessity to protect hospital patients **and the vulnerable populations in nursing homes was identified early in the pandemic.** . . .⁷

49. The visitation restrictions, social distancing, shelter-in-place, and PPE restrictions enacted in the beginning for nursing and long-term care facilities quickly expanded to the broader orders relevant to all of Nevada as losses, damage and death spiked through COVID-19 outbreaks at these homes, care centers, and then in the larger population.⁸

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

50. The COVID-19 virus is a tangible, physical object that has caused: (a) physical damage at multiple locations within 5 statute miles of the insured property, (b) physical loss of use

⁵ Haas, Greg, *33 new COVID-19 cases pop up at rehab hospital in Las Vegas*, 8NEWSNOW.COM, (May 28, 2020), <https://www.8newsnow.com/news/local-news/33-new-covid-19-cases-pop-up-at-rehab-hospital-in-las-vegas/> (last visited April 12, 2021).

⁶ *Id.*

⁷ *Exhibit C*, Nevada Health Response: Guidance on Hospital and Skilled Nursing Facility Visitation – October 2020. (emphasis added).

⁸ *Exhibit D*, March 16, 2020 Nevada Department of Health and Human Services Technical Bulletin describing March 13, 2020 CMS measures for nursing homes.

and functionality of the insured property, and (c) a *risk* of physical loss or damage at the insured property and the surrounding high-risk locations.

51. 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.⁹ 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.¹⁰ 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.¹¹

52. The AFM 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 p. 7. Further, if it did not produce "physical loss or damage," then the coverage would be illusory.

⁹ See <https://www.who.int/publications/i/item/cleaning-and-disinfection-of-environmental-surfaces-inthe-context-of-covid-19>

¹⁰ 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.¹¹

53. The presence of the COVID-19 virus in proximity to the insured property, caused a physical loss or damage at such property through the spread of COVID-19, sickness and death amongst residents and employees, and deprived the facilities of their functionality and rendered them unusable for their intended purpose of safely providing nursing home, hospice and/or senior and vulnerable adult care.

54. Because of the restrictions imposed by civil authority orders issued due to the presence and spread of the virus, Plaintiff suffered a physical loss or damage to the insured property. Plaintiff was required to cease operation at most of the insured property. More specifically, customers were directly prohibited from accessing the Restaurants, Bars and other amenities on the hotel premises. Additionally, Plaintiff lost the use and function of the property when the virus and civil authority orders rendered the Gaming floor, Hotel, Meeting Spaces, Spa and other amenities unusable for their full, intended purposes.

55. The AFM 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. The operative phrase “physical loss of or damage to” is subject to more than a single reasonable interpretation as reflected in the multitude of Court decisions around the country reaching conflicting results with regard to the meaning of that phrase.

Actions and Orders of Civil Authorities.

56. COVID-19 is widespread in every state in which a subject property is located.

57. The widespread physical presence of the virus in Las Vegas and Clark County -- including in proximity to the insured property -- and the virus' propensity to cause physical loss or damage and to present a *risk* of physical loss or damage, caused civil authorities to prohibit access

to the subject hotels, in whole or in part, 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.

58. The Government Orders caused Plaintiff to completely close and later suspend or severely limit their businesses at Plaintiff's insured property and/or rendered the property unusable for its intended purpose.

59. In addition, Nevada and many other cities and states issued orders that discouraged travel to and from their respective states, including imposing quarantine restrictions on travelers returning from their respective destinations.¹²

60. Quarantine requirements or recommendations have also been in effect in other states. To avoid the quarantine requirements, travelers were advised by government officials to cancel or postpone travel to impacted states.

61. As businesses that rely upon customers, locally, from across the country and around the world, Plaintiff's insured property are directly affected by the Government Orders and by similar orders issued by other counties, states, and countries.

62. Plaintiff's insured property lost functionality and has been impaired by the risk of COVID-19 and the resultant Government Orders.

63. Plaintiff suffered physical loss or damage at the insured property based on the Civil Authority orders which increasingly tightened restrictions on Plaintiff's core business – gaming and hospitality – in response to the unfolding communicable disease disaster at nursing homes in close proximity to insured property.

64. The Government 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

¹² See *Ex. B* Government Orders.

spreading uncontrollably beyond the nursing homes, has had a devastating impact on Plaintiff's businesses.

65. The presence of COVID-19 in and around the subject property caused physical loss, damage, and required significant mitigation and alteration to the functioning of the Plaintiff's business.

D. Coverage Under the AFM Policies.

66. The Policy issued to Plaintiff was AFM's ProVision 4100 "all risks" policy. As an all risks policy, the perils insured against are defined by the Policy's exclusions 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.

67. 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.

68. The Policy was drafted by AFM.

The Policy's Basic Insuring Provision

69. 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 Ex. A, Pro AR 4100 (01/17) All Risk Coverage Form, p. 1 of 44.

70. 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

AFM 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."

71. The Policy expressly recognizes that property is physically damaged by the presence of communicable disease. Under a heading titled "Communicable Disease Response," the Policy expressly states that it covers, among other things "the reasonable and necessary costs incurred by the Insured at such **location** with the actual not suspected presence of **communicable disease** for the: 1) cleanup, removal and disposal of the actual not suspected presence of **communicable disease** from insured property." *See Ex. A*, p. 24. Accordingly, because the Policy specifically covers cleanup, removal and disposal of the damage caused by the "actual not suspected presence of communicable disease" is "physical damage of the type insured" under the Policy.

Business Interruption Coverage

72. The Policy affords coverage for Plaintiff's 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 Ex. A, p. 19.

73. COVID-19 has caused Plaintiff 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 Plaintiff 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 Business Interruption Gross Earnings or Gross Profits for a 12-month period, as well as, Extra Expense loss.

Attraction Property Coverage Extension

74. 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.

75. 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 Ex. A, p. 24.

76. COVID-19 has caused, and is continuing to cause, physical loss and damage to properties that attract business to Plaintiff's property, located within 1 mile, including but not limited to, the restaurants and gaming establishments within the Las Vegas strip.

77. Plaintiff has 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 or Military Authority Coverage Extension

78. 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 Ex. A, p. 24.

79. 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.

80. As a direct and proximate result of the Government Orders, access to Plaintiff's insured property has been prohibited or limited. Plaintiff was required by Civil Authority orders to close its doors to customers and cease certain businesses, particularly the Casino, Restaurants, Bars and Retail. Restrictions on travel, gathering size, and "shelter-in-place" and "stay at home" 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.

81. The Government Shutdown Orders in the states containing the insured property 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 those States and cities -- including at and near the insured property.

82. Plaintiff has 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 insured property.

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

83. Under the policies, AFM must cover Plaintiff 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. The Policy includes the following provisions and definition relating to Communicable Disease:

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 Ex. A, p. 25.

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 Ex. A, p. 7.

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 Ex. A, p. 42.

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

85. The actual presence and spread of COVID-19 at Silver Ridge Healthcare Center, Horizon Health and Rehabilitation Center and other nursing homes, in particular, and the

tremendous risk of explosive disease spread, loss, damage and death were a cause of the government shutdown orders which effectively closed Plaintiff's business. As such, Plaintiff meets the requirements for Civil or Military Authority coverage under the policy.

Ingress/Egress Coverage Extension

86. 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 Ex. A, p. 27.

87. Coverage is triggered under the Ingress/Egress provision because Plaintiff 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

88. 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 Ex. A, p. 30.

89. In addition to the steps taken in compliance with civil authority orders, Plaintiff 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.

90. Plaintiff’s preventative measures aligned with the spirit and intent of various civil authority directives and were also independently necessary. Plaintiff’s actions were taken to protect and preserve Plaintiff’s insured property.

Extended Period of Liability

91. 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 Ex. A, pp. 26-27.

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

No Exclusion In the Policy Impacts Coverage

93. 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.

94. 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 Ex. A*, p. 2. 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 Id.* at p. 3.

95. The Contamination exclusion is a Group III exclusion.

96. 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. There was no damage directly caused by on-premises “contamination” at Sahara sufficient to animate the exclusion.

97. 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 Ex. A, pp. 4-5.

“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 Id. at 42. (emphasis added).

98. 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.

99. 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.

100. 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, at best, understood as describing something different than the "communicable disease" defined in the policy as "transmissible from human to human by direct or indirect contact. . .," or is ambiguous and contradictory in that it would render the communicable disease coverage illusory if it included COVID-19.

101. 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 Silver Ridge Healthcare Center, Horizon Health and Rehabilitation Center and other nursing homes and long-term care facilities.

102. 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.

E. AFM's Bad Faith Conduct

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

104. Claims personnel were instructed to follow AFM'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 E*, "Talking Points."

105. Upon information and belief, AFM follows AFM's Talking Points.

106. The Talking Points incorrectly and summarily state that the Policy coverages for Business Interruption, Civil or Military Authority, and the other relevant coverages 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 Ex. E*.

107. 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."

108. 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.

109. Consistent with the approach set forth in the Talking Points, AFM conducted an inadequate and improper investigation of Plaintiff's claim. AFM intentionally conducted a pretextual investigation. In response to Plaintiff's 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 sub-limited Communicable Disease provisions could possibly afford coverage. AFM failed to request or consider relevant facts relating to Plaintiff's *entire* claim under the Policy language.

110. 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.

111. 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.

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

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

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

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

116. AFM has effectively denied Plaintiff's claim and in so doing has knowingly or recklessly failed to conduct a reasonable investigation of Plaintiff's 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.

117. Plaintiff has suffered and continues to suffer substantial damages due to AFM's wrongful denial and bad faith conduct.

F. Plaintiff's Losses.

118. The continuous presence of the coronavirus around the insured property has created the risk of a dangerous condition and rendered the Property unsafe and unfit for its intended use.

119. As a direct result of (1) the COVID-19 virus' actual presence in the state of Nevada 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 Plaintiff's businesses, Plaintiff has suffered physical losses and/or damage.

120. Plaintiff has also suffered loss and damage through instances in which employees tested positive for COVID-19 leading to costs associated with mitigation efforts and loss of productivity during the periods when partially open.

121. The COVID-19 virus and the Shutdown Orders have caused direct physical loss of Plaintiff's 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.

122. As a result of COVID-19 and the Shutdown Orders, the insured property have suffered direct physical loss and/or damage. Plaintiff has 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**

123. Plaintiff repeats and re-alleges each and every allegation in this Complaint and incorporates each allegation into this Count, as if fully set forth herein.

124. 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.

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

126. Accordingly, Plaintiff seeks 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 the insured property;
- (b) that the Shutdown Orders limited, restricted, or prohibited partial or total access 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, and actual 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 their intended purpose and the monetary and other losses and damages resulting therefrom, due to COVID-19 and 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 Plaintiff's claims;
- (g) that the Policy provides coverage for Plaintiff's claims.

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

127. Plaintiff repeats and re-alleges each and every allegation in this Complaint and incorporate each allegation into this Count, as if fully set forth herein.

128. AFM has failed to pay Plaintiff's 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.

129. AFM's effective denial of Plaintiff's full claim lacks any reasonable basis.

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

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

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

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

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

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

136. 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 Plaintiff. The failure of AFM to promptly accept Plaintiff's entire claim under the Policy have caused (and will continue to cause) Plaintiff to incur direct and consequential damages.

137. As a result of AFM's bad faith, Plaintiff has 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

138. Plaintiff repeats and re-alleges each and every allegation in this Complaint and incorporate each allegation into this Count, as if fully set forth herein.

139. 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.

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

141. Plaintiff is entitled to compensatory damages and punitive damages as a result of AFM's bad faith.

142. Plaintiff has 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, Plaintiff respectfully requests that the Court enter judgment in its 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 limited, restricted, or prohibited partial or total access 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, and actual 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 their intended purpose and the monetary and other losses and damages resulting therefrom, due to COVID-19 and 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 Plaintiff's claims;
 - (g) that the Policy provides coverage for Plaintiff's claims.
- 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; and
 - 6. For any other and further relief, either in at law or in equity, to which Plaintiff may show itself to be justly entitled.

VII.
JURY DEMAND

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

Respectfully Submitted,

MCINTYRE TATE LLP

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