

**STATE OF RHODE ISLAND  
PROVIDENCE, S.C.**

**SUPERIOR COURT**

AUBERGE RESORTS LLC,  
CALISTOGA RANCH OWNER LLC, SOLAGE  
OWNERS LLC, ICONIC PROPERTIES – JEROME,  
L.L.C., TELLURIDE RESORT PARTNERS LLC,  
VANDERBILT HOTEL, LLC, and  
US HOTELS NEW ENGLAND LLC,

Plaintiffs,

v.

ALLIANZ GLOBAL RISKS US INSURANCE  
COMPANY, EVEREST INDEMNITY INSURANCE  
COMPANY, GREAT LAKES INSURANCE SE,  
HOMELAND INSURANCE COMPANY OF NEW  
YORK, INTERSTATE FIRE & CASUALTY  
COMPANY, LANDMARK AMERICAN  
INSURANCE COMPANY, NATIONAL FIRE AND  
MARINE INSURANCE COMPANY and  
WESTPORT INSURANCE CORPORATION,

Defendants.

C.A. No.: PC – 2022 -

**COMPLAINT AND DEMAND FOR JURY TRIAL**

Plaintiffs Auberge Resorts LLC (“Auberge”), Calistoga Ranch Owner LLC (“Calistoga LLC”), Solage Owners LLC (“Solage Owners”), Iconic Properties – Jerome, L.L.C. (“Jerome”), Telluride Resort Partners LLC (“Telluride”), Vanderbilt Hotel, LLC (“Vanderbilt”), US Hotels New England LLC (“USNE”), (Plaintiffs Calistoga LLC, Solage Owners, Jerome, Telluride, Vanderbilt and USNE shall be referred to collectively herein as the “Hotel Owner Plaintiffs”) (Auberge and the Hotel Owner Plaintiffs shall be referred to collectively herein as “Plaintiffs”) brings its Complaint against Defendants Allianz Global Risks US Insurance Company (“Allianz”), Everest Indemnity Insurance Company (“Everest”), Great Lakes Insurance SE (“Great Lakes”), Homeland Insurance Company of New York (“Homeland”), Interstate Fire & Casualty Company (“Interstate”), Landmark American Insurance Company (“Landmark”), National Fire and Marine Insurance Company

(“National Fire and Marine”) and Westport Insurance Corporation (“Westport”) (collectively, the “Defendant Insurers” or “Insurers”) for declaratory relief and breach of contract and alleges and states as follows:

### **INTRODUCTION**

1. Auberge manages world-class resorts (the “Resorts”) in some of the most luxurious beach, ski, wine country, wellness, and other vacation destinations in Rhode Island, the United States and the world. The Hotel Owner Plaintiffs own six Auberge-branded, Auberge-managed world-class resorts (the “Owned Resorts”), located in Newport, Rhode Island; Napa Valley, California; Aspen and Telluride, Colorado; and Kennebunk, Maine. The Insurers are among the largest insurance companies in the world.

2. This Complaint arises from the Defendant Insurers’ refusal to provide coverage for Plaintiffs’ losses arising from SARS-CoV-2 virus (“Coronavirus”) and the disease it causes, Coronavirus Disease 2019 (“COVID-19”), and the direct physical loss, damage or destruction to property and business interruption they caused under the insurance policies that Insurers sold to Plaintiffs, which, among other things, led to the issuance of civil authority orders that forced the closure of each of the Owned Resorts and, after the orders lifted, severely disrupted, limited and slowed down their business operations.

3. On January 21, 2020, the first case of COVID-19 was identified in the United States. By the end of March 2020, non-essential businesses, schools, and places of worship closed their doors in an effort to stop the proliferation of Coronavirus, which spreads through aerosols or droplets from infected persons, remaining in the air and on surfaces for hours to days, and consistently reintroduced by infected persons. The presence of the virus on Plaintiffs’ premises during the Period of Recovery, accompanied by the government orders shuttering businesses in response to Coronavirus, caused physical loss, damage or destruction to Plaintiffs’ properties, triggering property and business interruption coverage under the insurance policies sold to Plaintiffs by Defendant Insurers.

4. The policies sold by Defendant Insurers are high-end, “all risk” commercial

property insurance policies, with very substantial premiums, covering Plaintiffs' properties and the income stream from Plaintiffs' activities on the insured properties. The policies cover business interruption losses from the slowdown of Plaintiffs' business activities, as well as the complete cessation, caused by physical loss, damage or destruction to Plaintiffs' properties as wrought by Coronavirus during the Period of Recovery.

5. Due to the physical loss, damage or destruction to Plaintiffs' properties caused by the presence of Coronavirus during the Period of Recovery and government orders resulting therefrom, the Owned Resorts were completely closed from March 25, 2020 to June 1, 2020, and all of the Resorts, when open, operated at reduced capacity with strict limitations on use. As a result, Plaintiffs suffered massive losses. But when Plaintiffs turned to their insurance carriers for coverage, reasonably expecting their high-end insurance policies to compensate them for their losses from Coronavirus and COVID-19, Defendant Insurers turned their backs on Plaintiffs and denied their claims.

6. At the same time they were denying claims, Defendant Insurers, upon information and belief, were raising premiums following the emergence of Coronavirus and COVID-19. The result of the Insurers' behavior (i.e., denying claims and raising premiums) is a profit bonanza of historic proportions, that belies the insurance industry's repeated and false warnings to courts and the media that paying Coronavirus and COVID-19-related claims would bankrupt them and shatter the insurance market. In reality, Insurers have been recording record profits.

7. By way of example only, Allianz Global Corporate & Specialty SE ("Allianz SE") (the ultimate parent company of Defendant Insurers Allianz and Interstate) reported on November 10, 2021, that in its Property-Casualty segment, "operating profit jumped by 19.2% to €4.2 billion".<sup>1</sup> Allianz attributed its significant rise in profits as "*mostly due to*

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<sup>1</sup> *9M 2021 Results update*, ALLIANZ GLOB. CORP. & SPECIALTY SE (Nov. 10, 2021), <https://www.agcs.allianz.com/news-and-insights/news/agcs-q3-9m-2021-results.html> (last visited Feb. 21, 2022).

*negligible COVID-19 related losses,*<sup>2</sup> as well as to increased premiums, “with strongest rate increases in Entertainment, Financial Lines and **Property**” despite a “significantly lower impact from COVID-19 losses”.<sup>3</sup>

8. Given Insurers’ breach of their contractual promises of coverage while reaping a windfall from Coronavirus and COVID-19, Plaintiffs now turn to this Court for relief, seeking a declaratory judgment as to the scope and breadth of their rights under their high-end policies and damages for breach of contract. In the wake of the direct physical loss, damage or destruction to their insured properties caused by Coronavirus and COVID-19 during the Period of Recovery, Plaintiffs should be allowed to rely on their insurance policies, and Insurers should be made to account.

#### PARTIES

9. Auberge is a limited liability company formed under the laws of Delaware, with its principal place of business in California.

10. Calistoga LLC is a limited liability company formed under the laws of Delaware with its principal place of business in Illinois.

11. Solage Owners is a limited liability company formed under the laws of Delaware with its principal place of business in California.

12. Jerome is a limited liability company formed under the laws of Delaware with its principal place of business in Colorado, whose sole member is Iconic Properties, L.L.C.

13. Iconic Properties, L.L.C. is a limited liability company formed under the laws of Delaware, one of whose members is Quantum Investment Holdings, Inc. (“QIH”), a Delaware Corporation with its principal place of business in Texas.

14. For purposes of federal diversity jurisdiction, Iconic Properties, L.L.C. is at least a citizen of Delaware and Texas—citizenships also imputed to and shared by Jerome.

15. Telluride is a limited liability company formed under the laws of Delaware

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<sup>2</sup> *Id.* (emphasis added).

<sup>3</sup> *Id.* (emphasis added).

with its principal place of business in Colorado.

16. Vanderbilt is a limited liability company formed under the laws of Rhode Island with its principal place of business in Rhode Island, whose sole member is Vanderbilt Owners LLC.

17. Vanderbilt Owners LLC is a limited liability company formed under the laws of Delaware, one of whose members is QIH, which, as alleged above, is a citizen of Delaware and Texas.

18. For purposes of federal diversity jurisdiction, Vanderbilt Owners LLC is a citizen of Delaware and Texas—citizenship also imputed to and shared by Vanderbilt Hotel LLC.

19. USNE is a limited liability company formed under the laws of Delaware with its principal place of business in Maine, whose sole member is White Barn Owners LLC.

20. White Barn Owners LLC is a limited liability company formed under the laws of Delaware, one of whose members is QIH, which, as alleged above, is a citizen of Delaware and Texas.

21. For purposes of federal diversity jurisdiction, White Barn Owners LLC is a citizen of Delaware and Texas—citizenship also imputed to and shared by US Hotels New England LLC.

22. Upon information and belief, Allianz is an Illinois corporation with its principal place of business in the State of Illinois.

23. Upon information and belief, Everest is a Delaware corporation with its principal place of business in the State of New Jersey.

24. Upon information and belief, Great Lakes is a German corporation with its principal place of business in the Federal Republic of Germany.

25. Upon information and belief, Homeland is a New York corporation with its principal place of business in the State of Minnesota.

26. Upon information and belief, Interstate is an Illinois corporation with its

principal place of business in the State of Illinois.

27. Upon information and belief, Landmark is a New Hampshire corporation with its principal place of business in the State of Georgia.

28. Upon information and belief, National Fire and Marine is a Nebraska corporation with its principal place of business in the State of Nebraska.

29. Upon information and belief, Westport is a Missouri corporation with its principal place of business in the State of Kansas.

### **VENUE**

30. Venue is proper in this Court pursuant to R.I. Gen. Laws § 9-4-5 because no one of the Plaintiffs or Defendants dwell within the state and Plaintiffs have designated Providence County for the action to be tried in their complaint.

### **FACTUAL BACKGROUND**

#### **A. Plaintiffs and the Resorts**

31. Auberge is the manager of and provides marketing services to the Auberge Resorts Collection, a portfolio of numerous high-end hotels, resorts, residences, and private clubs, including in Rhode Island. In this action, Auberge seeks recovery from the Defendant Insurers under the Policies for losses in the fees and a reduction in the business income that Auberge earns for providing these services to the Resorts and their owners as a result of the physical loss, damage or destruction to the Resorts caused by Coronavirus and COVID-19 and the civil authority orders issued by governmental authorities arising from Coronavirus and COVID-19.

32. Auberge is an internationally renowned hotel management company that brands the Resorts and provides services to all the currently existing Resorts.

33. None of Auberge's Resorts are the same; rather, Auberge and its various hotel owners have built the reputation of the Auberge Resorts Collection by creating one-of-a-kind properties and offering customized experiences to capture the soul of each destination. Well-regarded publications have voted the Auberge properties as some of the highest-rated

and most admired resort properties in the world. Auberge's Resorts include over forty-one restaurants, fifteen spas, nine residential stay locations and offer hundreds of unique adventures.

34. Of the Resorts, six of them (the Owned Resorts) are both owned by the Hotel Owner Plaintiffs and insured under the Policies. The Owned Resorts, all located in the United States, are as follows:

- The Vanderbilt Hotel, in Newport, Rhode Island, is a thirty-three-room harborside resort occupying the historic mansion built by Alfred Gwynne Vanderbilt, a scion of the Vanderbilt family. The Vanderbilt Hotel features the Gwynne restaurant and two bars, the Knot Bar and the Roof Deck, which offer not only dining experiences to both hotel guests and residents and visitors to Newport, but also mixology classes, cooking classes, and wine tastings. In addition to a host of other amenities, The Vanderbilt Hotel has two pools, a spa, a sauna, a gym that offers a variety of fitness classes, and various spaces in which to hold weddings, conferences, and other events. Plaintiff Vanderbilt owns The Vanderbilt Hotel, and Plaintiff Auberge is the exclusive manager of the resort and is responsible for taking such action as is necessary for the furnishing, equipment, marketing and management of the resort.
- Calistoga Ranch,<sup>4</sup> in Napa Valley, California, was a fifty-room and twenty-two-residence luxury resort located on a 157-acre site marked by ancient oaks, majestic hills, a rock-hewn stream, a private lake, and also featured the onsite Lakehouse Restaurant, a spa, fitness center, yoga deck, pool, and an onsite vineyard that offered tours and wine tastings. Plaintiff Calistoga LLC owned the

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<sup>4</sup> The Calistoga Ranch suffered a catastrophic fire in October 2020, and is closed indefinitely. Like the other Resorts, however, the Calistoga Ranch was forced to close in March 2020 as a result of Coronavirus, COVID-19 and the resulting governmental orders, and suffered physical loss, damage or destruction to property as a result.

Calistoga Ranch, and Plaintiff Auberge was, until November 26, 2020, the exclusive manager of the resort and was responsible for its management.

- Solage, in Napa Valley, California, is a 100-room resort, which features Solbar restaurant; the Spa Solage, a destination in its own right, an award-winning 20,000 square foot spa, which models a bathhouse, includes a Eucalyptus Steam Room and Infrared Sauna and showcases the renowned Calistoga mud and mineral water therapies that have attracted spa-goers to this northern stretch of Napa Valley since the 19th century; pool; fitness center; and event space that can host up to 220 guests. Plaintiff Solage Owners owns Solage, and Plaintiff Auberge is the exclusive manager of the resort and is responsible for taking such action as is necessary for the furnishing, equipment, marketing and management of the resort.
- Madeline Hotel & Residences (“Madeline”), in Telluride, Colorado, ‘a ski-in, ski-out’ mountain retreat located at 10,540 feet above sea level in Telluride, Colorado, has 153 rooms (eighty-three hotel and seventy residential units), and offers a host of amenities such as dining at the Timber Room and Black Iron Kitchen and Bar; spa treatments and post-workout therapies at the Recovery Ski Lodge; an ice skating rink; heated outdoor pool; the Madeline Wellness Studio offering a host of fitness and mindfulness classes; event space to hosts weddings, meetings and other events; and offers activities such as alpine skiing, dog sledding, helicopter tours, flyfishing, and ice climbing. Plaintiff Telluride owns the Madeline, and Plaintiff Auberge is the exclusive manager of the resort and is responsible for taking such action as is necessary for the furnishing, equipment, marketing and management of the resort.
- Hotel Jerome, in Aspen, Colorado, a 101-room hotel (ninety-nine hotel and two residential units) in Aspen housed in a historical landmark listed on the National Register of Historic Places, provides guests with an ideal ski getaway, where guests can enjoy world-class skiing, snowshoeing, and snowboarding with the



service of the Hotel Jerome’s on-site ski rental shop, concierge and valet. Hotel Jerome is home to five dining outlets including, the Lobby Living Room and Bar and Prospect, Hotel Jerome’s fine dining establishment, as well as the J-Bar, a famed Aspen institution. Guests have access to the expansive Aspen Club and Spa, which offers advanced fitness programs and personal training, the Auberge spa with three treatment rooms and a movement studio, an outdoor heated pool, complimentary car service to anywhere in Aspen, and a host of activities such as naturalist-led talks, night-tubing, and whitewater rafting the Colorado rapids. Hotel Jerome also has over 13,000 square feet of meeting space and can host events for up to 500 guests. Plaintiff Jerome owns Hotel Jerome, and Plaintiff Auberge is the exclusive manager of the resort and is responsible for taking such action as is necessary for the furnishing, equipment, marketing and management of the resort.

- White Barn Inn, in Kennebunk, Maine, is a twenty-seven-room inn set in a cluster of cottages, restored barns, and an 1860s house. White Barn Inn offers amenities such as the award-winning White Barn Inn Restaurant, one of the region’s most acclaimed restaurants; the Little Barn, the Inn’s casual dining option with a focus on local cuisine; a host of culinary classes including cheese making, craft cocktail classes, and maple syrup making; the White Barn Spa; New England lobster suppers; winter activities such as snow shoeing and dog sledding; and hosts weddings, conferences, and other events. Plaintiff USNE owns the White Barn Inn, and Plaintiff Auberge is the exclusive manager of resort and is responsible for taking such action as is necessary for the furnishing, equipment, marketing and management of the resort.

35. The Owned Resorts are (or in the case of The Calistoga Range, was) within proximity to numerous properties that attract guests to the Owned Resorts and their restaurants and amenities (known as “Leader Property” in the Policy), and that likewise

sustained physical loss, damage or destruction to their property caused by Coronavirus and COVID-19.

36. For example:

- The Vanderbilt Hotel is within five miles of many businesses and attractions that also draw guests and patrons to the resort, including but not limited to: The Breakers, Marble House, International Tennis Hall of Fame, Newport State Airport, Jane Pickens Theatre, Touro Synagogue, Newport Historical Society, Museum of Newport History, Ocean Drive Historic District, Thames Street, Newport Harbor, and restaurants, bars, and other attractions, including the city of Newport itself.
- Calistoga Ranch was within five miles of many businesses and attractions that also draw guests and patrons to the resort, including but not limited to: wineries such as Duckhorn Vineyards, Freemark Abbey Winery, Hans Kornell Champagne Cellars, Sterling Vineyards, Schramsberg Vineyards, Clos Pegase Winery & Tasting Room, Castello di Amorosa, as well as, Safari West, Sharpsteen Museum, Bothe-Napa State Park, Calistoga Hot Springs, and restaurants, bars, and other attractions, including the Napa Valley area itself.
- Solage is within five miles of many businesses and attractions that also draw guests and patrons to the resort, including but not limited to: Clos Pegase Winery, Sterling Vineyards, Schramsberg Vineyards, Zahtila Vineyards, Castello di Amorosa, August Briggs Winery, Sharpsteen Museum, Oat Hill Mine Trail, Catoga Galleria Darte, Calistoga Hot Springs, and restaurants, bars, and other attractions, including the Napa Valley area itself.
- Madeline is within five miles of many businesses and attractions that also draw guests and patrons to the resort, including but not limited to: ski areas such as Telluride Ski Resort, Telluride Sports - The Peaks, Sundance Ski Run, Enchanted Forest Ski Run, Misty Maiden, and restaurants, bars, and other attractions,

including the city of Telluride itself.

- Hotel Jerome is within five miles of many businesses and attractions that also draw guests and patrons to the resort, including but not limited to: Aspen Airport, Wheeler Opera House, Isis Theatre, Aspen Art Museum, The John Denver Sanctuary, Aspen Mountain, Aspen Skiing Company, and restaurants, bars, and other attractions, including the city of Aspen itself.
- White Barn Inn is within five miles of many businesses and attractions that also draw guests and patrons to the resort, including but not limited to St. Anthony's Franciscan Monastery, First Families Kennebunkport Museum, Mast Cove Galleries, W. Robert Paine Gallery, Webhannet Golf Club, Gooch's Kennebunk Beach, Kennebunkport Harbor, and restaurants, bars, and other attractions.

37. Plaintiffs contribute to their communities in numerous ways. For example, in response to the recent loss of Calistoga Ranch to the Napa Valley Glass Fire, Auberge launched the Auberge Assistance Fund, a 501(c)(3) charity relief initiative to help struggling team members who have experienced hardship due to the disaster, many beyond even their jobs at the Ranch. The Auberge Assistance Fund launched with initial pledges of more than \$100,000 combined from Auberge and the owners of Calistoga Ranch. The Auberge Assistance Fund continues to fundraise to support team members against future unexpected hardships or disasters.

38. As a part of their prudent business practices and in recognition of their responsibilities to their employees, community, and patrons, Plaintiffs maintain insurance coverage.

39. Plaintiffs specifically maintain "all risk" commercial property coverage with the Defendant Insurers, covering not only more commonly occurring risks like fire but also entirely unanticipated and novel risks that may arise. The pertinent policies were effective from June 4, 2019, to June 4, 2020, with total combined limits of \$100 million (the "Policies," Exs. 1-8).

40. As described below in greater detail, the Policies provide coverage “against all risk of direct physical *loss*, damage or destruction” to Plaintiffs’ property, unless expressly excluded (emphasis added).

**B. Coronavirus and COVID-19**

41. COVID-19 is a severe infectious disease caused by Coronavirus. Coronavirus causes serious systemic illness and death.<sup>5</sup> Coronavirus is primarily spread through airborne transmission, and cannot be effectively removed from the air or even entirely from many surfaces by means of routine surface cleaning.

42. The existence and presence of Coronavirus and COVID-19 are not completely reflected in reported cases or individuals’ positive test results, as only a portion of the population has been tested. For example, in June 2020, the Centers for Disease Control and Prevention (“CDC”) estimated that the number of people in the United States who had been infected with COVID-19 was ten times higher than the number of reported cases.<sup>6</sup> Additionally, at least 40% of people infected with COVID-19 are asymptomatic.<sup>7</sup> COVID-19 also includes a pre-symptomatic incubation period of up to 14 days, during which time infected people can transmit COVID-19 to other people, given that they release infectious

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<sup>5</sup> Tianna Hicklin, *Immune cells for common cold may recognize SARS-COV-2*, NAT’L INST. HEALTH (Aug. 18, 2020), <https://www.nih.gov/news-events/nih-research-matters/immune-cells-common-cold-may-recognize-sars-cov-2> (last visited Feb. 21, 2022), Ex. 9; Nathan Jaffay, *COVID proteins that trigger strokes and heart attacks identified by Israeli team*, TIMES ISR. (Nov. 3, 2021), [https://www.timesofisrael.com/covid-pieces-that-trigger-strokes-and-heart-attacks-identified-by-israeli-team/?utm\\_source=dlvr.it&utm\\_medium=twitter](https://www.timesofisrael.com/covid-pieces-that-trigger-strokes-and-heart-attacks-identified-by-israeli-team/?utm_source=dlvr.it&utm_medium=twitter) (last visited Feb. 21, 2022), Ex. 10.

<sup>6</sup> Lena H. Sun & Joel Achenbach, *CDC chief says coronavirus cases may be 10 times higher than reported*, WASH. POST (June 25, 2020), <https://www.washingtonpost.com/health/2020/06/25/coronavirus-cases-10-times-larger/> (last visited Feb. 21, 2022), Ex. 11.

<sup>7</sup> Ellen Cranley, *40% of people infected with covid-19 are asymptomatic, a new CDC estimate says*, BUS. INSIDER (July 12, 2020), <https://www.businessinsider.com/cdc-estimate-40-percent-infected-with-covid-19-asymptomatic-2020-7> (last visited Feb. 21, 2022), Ex. 12.

droplets and aerosols into the air and onto surfaces without having experienced symptoms and without realizing that they are contagious or infected.<sup>8</sup>

43. Studies have demonstrated that pre-symptomatic individuals have an even greater ability to transmit COVID-19 than other infected people because they carry high levels of “viral load” during a period when they have no symptoms and therefore are unaware that they are infectious.<sup>9</sup> The National Academy of Sciences has concluded that “the majority of transmission is attributable to people who are not exhibiting symptoms, either because they are still in the pre-symptomatic stage or the infection is asymptomatic.”<sup>10</sup>

44. As early as February 26, 2020, the CDC advised that COVID-19 was spreading freely without the ability to trace the source of new infections, also known as community transmission or community spread.

45. COVID-19 is contagious, uniquely resilient, and deadly. The degree to which an infectious disease is contagious is measured by  $R_0$ , a term that defines the average number of other people who are likely to become infected by one person with that disease. The  $R_0$  is a measure of the transmissibility of a pathogen and is determined by estimating the susceptibility of individuals in the population to disease, the transmissibility of the pathogen,

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<sup>8</sup> See *Coronavirus disease 2019 (COVID-19) Situation Report – 73*, WHO (Apr. 2, 2020), <https://apps.who.int/iris/bitstream/handle/10665/331686/nCoVsitrep02Apr2020-eng.pdf?sequence=1&isAllowed=y> (last visited Feb. 21, 2022), Ex. 13; Minghui Yang et al., *SARS-CoV-2 Detected on Environmental Fomites for Both Asymptomatic and Symptomatic Patients with COVID-19*, 203 AM. J. RESPIRATORY & CRITICAL CARE MED. 3 (Feb. 1, 2021), <https://www.atsjournals.org/doi/10.1164/rccm.202006-2136LE> (last visited Feb. 21, 2022), Ex. 14.

<sup>9</sup> See, e.g., Xi He et al., *Temporal dynamics in viral shedding and transmissibility of COVID-19*, 26 NATURE MED. 672-75 (Apr. 15, 2020), <https://www.nature.com/articles/s41591-020-0869-5> (last visited Feb. 21, 2022), Ex. 15; Lirong Zou et al., *SARS-CoV-2 Viral Load in Upper Respiratory Specimens of Infected Patients*, 382 NEW ENG. J. MED. 1177-79 (Mar. 19, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMc2001737> (last visited Feb. 21, 2022), Ex. 16.

<sup>10</sup> Seyed M. Moghadas et al., *The implications of silent transmission for the control of COVID-19 outbreaks*, 117 PNAS 30, 17513-15 (July 28, 2020), <https://www.pnas.org/content/117/30/17513> (last visited Feb. 21, 2022), Ex. 17.

and importantly, the likelihood and duration of contact between individuals in a population, a parameter that is directly determined by the physical properties of the environment in which contact occurs.<sup>11</sup> Studies have concluded that one person with COVID-19 could infect as many as 5.7 others ( $R_0 \approx 5.7$ ), which is much higher than seasonal influenza, for example, where on average, one person will infect only 1.3 others ( $R_0 \approx 1.3$ ).<sup>12</sup>

46. Coronavirus can remain infectious for “much longer time periods than generally considered possible.”<sup>13</sup>

47. The World Health Organization (“WHO”) stated that “[t]he disease spreads primarily from person to person through small droplets from the nose or mouth, which are expelled when a person with COVID-19 coughs, sneezes, or speaks . . . . People can catch COVID-19 if they breathe in these droplets from a person infected with the virus . . . . These droplets can land on objects and surfaces around the person such as tables, doorknobs, and handrails. People can become infected by touching these objects or surfaces, then touching their eyes, nose or mouth.”<sup>14</sup>

48. People infected with Coronavirus spread the virus not only from small droplets but also from aerosols expelled from their nose and mouth when they cough, sneeze, or speak. People become infected with Coronavirus and resultant COVID-19 disease if they

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<sup>11</sup> Anthony R. Ives & Claudio Bozzuto, *Estimating and explaining the spread of COVID-19 at the county level in the USA*, 4 *COMMC’NS BIOLOGY* 60 (Jan. 5, 2021), <https://www.nature.com/articles/s42003-020-01609-6> (last visited Feb. 21, 2022), Ex. 18.

<sup>12</sup> M. Cevik et al., *COVID-19 pandemic-a focused review for clinicians*, 26 *CLINICAL MICROBIOLOGY & INFECTION* 7, 842-47 (July 1, 2020), [https://www.clinicalmicrobiologyandinfection.com/article/S1198-743X\(20\)30231-7/fulltext](https://www.clinicalmicrobiologyandinfection.com/article/S1198-743X(20)30231-7/fulltext) (last visited Feb. 21, 2022), Ex. 19.

<sup>13</sup> Shane Riddell et al., *The effect of temperature on persistence of SARS-CoV-2 on common surfaces*, 17 *VIROLOGY J.* 145 (Oct. 7, 2020), <https://virology.biomedcentral.com/articles/10.1186/s12985-020-01418-7> (last visited Feb. 21, 2022), Ex. 20.

<sup>14</sup> *Q&A on coronaviruses (COVID-19)*, WHO (Apr. 17, 2020), <https://web.archive.org/web/20200506094904/https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses> (last visited Feb. 21, 2022), Ex. 21.

breathe in these droplets or aerosols expelled by an infected person. Droplets and aerosols can be expelled in close proximity (one-to-two meters) or can be carried on air currents tens of meters.<sup>15</sup>

**C. Coronavirus and COVID-19 Cause Direct Physical Loss, Damage or Destruction to Property**

49. The omnipresence of Coronavirus and COVID-19 is enabled by multiple modes of viral transmission, including respiratory droplet, airborne/aerosolized, and fomite transmission (i.e., transmission from surfaces and objects).<sup>16</sup> These transmission methods demonstrate that Coronavirus and COVID-19 cause direct physical loss, damage or destruction to property.

**1. Respiratory Droplet/Airborne Transmission**

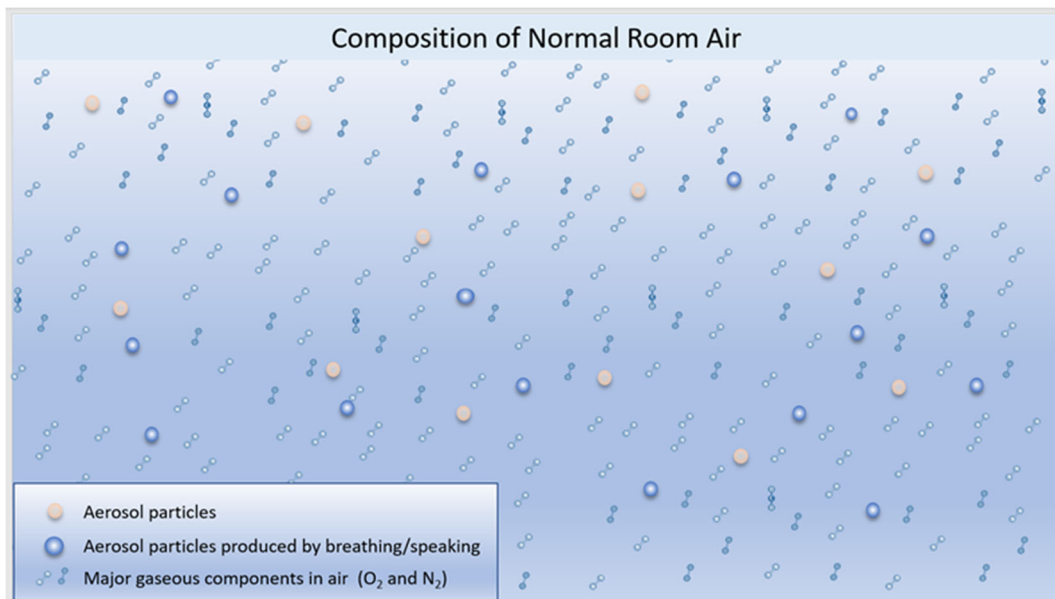
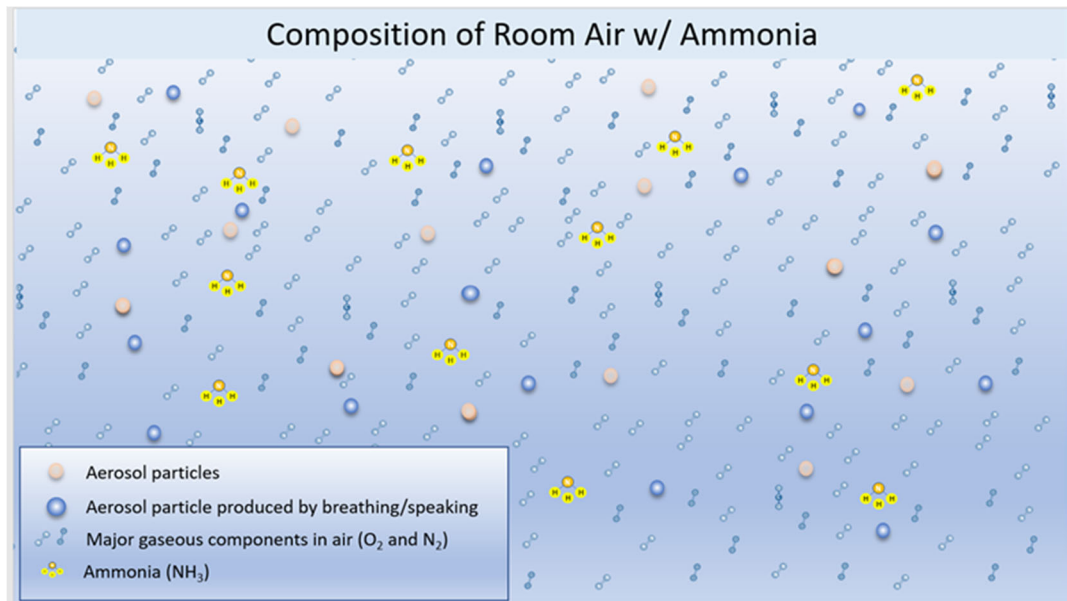
50. The presence of Coronavirus in the air physically alters and transforms the content of the room air as shown in the following illustrations, which depict normal room air at the molecular level in comparison to room air infested with aerosolized Coronavirus at increasing concentration. Normal room air and room air infested with aerosolized Coronavirus is also compared to room air containing ammonia to depict the similarities in the physical alteration caused by aerosolized Coronavirus and ammonia—and ammonia is a substance that courts have held causes direct physical loss, damage or destruction to property by impairing the functional use of the property. As depicted, aerosolized Coronavirus causes the same direct physical loss, damage or destruction to property caused by ammonia, smoke, soot, radon gas, asbestos, and other hazardous substances.

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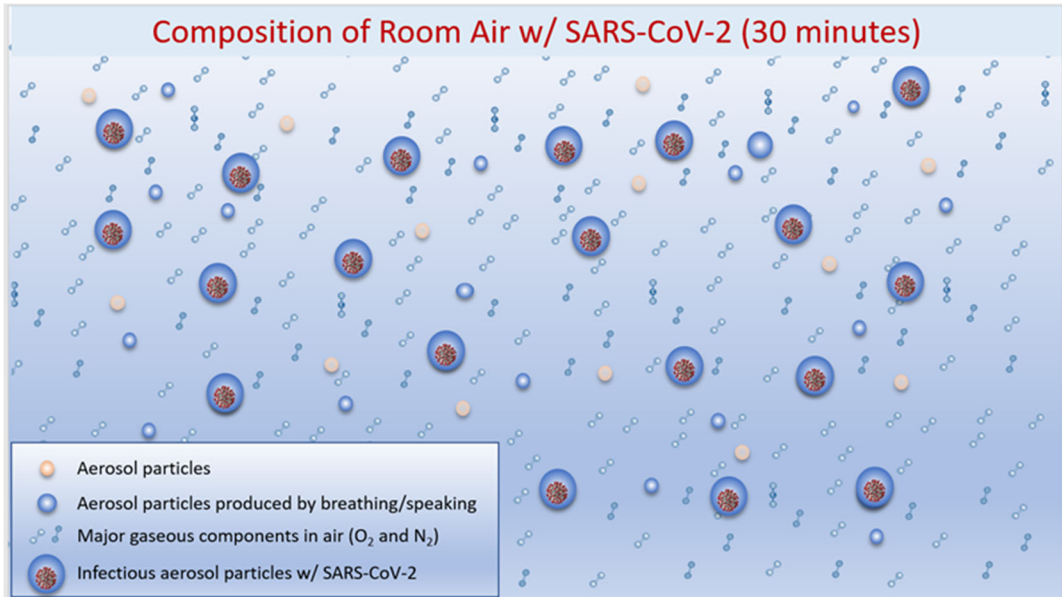
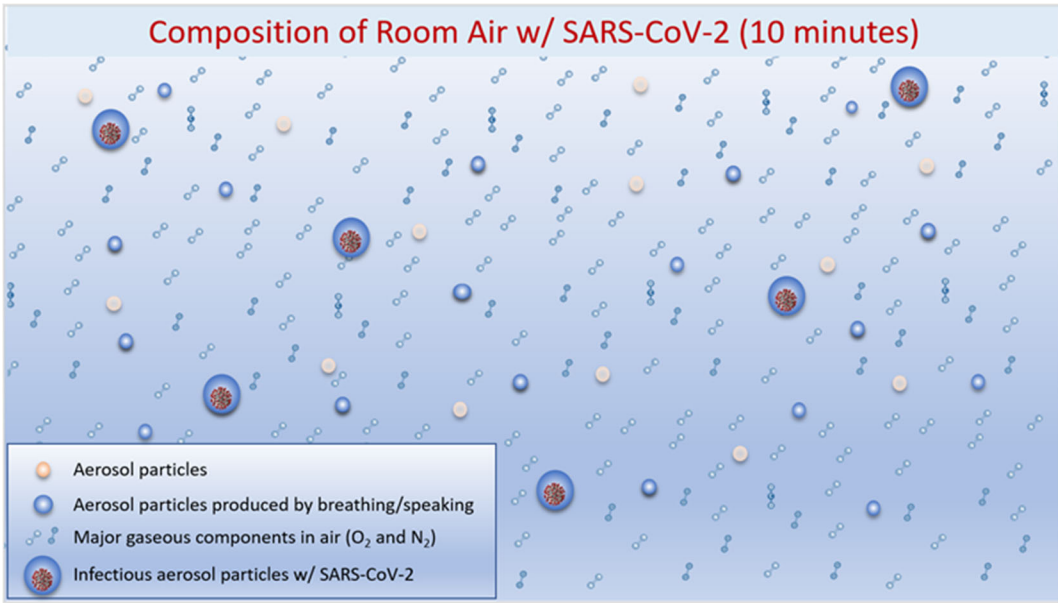
<sup>15</sup> Lidia Morawska & Donald K. Milton, *It Is Time to Address Airborne Transmission of Coronavirus Disease 2019 (COVID-19)*, 71 CLINICAL INFECTIOUS DISEASES 9, 2311-13 (Dec. 3, 2020), <https://pubmed.ncbi.nlm.nih.gov/32628269/> (last visited Feb. 21, 2022), Ex. 22.

<sup>16</sup> *See, e.g., Scientific Brief: Transmission of SARS-CoV-2: implications for infection prevention precautions*, WHO (July 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions> (last visited Feb. 21, 2022), Ex. 23.

## Composition of Room Air – Normal vs. Ammonia vs. SARS-CoV-2 Over Time







51. Respiratory transmission of COVID-19 occurs through exposure to an infected person’s respiratory particles, such as from saliva or mucus.<sup>17</sup> Respiratory transmission of Coronavirus is commonly divided into droplet (larger particles that have a transmission range of about six feet) and airborne (smaller particles that can remain suspended in the air for prolonged periods of time) modes of transmission. Though convenient, this binary division is an oversimplification that underscores transmission risk.<sup>18</sup> Humans produce a wide range of particle sizes when coughing, sneezing, talking, singing, or otherwise dispersing droplets, with virions predominating in the smallest particles.<sup>19</sup> Respiratory particles produced by the average person can travel almost twenty feet by sneezing.<sup>20</sup> An M.I.T. researcher has found that virus-laden “clouds” containing clusters of droplets can travel twenty-three to twenty-seven feet.<sup>21</sup> A comprehensive review of viral, host, and environmental factors that affect Coronavirus transmission reported on the “abundant evidence” that proximity is a significant factor in measuring Coronavirus transmission risks.<sup>22</sup>

52. Airborne transmission involves the spread of the infectious agent caused by the dissemination of droplet nuclei (aerosols) from, for example, exhaled breath that remain

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<sup>17</sup> See, e.g., *Scientific Brief: Transmission of SARS-CoV-2: implications for infection prevention precautions*, WHO (July 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions> (last visited Feb. 21, 2022), Ex. 23.

<sup>18</sup> Kevin P. Fennelly, *Particle sizes of infectious aerosols: implications for infection control*, 8 LANCET RESPIRATORY MED. 9, 914-24 (Sept. 1, 2020), [https://www.thelancet.com/journals/lanres/article/PIIS2213-2600\(20\)30323-4/fulltext](https://www.thelancet.com/journals/lanres/article/PIIS2213-2600(20)30323-4/fulltext) (last visited Feb. 21, 2022), Ex. 24.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Lydia Bourouiba, *Turbulent Gas Clouds and Respiratory Pathogen Emissions, Potential Implications for Reducing Transmission of COVID-19*, 323 JAMA 18, 1837-38 (Mar. 26, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2763852> (last visited Feb. 21, 2022), Ex. 25.

<sup>22</sup> Eric A. Meyerowitz et al., *Transmission of SARS-CoV-2: A Review of Viral, Host, and Environmental Factors*, ANNALS INTERNAL MED. (Jan. 2021), <https://www.acpjournals.org/doi/10.7326/M20-5008> (last visited Feb. 21, 2022), Ex. 26.

infectious when suspended in the air over long distances and time.<sup>23</sup> These tiny particles can remain suspended “for indefinite periods unless removed by air currents or dilution ventilation.”<sup>24</sup> As a result, the risk of disease transmission increases substantially in enclosed environments compared to outdoor settings.<sup>25</sup>

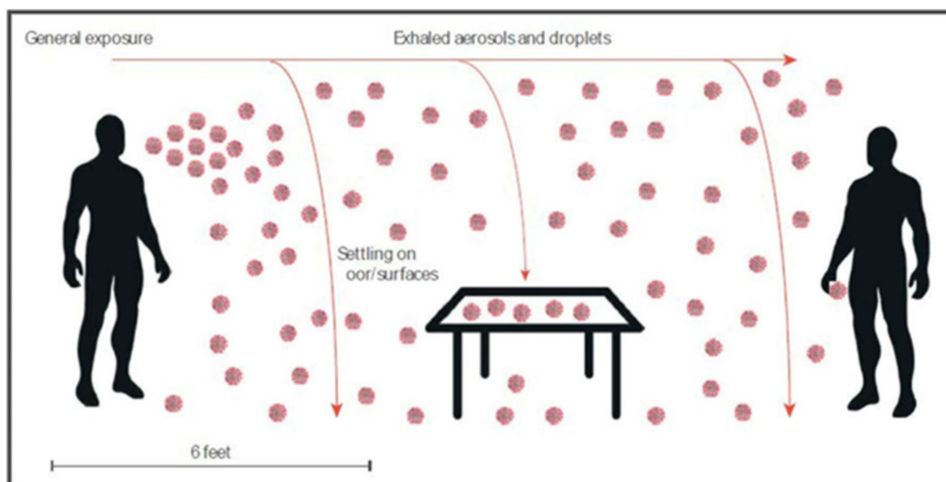
53. The airborne transmission of Coronavirus within buildings is depicted in the following illustrations:

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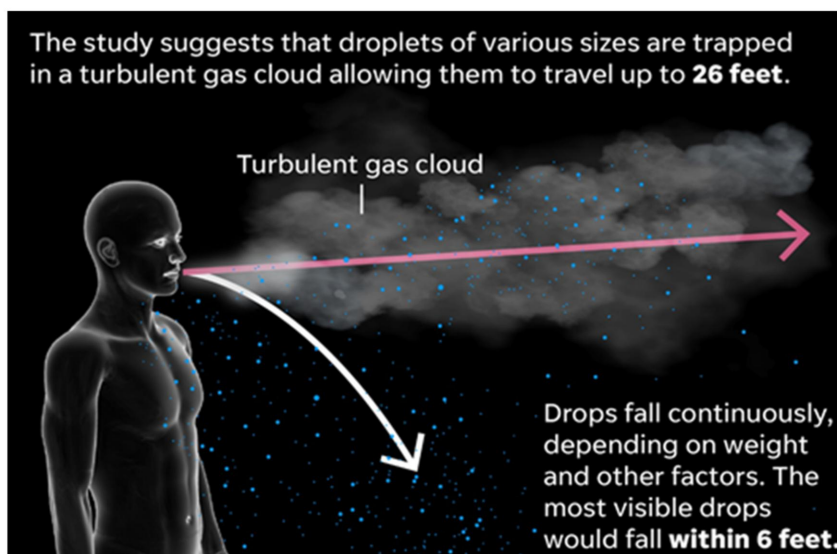
<sup>23</sup> Lydia Bourouiba, *Turbulent Gas Clouds and Respiratory Pathogen Emissions, Potential Implications for Reducing Transmission of COVID-19*, 323 JAMA 18, 1837-38 (Mar. 26, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2763852> (last visited Feb. 21, 2022), Ex. 25; see also Jose-Luis Jimenez, *COVID-19 Is Transmitted Through Aerosols. We Have Enough Evidence, Now It Is Time to Act*, TIME (Aug. 25, 2020), <https://time.com/5883081/covid-19-transmitted-aerosols/> (last visited Feb. 21, 2022), Ex. 27; Ramon Padilla & Javier Zarracina, *WHO agrees with more than 200 medical experts that COVID-19 may spread via the air*, USA TODAY (updated Sept. 21, 2020), [www.usatoday.com/in-depth/news/2020/04/03/coronavirusprotection-how-masks-might-stop-spread-throughcoughs/5086553002/](http://www.usatoday.com/in-depth/news/2020/04/03/coronavirusprotection-how-masks-might-stop-spread-throughcoughs/5086553002/) (last visited Feb. 21, 2022), Ex. 28; Wenzhao Chen et al., *Short-range airborne route dominates exposure of respiratory infection during close contact*, 176 BLDG. & ENV'T 106859 (June 2020), <https://www.sciencedirect.com/science/article/abs/pii/S0360132320302183> (last visited Feb. 21, 2022), Ex. 29.

<sup>24</sup> Kevin P. Fennelly, *Particle sizes of infectious aerosols: implications for infection control*, 8 LANCET RESPIRATORY MED. 9, 914-24 (Sept. 1, 2020), [https://www.thelancet.com/journals/lanres/article/PIIS2213-2600\(20\)30323-4/fulltext](https://www.thelancet.com/journals/lanres/article/PIIS2213-2600(20)30323-4/fulltext) (last visited Feb. 21, 2022), Ex. 24.

<sup>25</sup> Muge Cevik et al., *Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) Transmission Dynamics Should Inform Policy*, 73 CLINICAL INFECTIOUS DISEASES, Suppl. 2 (Aug. 1, 2021), <https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1442/5910315> (last visited Feb. 21, 2022), Ex. 30.



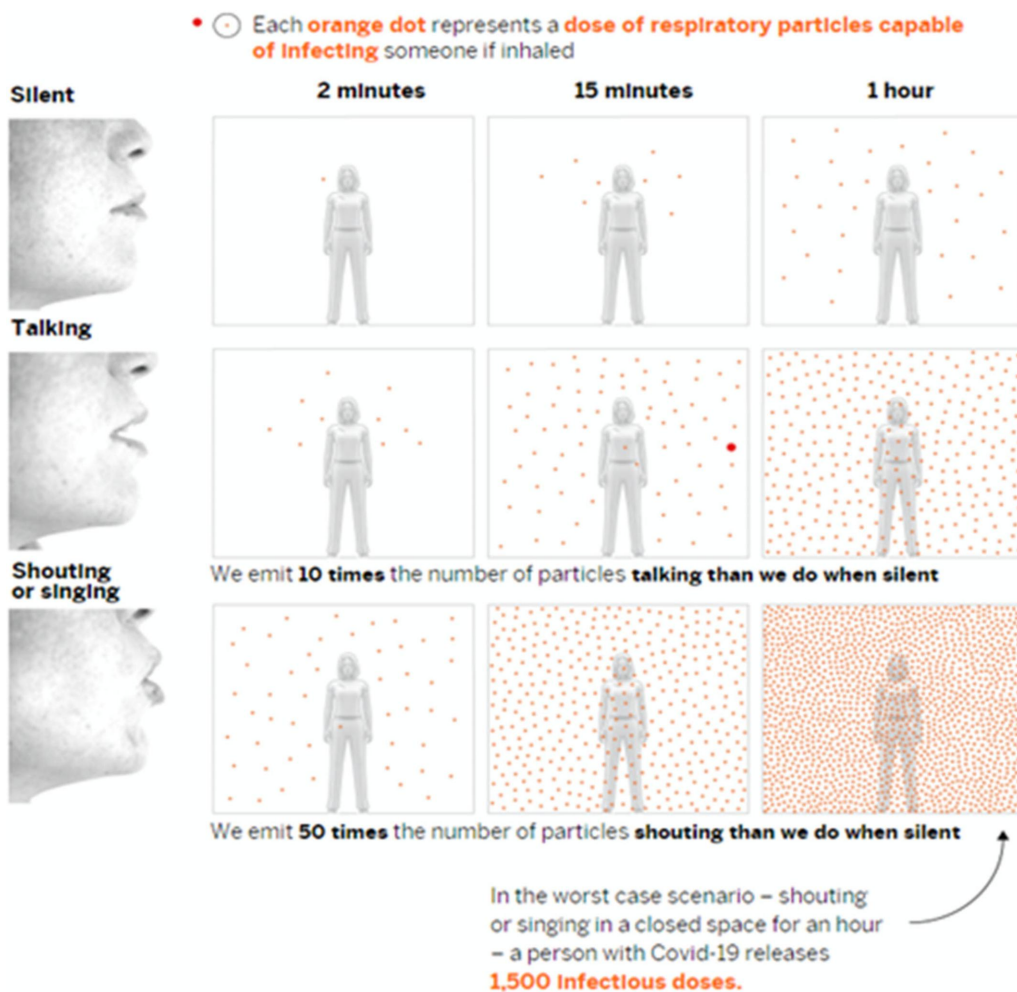
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<sup>26</sup> *The Cycle of Property Damage by Persons with COVID-19 in Air and On Surfaces* (illustration), in *Treasure Island, LLC's Motion to Amend Complaint, Exhibit K, Treasure Island, LLC v. Affiliated FM Ins. Co.*, No. 2:20-cv-00965-JCM-EJY (Mar. 8, 2021) (No. 85-2), at 156, Ex. 31.

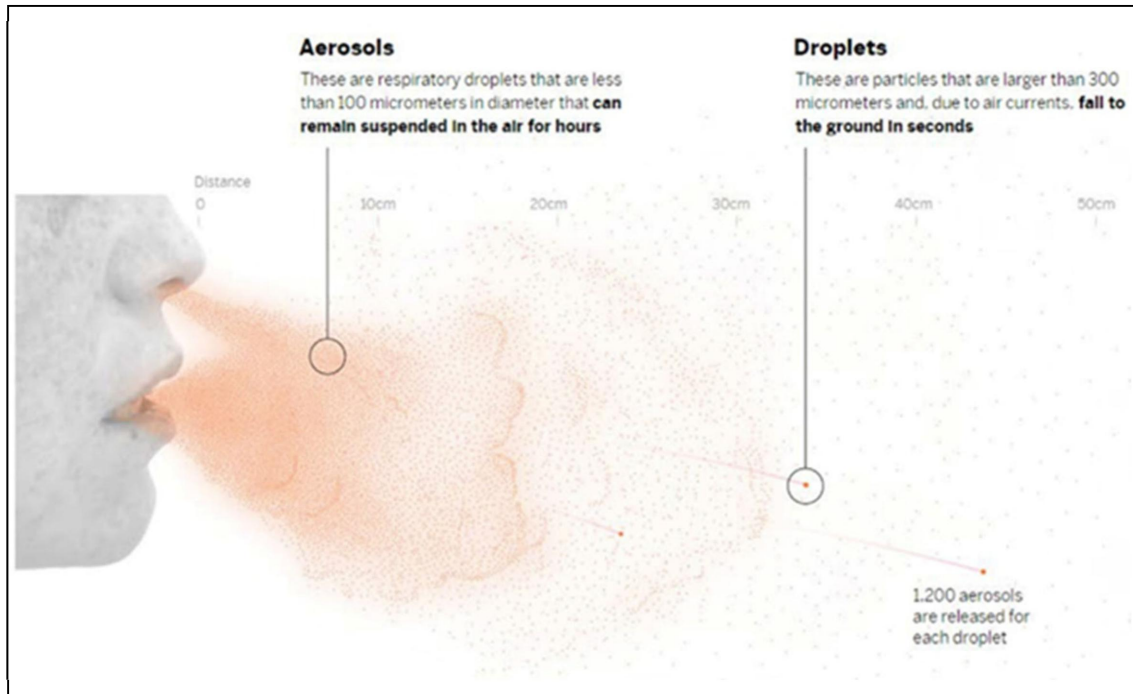
<sup>27</sup> *How cough and sneeze droplets travel* (illustration), in Ramon Padilla & Javier Zarracina, *WHO agrees with more than 200 medical experts that COVID-19 may spread via the air*, USA TODAY (updated Sept. 21, 2020), <https://www.usatoday.com/in-depth/news/2020/04/03/coronavirus-protection-how-masks-might-stop-spread-through-coughs/5086553002/> (last visited Feb. 21, 2022), Ex. 28.



Videos: Luis Almodóvar

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<sup>28</sup> Luis Almodóvar, *Breathing, speaking and shouting* (illustration), in Mariano Zafra & Javier Salas, *A room, a bar and a classroom: how the coronavirus is spread through the air*, EL PAÍS (Oct. 29, 2020), [https://english.elpais.com/society/2020-10-28/a-room-a-bar-and-a-class-how-the-coronavirus-is-spread-through-the-air.html?fbclid=IwAR1jmVExKaRBcT9-IUHc9RV-xBO-XIShPIFtZsdyn1ltCeoNEXwtV\\_YP4q0](https://english.elpais.com/society/2020-10-28/a-room-a-bar-and-a-class-how-the-coronavirus-is-spread-through-the-air.html?fbclid=IwAR1jmVExKaRBcT9-IUHc9RV-xBO-XIShPIFtZsdyn1ltCeoNEXwtV_YP4q0) (last visited Feb. 21, 2022), Ex. 32.

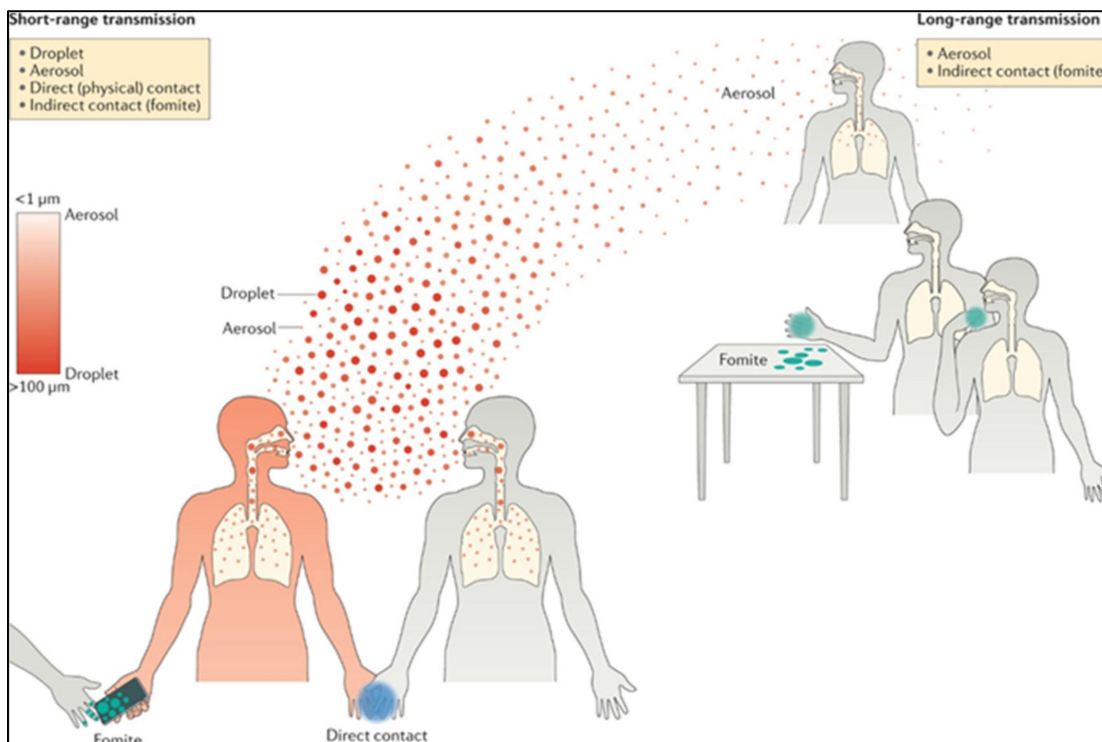


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<sup>29</sup> *Coronavirus aerosols and droplets* (illustration), in Mariano Zafra & Javier Salas, *A room, a bar and a classroom: how the coronavirus is spread through the air*, EL PAÍS (Oct. 29, 2020), [https://english.elpais.com/society/2020-10-28/a-room-a-bar-and-a-class-how-the-coronavirus-is-spread-through-the-air.html?fbclid=IwAR1jmVExKaRBcT9-IUHc9RV-xBO-XIShPIFtZsdyn1ltCeonEXwtV\\_YP4q0](https://english.elpais.com/society/2020-10-28/a-room-a-bar-and-a-class-how-the-coronavirus-is-spread-through-the-air.html?fbclid=IwAR1jmVExKaRBcT9-IUHc9RV-xBO-XIShPIFtZsdyn1ltCeonEXwtV_YP4q0) (last visited Feb. 21, 2022), Ex. 32.





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54. Available videos demonstrate Coronavirus “aerosol clouds” lingering indoors in a supermarket, transmitting COVID-19 and rendering the business premises unsafe, uninhabitable, unfit for its intended use, or causing it to lose, in whole or in part, its functional use.<sup>31</sup>

55. The WHO and the scientific community have studied the spread of Coronavirus through aerosols in indoor settings via air circulation systems. For example, on April 5, 2021, the CDC concluded that:

- “[t]he principal mode by which people are infected with [Coronavirus] ... is through exposure to respiratory droplets carrying infectious virus”; and

<sup>30</sup> *Major modes of transmission of respiratory viruses during short-range and long-range transmission* (illustration), in Nancy H.L. Leung, *Transmissibility and transmission of respiratory viruses*, 19 NATURE REVIEWS MICROBIOLOGY 528-45 (Mar. 22, 2021), <https://www.nature.com/articles/s41579-021-00535-6> (last visited Feb. 21, 2022), Ex. 33.

<sup>31</sup> See e.g., David Mercer, *Coronavirus lingers in air longer than previously thought, scientists warn*, SKY NEWS (Apr. 10, 2020), <https://news.sky.com/story/coronavirus-3d-model-reveals-how-covid-19-can-spread-in-supermarket-11971373> (last visited Feb. 21, 2022).

- “when a person with suspected or confirmed COVID-19 has been indoors, virus can remain suspended in the air for minutes to hours.”<sup>32</sup>

56. Investigation of over 7,000 COVID-19 cases found that all outbreaks involving three or more people occurred indoors.<sup>33</sup>

57. Moreover, the CDC published a research letter concluding that a restaurant’s air conditioning system triggered the transmission of Coronavirus, spreading it to people who sat at separate tables downstream of the restaurant’s airflow.<sup>34</sup> Additionally, one study detected Coronavirus inside HVAC systems transmitted over 180 feet from its source.<sup>35</sup>

58. A systematic review of airborne transmission of Coronavirus corroborated the CDC’s concerns and recommended procedures to improve ventilation of indoor air environments to decrease bioaerosol concentration and reduce Coronavirus’ spread.<sup>36</sup>

59. Additionally, on May 7, 2021, the CDC issued a scientific warning of the risks of indoor airborne transmission of Coronavirus from aerosols at distances greater than six feet from the source, stating that “transmission of SARS-CoV-2 [i.e., Coronavirus] from

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<sup>32</sup> *Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, CDC (updated Apr. 5, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html> (last visited Feb. 21, 2022), Ex. 34.

<sup>33</sup> Hua Qian et al., *Indoor transmission of SARS-CoV-2*, 31 *INDOOR AIR* 3, 639-45 (May 2021), <https://pubmed.ncbi.nlm.nih.gov/33131151/> (last visited Feb. 21, 2022), Ex. 35.

<sup>34</sup> Jianyun Lu et al., *COVID-19 Outbreak Associated with Air Conditioning in Restaurant, Guangzhou, China, 2020*, 26 *EMERGING INFECTIOUS DISEASES* 7 (July 2020), [https://wwwnc.cdc.gov/eid/article/26/7/20-0764\\_article](https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article) (last visited Feb. 21, 2022), Ex. 36; see also Keun-Sang Kwon et al., *Evidence of Long-Distance Droplet Transmission of SARS-CoV-2 by Direct Air Flow in a Restaurant in Korea*, 35 *J. KOREAN MED. SCI.* 46, e415 (Nov. 30, 2020), <https://jkms.org/DOIx.php?id=10.3346/jkms.2020.35.e415> (last visited Feb. 21, 2022), Ex. 37.

<sup>35</sup> Karolina Nissen et al., *Long-distance airborne dispersal of SARS-CoV-2 in COVID-19 wards*, *SCI. REPS.* 10, 19589 (Nov. 11, 2020), <https://www.nature.com/articles/s41598-020-76442-2> (last visited Feb. 21, 2022), Ex. 38.

<sup>36</sup> Zahra Noorimotlagh et al., *A systematic review of possible airborne transmission of the COVID-19 virus (SARS-CoV-2) in the indoor air environment*, 193 *ENV’T RSCH.* 110612, 1-6 (Feb. 2021), [https://www.sciencedirect.com/science/article/pii/S0013935120315097?dgcid=rss\\_sd\\_all](https://www.sciencedirect.com/science/article/pii/S0013935120315097?dgcid=rss_sd_all) (last visited Feb. 21, 2022), Ex. 39.



inhalation of virus in the air farther than six feet from an infectious source can occur” and that:

With increasing distance from the source, the role of inhalation likewise increases. Although infections through inhalation at distances greater than six feet from an infectious source are less likely than at closer distances, the phenomenon has been repeatedly documented under certain preventable circumstances. These transmission events have involved the presence of an infectious person exhaling virus indoors for an extended time (more than 15 minutes and in some cases hours) leading to virus concentrations in the air space sufficient to transmit infections to people more than 6 feet away, and in some cases to people who have passed through that space soon after the infectious person left. Per published reports, factors that increase the risk of SARS-CoV-2 infection under these circumstances include:

- **Enclosed spaces with inadequate ventilation or air handling** within which the concentration of exhaled respiratory fluids, especially very fine droplets and aerosol particles, can build-up in the air space.
- **Increased exhalation** of respiratory fluids if the infectious person is engaged in physical exertion or raises their voice (e.g., exercising, shouting, singing).
- **Prolonged exposure** to these conditions, typically more than 15 minutes.<sup>37</sup>

60. The CDC has recommended “ventilation interventions” to help reduce exposure to airborne Coronavirus in indoor spaces, including increasing airflow and air filtration.<sup>38</sup> These and other remedial measures must be implemented, at high cost and extra expense, to mitigate loss and reduce the amount of Coronavirus present in the space and to attempt to make property safer for its intended use. These extreme measures demonstrate that Coronavirus and COVID-19 cause direct physical loss, damage or destruction to interior spaces. Even then, those interventions cannot be guaranteed to eliminate the aerosolized Coronavirus in an indoor space. Nor do they reduce it immediately.

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<sup>37</sup> *Scientific Brief: SARS-CoV-2 Transmission*, CDC (updated May 7, 2021), [https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fscience%2Fscience-briefs%2Fscientific-brief-sars-cov-2.html](https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fscience%2Fscience-briefs%2Fscientific-brief-sars-cov-2.html) (last visited Feb. 21, 2022), Ex. 40.

<sup>38</sup> *Ventilation in Buildings*, CDC (updated June 2, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html#:~:text=HEPA%20filters%20are%20even%20more,wit h%20SARS%2DCoV%2D2> (last visited Feb. 21, 2022), Ex. 41.

61. The inability to guarantee complete or immediate elimination of aerosolized Coronavirus in indoor spaces can be observed acutely by comparing the infection rates of “essential workers” with that of the general public. Essential workers are defined by the CDC to be those who conduct “operations and services in industries that are essential to ensure the continuity of critical functions in the United States.”<sup>39</sup>

62. After the first wave of mass business closures in March and April of 2020, employees of so-called “essential businesses” that were eventually allowed to re-open or operate at reduced capacities (i.e., essential workers) were faced with elevated rates of infection when compared to the general public, demonstrating the presence of Coronavirus in their workplaces, rendering the same unfit and unsafe for normal use (e.g., for people to be present therein).<sup>40</sup> For example:

- One study found that 20% of essential grocery store workers tested positive for COVID-19, a much higher rate of infections than others in their surrounding communities<sup>41</sup> and that those grocery store workers with interactions with the public tested positive for COVID-19 at a rate five times greater than the general population.<sup>42</sup>
- Essential workers (e.g., liquor store employees) accounted for 87% of excess

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<sup>39</sup> See *Interim List of Categories of Essential Workers Mapped to Standardized Industry Codes and Titles*, CDC (updated Mar. 29, 2021), <https://www.cdc.gov/vaccines/covid-19/categories-essential-workers.html> (last visited Feb. 21, 2022).

<sup>40</sup> Joanna Gaitens et al., *COVID-19 and Essential Workers: A Narrative Review of Health Outcomes and Moral Injury*, 18 INT’L J. ENV’T RSCH. PUB. HEALTH 4, 1446 (Feb. 4, 2021), <https://www.mdpi.com/1660-4601/18/4/1446> (last visited Feb. 21, 2022), Ex. 42.

<sup>41</sup> *Id.*

<sup>42</sup> Fan-Yun Lan et al., *Association between SARS-CoV-2 infection, exposure risk and mental health among a cohort of essential retail workers in the USA*, 78 OCCUPATIONAL ENV’T MED. 237-43 (Oct. 30, 2020), <https://oem.bmj.com/content/oemed/78/4/237.full.pdf> (last visited Feb. 21, 2022), Ex. 43.

deaths in California<sup>43</sup> and over 60% in New York City.<sup>44</sup>

- Nursing home residents and employees accounted for at least 35% of all COVID-19 deaths in the United States.<sup>45</sup>

63. Similar findings have been reported across various sectors of essential workers, including elevated rates of infection for emergency services personnel (e.g., firefighters, police), prison correctional officers, and transportation and factory workers, among others.<sup>46</sup> These findings disprove arguments that Coronavirus does not affect the safety, usability, or the functional use of property because the government allowed businesses it determined were “essential” to remain open.

## 2. Fomite (i.e., Surface and Object) Transmission

64. COVID-19 may also be transmitted to people from physical objects, materials, or surfaces. “Fomites” are physical objects or materials that carry and are capable of transmitting infectious agents, altering these objects to become vectors of disease.<sup>47</sup> Fomite transmission has been demonstrated as highly efficient for viruses, both from object-to-hand and from hand-to-mouth.<sup>48</sup>

65. In addition, while fomite transmission may not be the primary route of

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<sup>43</sup> Yea-Hung Chen et al., *Excess mortality associated with the COVID-19 pandemic among Californians 18-65 years of age, by occupational sector and occupation: March through November 2020*, 16 PLOS ONE 6, e0252454 (June 4, 2021), <https://pubmed.ncbi.nlm.nih.gov/34086762/> (last visited Feb. 21, 2022), Ex. 44.

<sup>44</sup> *The plight of essential workers during the COVID-19 pandemic*, 395 LANCET 1587 (May 23, 2020), <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2820%2931200-9> (last visited Feb. 21, 2022), Ex. 45.

<sup>45</sup> Artis Curiskis et al., *Federal COVID Data 101: Working with CMS Nursing Home Data*, ATLANTIC (Mar. 4, 2021), <https://covidtracking.com/analysis-updates/federal-covid-data-101-working-with-cms-nursing-home-data> (last visited Feb. 21, 2022), Ex. 46.

<sup>46</sup> *Id.*

<sup>47</sup> *Fomite*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/fomite> (last visited Feb. 21, 2022).

<sup>48</sup> Jing Cai et al., *Indirect Virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China, 2020*, 26 EMERGING INFECTIONS DISEASES 6 (June 2020), [https://wwwnc.cdc.gov/eid/article/26/6/20-0412\\_article](https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article) (last visited Feb. 21, 2022), Ex. 47.

transmission for COVID-19, fomite transmission is significant and in October 2020 was estimated to be responsible for up to 25% of all deaths due to COVID-19 since lockdowns were imposed.<sup>49</sup>

66. The WHO has described fomite transmission as follows:

Respiratory secretions or droplets expelled by infected individuals can contaminate surfaces and objects, creating fomites (contaminated surfaces). **Viable SARS-CoV-2 virus and/or RNA detected by RT-PCR can be found on those surfaces for periods ranging from hours to days**, depending on the ambient environment (including temperature and humidity) and the type of surface, in particular at high concentration in health care facilities where COVID-19 patients were being treated. Therefore, transmission may also occur indirectly through touching surfaces in the immediate environment or objects contaminated with virus from an infected person . . .<sup>50</sup> (Emphasis added).

67. In addition to studies cited by the WHO,<sup>51</sup> numerous other studies and scientific articles have discussed fomite transmission as a mode of virus transmission, including, but not limited to:

- A study of a COVID-19 outbreak published by the CDC identifying elevator buttons and restroom taps as possible causes of the “rapid spread of SARS-CoV-2” in a shopping mall in China.<sup>52</sup>
- A National Institutes of Health study published in the *New England Journal of Medicine* finding that Coronavirus survives up to four hours on copper, up to 24 hours on cardboard, and up to three days on plastic and

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<sup>49</sup> A. Meiksin, *Dynamics of COVID-19 transmission including indirect transmission mechanisms: a mathematical analysis*, 148 EPIDEMIOLOGY & INFECTION e257, 1-7 (Oct. 23, 2020), <https://www.cambridge.org/core/journals/epidemiology-and-infection/article/dynamics-of-covid19-transmission-including-indirect-transmission-mechanisms-a-mathematical-analysis/A134C5182FD44BEC9E2BA6581EF805D3> (last visited Feb. 21, 2022), Ex. 48.

<sup>50</sup> See, e.g., *Scientific Brief: Transmission of SARS-CoV-2: implications for infection prevention precautions*, WHO (July 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions> (last visited Feb. 21, 2022), Ex. 23.

<sup>51</sup> *Id.*

<sup>52</sup> Jing Cai et al., *Indirect Virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China, 2020*, 26 EMERGING INFECTIONS DISEASES 6 (June 2020), [https://wwwnc.cdc.gov/eid/article/26/6/20-0412\\_article](https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article) (last visited Feb. 21, 2022), Ex. 47.

stainless steel, and suggesting that people may acquire the virus through the air and after touching contaminated objects.<sup>53</sup>

- An American Society for Microbiology article discussing fomite infection as involving both porous and non-porous surfaces and occurring through a fomite's contact with bodily secretions, hands, aerosolized virus from talking, sneezing, coughing, etc., or other airborne viral particles that settle after a disturbance of a fomite (e.g., shaking a contaminated textile such as sheets and blankets).<sup>54</sup> According to the researchers, “[o]nce a fomite is contaminated, the transfer of infectious virus may readily occur between inanimate and animate objects, or vice versa, and between two separate fomites (if brought together).”<sup>55</sup> Generally, frequently touched surfaces can become highly transmissible fomites.<sup>56</sup>
- A CDC research letter reporting that Coronavirus can remain viable on polystyrene plastic, aluminum, and glass for 96 hours in indoor living spaces.<sup>57</sup>
- A *Journal of Hospital Infection* article citing studies revealing that human coronaviruses can persist on inanimate surfaces like metal, glass, or plastic for up to nine days.<sup>58</sup>

68. Importantly, Coronavirus has been detected on environmental objects and surfaces from both symptomatic, pre-symptomatic, and asymptomatic individuals.<sup>59</sup> Fomites

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<sup>53</sup> *New coronavirus stable for hours on surfaces*, NAT'L INST. HEALTH (Mar. 17, 2020), <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last visited Feb. 21, 2022), Ex. 49.

<sup>54</sup> Stephanie A. Boone & Charles P. Gerba, *Significance of Fomites in the Spread of Respiratory and Enteric Viral Disease*, 73 APPLIED & ENV'T MICROBIOLOGY 6, 1687-96 (Mar. 2007), <https://journals.asm.org/doi/pdf/10.1128/AEM.02051-06> (last visited Feb. 21, 2022), Ex. 50.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Boris Pastorino et al., *Prolonged Infectivity of SARS-CoV-2 in Fomites*, 26 EMERGING INFECTIOUS DISEASES 9 (Sept. 2020), [https://wwwnc.cdc.gov/eid/article/26/9/20-1788\\_article](https://wwwnc.cdc.gov/eid/article/26/9/20-1788_article) (last visited Feb. 21, 2022), Ex. 51.

<sup>58</sup> G. Kampf et al., *Persistence of coronaviruses on inanimate surfaces and their inactivation with biocidal agents*, J. HOSP. INFECTION 104, 246-51 (Mar. 1, 2020), <https://www.journalofhospitalinfection.com/action/showPdf?pii=S0195-6701%2820%2930046-3> (last visited Feb. 21, 2022), Ex. 52.

<sup>59</sup> *See Coronavirus disease 2019 (COVID-19) Situation Report – 73*, WHO (Apr. 2, 2020), <https://apps.who.int/iris/bitstream/handle/10665/331686/nCoVsitrep02Apr2020-eng.pdf?sequence=1&isAllowed=y> (last visited Feb. 21, 2022), Ex. 13; Minghui Yang et

are known to transform the surface of property into a potentially deadly Coronavirus transmission device.

69. As noted above, Coronavirus can remain infectious for a considerable length of time. For example, in the *Journal of Virology*, researchers demonstrated that Coronavirus could survive up to twenty-eight days at room temperature (68°F) on a variety of surfaces, including glass, steel, vinyl, plastic, and paper.<sup>60</sup> A CDC report from March 27, 2020, stated that Coronavirus was identified on surfaces of the cabins on the Diamond Princess cruise ship seventeen days after the cabins were vacated but before they were disinfected.<sup>61</sup>

70. Numerous other scientific studies and articles have identified the persistence of Coronavirus on doorknobs, toilets, faucets, and other high-touch points, as well as on commonly overlooked surfaces such as floors.<sup>62</sup>

71. While the detection of viral RNA on surfaces or in the air does not necessarily mean that Coronavirus is *currently* present and infectious, it demonstrates that Coronavirus was, in fact, present. Studies have demonstrated the transmission of laboratory-confirmed Coronavirus infection via surfaces.<sup>63</sup>

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al., *SARS-CoV-2 Detected on Environmental Fomites for Both Asymptomatic and Symptomatic Patients with COVID-19*, 203 AM. J. RESPIRATORY & CRITICAL CARE MED. 3, 374-78 (Feb. 1, 2021), <https://www.atsjournals.org/doi/10.1164/rccm.202006-2136LE> (last visited Feb. 21, 2022), Ex. 14.

<sup>60</sup> Minghui Yang et al., *SARS-CoV-2 Detected on Environmental Fomites for Both Asymptomatic and Symptomatic Patients with COVID-19*, 203 AM. J. RESPIRATORY & CRITICAL CARE MED. 3, 374-78 (Feb. 1, 2021), <https://www.atsjournals.org/doi/pdf/10.1164/rccm.202006-2136LE> (last visited Feb. 21, 2022), Ex. 14.

<sup>61</sup> Leah F. Moriarty et al., *Public Health Responses to COVID-19 Outbreaks on Cruise Ships — Worldwide, February–March 2020*, 69 MMWR 12, 347-52 (Mar. 27, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.htm> (last visited Feb. 21, 2022), Ex. 53.

<sup>62</sup> Zhen-Dong Guo et al., *Aerosol and Surface Distribution of Severe Acute Respiratory Syndrome Coronavirus 2 in Hospital Wards, Wuhan, China, 2020*, 26 EMERGING INFECTIOUS DISEASES 7, 1583-91 (July 2020), <https://pubmed.ncbi.nlm.nih.gov/32275497/> (last visited Feb. 21, 2022), Ex. 54.

<sup>63</sup> Nancy HL Leung, *Transmissibility and transmission of respiratory viruses*, 19 NATURE REVS. MICROBIOLOGY 8, 528-45 (Aug. 2021),

**3. These Modes of Transmission Cause Direct Physical Loss, Damage or Destruction to Property**

72. The presence of Coronavirus in and on property, including in the indoor air, on surfaces, and on objects, causes direct physical loss, damage or destruction to property by physically changing and physically altering property and otherwise making it incapable of being used for its intended purpose—just as if asbestos, ammonia, radon gas, cat urine, fumes, sulfuric gases emitted from defective drywall, carbon monoxide, mold, or salmonella were in the air or on surfaces of the premises.

73. Among other things, the presence of Coronavirus transforms everyday surfaces and objects into fomites, causing a tangible change of the property into a transmission vehicle for disease from one host to another. The WHO’s description of fomite transmission of COVID-19 expressly recognizes this physical alteration of property, describing viral droplets as “**creating** fomites (contaminated surfaces).”<sup>64</sup> “Creating” involves making or bringing into existence something new<sup>65</sup>—such as something that is in an altered state from what it was before Coronavirus was present on, in, and around the property.

74. Coronavirus adheres to surfaces and objects, physically changing and physically altering those objects by becoming a part of their surface and making physical contact with them unsafe for their ordinary and customary use. For example, the Resorts each feature countless fixtures, counters, point of sale areas, restroom taps, elevator buttons, door handles, linens, exercise equipment, and many other surfaces on which Coronavirus

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<https://pubmed.ncbi.nlm.nih.gov/33753932/> (last visited Feb. 21, 2022), Ex. 33; G. Kampf et al., *Persistence of coronaviruses on inanimate surfaces and their inactivation with biocidal agents*, 104 J. HOSP. INFECTION 3, 246-51 (Mar. 2020), <https://pubmed.ncbi.nlm.nih.gov/32035997/> (last visited Feb. 21, 2022), Ex. 52.

<sup>64</sup> See, e.g., *Scientific Brief: Transmission of SARS-CoV-2: implications for infection prevention precautions*, WHO (July 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions> (last visited Feb. 21, 2022), Ex. 23 (Emphasis added).

<sup>65</sup> See, e.g., *Create*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/create> (last visited Feb. 21, 2022), Ex. 55.

could deposit and transform the surfaces into fomites capable of Coronavirus transmission.

75. Once Coronavirus is in, on, or near property, it is easily spread by the air, people and objects, from one area to another, causing additional direct physical loss, damage or destruction to property.

76. Additionally, the presence of the dangerous and potentially fatal Coronavirus in and on property, including in indoor air, on surfaces, and on objects, renders the property lost, unsafe, and unfit for its normal usage or causes the loss, in whole or in part, of the functional use of that property. Respiratory particles (including droplets and airborne aerosols) and fomites are physical substances that alter the physical properties of the interiors of buildings to make them unsafe, untenable, uninhabitable, and unfit for normal use or cause the loss, in whole or in part, of their functional use.

77. In addition to being found in air samples,<sup>66</sup> Coronavirus remains stable in body secretions (respiratory, urine, feces) and on surfaces, particularly at lower temperatures.<sup>67</sup>

#### **D. Coronavirus Cannot be Removed or Eliminated by Routine Cleaning**

78. Coronavirus cannot be removed by routine surface cleaning.

79. In fact, the CDC released guidance stating that there is little evidence to suggest that routine use of disinfectants can prevent the transmission of Coronavirus from fomites in community settings.<sup>68</sup> The CDC concluded that according to a more quantitative microbial risk assessment study, “surface disinfection once- or twice-per-day had little

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<sup>66</sup> Zhen-Dong Guo et al., *Aerosol and Surface Distribution of Severe Acute Respiratory Syndrome Coronavirus 2 in Hospital Wards, Wuhan, China, 2020*, 26 EMERGING INFECTIOUS DISEASES 7, 1583-91 (July 2020), <https://pubmed.ncbi.nlm.nih.gov/32275497/> (last visited Feb. 21, 2022), Ex. 54.

<sup>67</sup> Nevio Cimolai, *Environmental and decontamination issues for human coronaviruses and their potential surrogates*, 92 J. MED. VIROLOGY 11, 2498-510 (June 12, 2020), <https://onlinelibrary.wiley.com/doi/10.1002/jmv.26170> (last visited Feb. 21, 2022), Ex. 56.

<sup>68</sup> *Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, CDC (updated Apr. 5, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html> (last visited Feb. 21, 2022), Ex. 34.



impact on reducing estimated risks” of Coronavirus transmission.<sup>69</sup>

80. A number of studies have similarly demonstrated that Coronavirus is “much more resilient to cleaning than other respiratory viruses so tested.”<sup>70</sup> The measures that must be taken to attempt to remove and disinfect Coronavirus from property are significant and depend on the concentration of Coronavirus, myriad surface characteristics (e.g., type of surface, temperature, porosity), and extend far beyond ordinary or routine cleaning.

81. The efficacy of decontaminating agents for viruses is based on a number of factors, including the initial amount of virus present, surface porosity, contact time with the decontaminating agent, dilution, temperature, and pH, among many others. No reported studies have investigated the efficacy of surface cleaning (with soap or detergent not containing a registered disinfectant) for reducing concentrations of Coronavirus on non-porous surfaces.<sup>71</sup> However, in one study, detergent surfactants were not recommended as single agents but rather in conjunction with other complex disinfectant solutions.<sup>72</sup>

82. Additionally, unlike cleaning a visible substance such as dust, Coronavirus is invisible to the naked eye, making it challenging to accurately determine the efficacy of decontaminating agents and how “clean is clean,” or if surface disinfection was even effective. Moreover, the toxicity of an agent may inhibit the growth of cells used to determine

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<sup>69</sup> *Id.* (citing A. K. Pitol & T. R. Julian, *Community transmission of SARS-CoV-2 by fomites: Risks and risk reduction strategies*, ENV'T SCI. & TECH. LETTERS (2020), Ex. 57).

<sup>70</sup> Nevio Cimolai, *Environmental and decontamination issues for human coronaviruses and their potential surrogates*, 92 J. MED. VIROLOGY 11, 2498-510 (June 12, 2020), <https://onlinelibrary.wiley.com/doi/10.1002/jmv.26170> (last visited Feb. 21, 2022), Ex. 56.

<sup>71</sup> *Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, CDC (updated Apr. 5, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html> (last visited Feb. 21, 2022), Ex. 34.

<sup>72</sup> Nevio Cimolai, *Environmental and decontamination issues for human coronaviruses and their potential surrogates*, 92 J. MED. VIROLOGY 11, 2498-510 (June 12, 2020), <https://onlinelibrary.wiley.com/doi/10.1002/jmv.26170> (last visited Feb. 21, 2022), Ex. 56.

the presence of virus, making it difficult to determine if lower levels of infectious virus are actually still present on treated surfaces.<sup>73</sup>

83. To be effective, cleaning and decontamination procedures require strict adherence to protocols not necessarily tested under “real-life” conditions in the midst of a widespread wave of pervasive Coronavirus spread, where treated surfaces or objects may not undergo even exposure or adequate contact time.<sup>74</sup> Indeed, studies of coronaviruses have demonstrated viral RNA persistence on objects despite cleaning with 70% alcohol.<sup>75</sup>

84. When considering disinfection and decontamination, the safety of products and procedures must be considered as well.<sup>76</sup>

85. With respect to textiles (e.g., sheets, blankets, and towels)—exceedingly common items used at the Resorts—studies have demonstrated that virus can survive on fabrics and be transferred to skin and other surfaces, “suggesting it is biologically plausible that . . . infectious diseases can be transmitted directly through contact with contaminated textiles.”<sup>77</sup> Coronavirus, which was dispersed onto and into the fabric of these items at the Resorts, therefore caused direct physical loss, damage or destruction to those commonly used textiles, transforming them into hazardous material.

86. Studies have demonstrated that even extraordinary cleaning measures do not remove Coronavirus from surfaces. For example, a 2021 study by the largest hospital

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<sup>73</sup> Muge Cevik et al., *Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) Transmission Dynamics Should Inform Policy*, 73 CLINICAL INFECTIOUS DISEASES, Suppl. 2 (Aug. 1, 2021), <https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1442/5910315> (last visited Feb. 21, 2022), Ex. 30.

<sup>74</sup> *Id.*

<sup>75</sup> Joon Young Song et al., *Viral Shedding and Environmental Cleaning in Middle East Respiratory Syndrome Coronavirus Infection*, 47 INFECTION & CHEMOTHERAPY 4, 252-5 (Dec. 2015), <https://www.icjournal.org/DOIx.php?id=10.3947/ic.2015.47.4.252> (last visited Feb. 21, 2022), Ex. 58.

<sup>76</sup> *Id.*

<sup>77</sup> Lucy Owen & Katie Laird, *The role of textiles as fomites in the healthcare environment: a review of the infection control risk*, 8 PEER J. LIFE & ENV'T e9790, 1-35 (Aug. 25, 2020), <https://peerj.com/articles/9790/> (last visited Feb. 21, 2022), Ex. 59.

network in New York State demonstrated that even *after* trained hospital personnel used disinfection procedures in Coronavirus patient treatment areas, much of the virus *survived* in those areas—proving that even intense, non-routine surface cleaning does not remove it from surfaces—let alone from the air.<sup>78</sup>

87. Given the inadequacy of conventional cleaning procedures, and in response to the direct physical loss, damage or destruction to property at the Resorts caused by the presence of Coronavirus and COVID-19 on surfaces, disinfection and decontamination measures have included, but are not limited to, the use of harsh chemicals to perform deep disinfection, the removal and disposal of porous materials like clothing, cloth and other fabrics, and making changes to air filtration systems.

88. Plaintiffs also have, as a result of or in connection with the physical loss, damage or destruction to their property, removed or decommissioned property within the Resorts and otherwise reconfigured and altered interior spaces to respond to and restore the physical loss, damage or destruction caused by Coronavirus.

89. None of the above-referenced surface cleaning measures, however, remove Coronavirus from the room air. Aerosolized Coronavirus particles and virions specifically cannot be eliminated by routine surface cleaning, and in some cases, routine cleaning methods have been shown to make the aerosolization situation worse.

90. Cleaning Coronavirus from surfaces in an indoor space does not remove aerosolized Coronavirus particles from the indoor air any more than cleaning friable asbestos particles that have landed on a surface will remove the friable asbestos particles suspended in the air.

91. But no amount of cleaning or ventilation intervention or even the dissipation of Coronavirus with the passage of time, will prevent a person who is infected with

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<sup>78</sup> Zarina Brune et al., *Effectiveness of SARS-CoV-2 Decontamination and Containment in a COVID-19 ICU*, 18 INT’L J. ENV’T RSCH. & PUB. HEALTH 5, 2479 (Mar. 3, 2021), <https://www.mdpi.com/1660-4601/18/5/2479> (last visited Feb. 21, 2022), Ex. 60.

Coronavirus and contagious from entering an indoor space and exhaling millions of additional Coronavirus droplets and infectious aerosols into the air, thereby further: (a) filling the room air and physically altering it with aerosolized and hazardous Coronavirus that can be inhaled; and (b) depositing infectious Coronavirus droplets on the surfaces, physically altering and transforming those surfaces into hazardous fomites.

92. Many of the surfaces and materials discussed in the studies and articles cited above existed throughout the Resorts and as part of their operations and included plastics, glass, metals, and cloth and fabrics such as blankets. Thus, during the relevant time period, routine cleaning was not able to remove or eliminate Coronavirus from Plaintiffs' property.

93. During the Period of Recovery, the only way Plaintiffs could eliminate Coronavirus from their property and prevent its continuous reintroduction was to close down property to the public and bar the public from entering, which they did for more than three months in the case of certain Resorts.

94. The only way to eliminate or reduce the presence of Coronavirus from property and prevent its continuous reintroduction is to close down property to the public, or at least reduce the level of the public's use of the premises.

**E. Coronavirus was Present at the Resorts and their Leader Properties**

95. Since the emergence of Coronavirus and COVID, no fewer than 1,432 of the Resorts' employees (including at least 8 in Rhode Island) have confirmed to Auberge that they had been infected with Coronavirus and contracted COVID-19, and all of the Resorts' employees who confirmed they had contracted COVID-19 did so during time periods when the Resorts where they worked were open for business and they were present.

96. The above is direct proof of the actual, certain presence of Coronavirus on Plaintiffs' property, i.e., the Resorts, during the Period of Recovery.

97. Rhode Island, like much of the nation, was an early epicenter for Coronavirus and outbreaks of COVID-19. On March 1, 2020, the Rhode Island Department of Health announced the first two confirmed cases of Coronavirus, and the first two deaths due to

Coronavirus were reported on March 28, 2020.<sup>79</sup> By April 25, 2020, there were 7,126 COVID-19 cases and 262 deaths from COVID-19 reported in Rhode Island, with 370 new infections a day over a seven-day period, with 12% of tests positive for COVID-19.<sup>80</sup> As of July 11, 2020, less than four months later, deaths due to COVID-19 in Rhode Island skyrocketed, surpassing 1,000 Rhode Islanders dead due to COVID-19.<sup>81</sup> In December of 2021, Rhode Island experienced yet another wave of Coronavirus cases with a high level of transmission in the community: 925.7 total new cases per 100,000 population in a seven day period. Indeed, on December 27, 2021, Rhode Island recorded a new single-day record high of 2,379 new COVID-19 infections.<sup>82</sup> As of February 20, 2022, there have been over 354,045 confirmed COVID-19 cases and over 3,397 deaths from COVID-19 in Rhode Island.<sup>83</sup>

98. The high prevalence of infectious COVID-19 cases during the Period of Recovery made it statistically certain or near-certain that Coronavirus droplets and aerosols were frequently dispersed into the air and on property in, on and around the Resorts, rendering routine cleaning even less effective at removing Coronavirus from surfaces at the Resorts and completely ineffective at removing aerosolized Coronavirus particles and virions from the air inside those properties.

99. And due to the high prevalence of infectious cases, Coronavirus was

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<sup>79</sup> *Timeline of RI's COVID milestones*, PROVIDENCE J. (updated Feb. 26, 2021), <https://www.providencejournal.com/story/news/healthcare/2021/02/25/rhode-island-coronavirus-timeline/4564028001/> (last visited Feb. 21, 2022).

<sup>80</sup> *Id.*; *Trends in the Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, CDC (updated Feb. 19, 2022), [https://covid.cdc.gov/covid-data-tracker/#trends\\_totaldeaths](https://covid.cdc.gov/covid-data-tracker/#trends_totaldeaths) (last visited Feb. 21, 2022).

<sup>81</sup> *Timeline of RI's COVID milestones*, PROVIDENCE J. (updated Feb. 26, 2021), <https://www.providencejournal.com/story/news/healthcare/2021/02/25/rhode-island-coronavirus-timeline/4564028001/> (last visited Feb. 21, 2022).

<sup>82</sup> Dan McGowan, *Some good news as COVID-29 cases hit a record high in Rhode Island*, BOS. GLOBE (updated Dec. 29, 2021), <https://www.bostonglobe.com/2021/12/29/metro/some-good-news-covid-19-cases-hit-record-high-rhode-island/> (last visited Feb. 21, 2022).

<sup>83</sup> *Tracking Coronavirus in Rhode Island: Latest Map and Case Count*, N.Y. Times (updated Feb. 21, 2022), <https://www.nytimes.com/interactive/2021/us/rhode-island-covid-cases.html> (last visited Feb. 21, 2022).

statistically certain or near certain to be present at the myriad of business and tourist destinations throughout the localities and states where the Resorts operate, including at Leader Properties.

100. The presence of Coronavirus and COVID-19 in, on, and near property, during the Period of Recovery, therefore caused direct physical loss, damage or destruction to Plaintiffs' property, resulting in business income loss covered under the Policies.

101. This direct physical loss, damage or destruction of Plaintiffs' property required Plaintiffs to (a) close the Resorts and/or sharply limit their occupancy and uses; and (b) undertake costly efforts to protect and preserve property from further damage or loss. Even after the Resorts re-opened, the many remaining restrictions continued to limit operations and require extensive ongoing remediation, all resulting in losses in the tens of millions of dollars.

102. Until they closed in March 2020, the Resorts were heavily trafficked vacation destinations, attracting guests and customers from all over the world.

103. The CDC keeps track of known infections by county, and each of the U.S.'s over 3,142 county and county-equivalents has reported COVID-19 infections.

104. The WHO keeps track of known infections by country, and each country where a Resort is located has reported COVID-19 infections.

105. Nearly all of the areas where the Resorts are located have experienced significant numbers of COVID-19 infections.

106. Thus, the presence of Coronavirus at Plaintiffs' properties as well as at many nearby Leader Properties was certain or virtually certain. This can also be confirmed with certainty or near-certainty by statistical modeling based on the known incidences of infection, despite the lack of commercially available tests for air or surface presence of Coronavirus, and despite the shortage of either rapid or laboratory COVID-19 tests and testing sites that could have otherwise resulted in testing being administered to every individual who was on-

site at the relevant times.<sup>84</sup>

107. Early in the course of Coronavirus and COVID-19, testing was limited, and thus potentially thousands more people were infected than were reported.<sup>85</sup> National and local incidence and prevalence rates clearly demonstrated the high magnitude of COVID-19 infections (and deaths) and the pervasiveness of Coronavirus throughout the regions in which the Resorts are located.

108. Epidemiologists have explained that “the percent positive is a critical measure because it gives us an indication of how widespread infection is in the area where the testing is occurring[.]”<sup>86</sup> The percent positive is a crucial indicator to determine whether a business can safely remain open. As a threshold for the percent positive being “too high,” the WHO stated that the percent positive should remain below 5% for at least two weeks before re-opening.<sup>87</sup>

109. Rhode Island presents a powerful example of how statistical modeling confirms the presence of Coronavirus at the Resorts (in addition to its certain presence as demonstrated by the Resorts’ employees who reported contracting COVID-19) during the Period of Recovery. With respect to the testing that was then available, local positivity rates demonstrated the pervasiveness of Coronavirus in Rhode Island by March 2020 and the certitude based on statistical modeling that the Vanderbilt Hotel and its nearby Leader

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<sup>84</sup> See, e.g., Aroon Chande et al., *Real-time, interactive website for US-county-level COVID-19 event risk assessment*, 4 NATURE HUM. BEHAV. 1313-19 (Nov. 9, 2020), <https://www.nature.com/articles/s41562-020-01000-9> (last visited Feb. 21, 2022), Ex. 61.

<sup>85</sup> See, e.g., Benedict Carey & James Glanz, *Hidden Outbreaks Spread Through U.S. Cities Far Earlier Than Americans Knew, Estimates Say*, N.Y. TIMES (updated July 6, 2020), <https://www.nytimes.com/2020/04/23/us/coronavirus-early-outbreaks-cities.html> (last visited Feb. 21, 2022), Ex. 62.

<sup>86</sup> David Dowdy & Gypsyamber D’Souza, *COVID-19 Testing: Understanding the “Percent Positive”*, JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH (Aug. 10, 2020), <https://publichealth.jhu.edu/2020/covid-19-testing-understanding-the-percent-positive> (last visited Feb. 21, 2022), Ex. 63.

<sup>87</sup> *Id.*

Properties suffered from the presence of Coronavirus.

110. As of March 17, 2020, Rhode Island's positivity rate was above 5% and climbed sharply after that.<sup>88</sup> Indeed, as of March 31, 2020, the statewide 7-day rolling test positivity rate was 17.8%., over three times higher than the 5% guideline, indicating uncontrolled community spread of Coronavirus throughout Rhode Island in late March and early April 2020.<sup>89</sup>

111. Other locations where the Resorts operate experienced a similar spread of Coronavirus and COVID-19 and the same direct physical loss, damage or destruction to property as the Vanderbilt Hotel experienced in Rhode Island. For example: as of April 20, 2020, Colorado reported a 7-day moving average of 23.5%; and as of as of April 1, 2020, California reported a 49.8% 7-day moving positivity average rate.<sup>90</sup>

112. Positivity rates dramatically above 5% as present in the areas where the Resorts operate indicated uncontrolled community spread of Coronavirus and its certain or virtually certain presence at the Resorts during the Period of Recovery.

**F. The Presence of Coronavirus in the Indoor Air of the Resorts as well as on Surfaces During the Period of Recovery Caused the Direct Physical Loss, Damage or Destruction to those Resorts by Causing the Loss, in Whole or in Part, of the Functional Use of the Resorts**

113. Due to the prevalence (ratio of infected persons in a population) and incidence (ratio of new cases) of COVID-19 infections in the U.S. and throughout the world, the Resorts were at consistently high risk for the presence of the airborne Coronavirus from infected patrons and employees, some of whom would have been asymptomatic and unknowing spreaders of Coronavirus.

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<sup>88</sup> *Daily State-By-State Testing Trends*, JOHNS HOPKINS UNIV. MED. (updated Feb. 21, 2022), <https://coronavirus.jhu.edu/testing/individual-states/rhode-island> (last visited Feb. 21, 2022).

<sup>89</sup> *Id.*

<sup>90</sup> *Daily State-By-State Testing Trends*, JOHNS HOPKINS UNIV. MED. (updated Feb. 21, 2022), <https://coronavirus.jhu.edu/testing/individual-states/usa> (last visited Feb. 21, 2022).



114. It is undisputed that air within a property laden with asbestos fibers is unsafe for people. It is no different for a property that has Coronavirus physically invading and physically altering its air—the building was damaged because the virus invaded and physically transformed the indoor air and made it unsafe for breathing.

115. The introduction of Coronavirus into the indoor air at the Resorts during the Period of Recovery directly and physically changed, altered, and transformed the composition of the air—such that it contained a concentration of hazardous and potentially deadly SARS-CoV-2 infectious particles and virions (whereas before it did not). The presence of Coronavirus during the Period of Recovery impaired the functional use of the Resorts in the same manner as the presence of any other hazardous, toxic, or noxious substance would, causing the physical loss, damage or destruction of the property.

116. It is undisputed that the air within a property filled with asbestos fibers is unsafe for people. Coronavirus was no different for the Resorts during the Period of Recovery – Coronavirus was an external force that, just like asbestos, ammonia, radon gas, cat urine, fumes, sulfuric gases emitted from defective drywall, carbon monoxide, or mold, physically invaded and physically altered the air space.

#### **G. The Civil Authority Orders and the Closure of the Resorts**

117. On March 16, 2020, the CDC and the national Coronavirus Task Force issued public guidance titled “30 Days to Slow the Spread” of COVID-19, which called for restrictive social distancing measures, such as working from home, avoiding gatherings of more than ten people and staying away from bars and restaurants.<sup>91</sup>

118. State and local governments in the United States and across the world recognized the unprecedented and catastrophic situation of the mushrooming outbreaks of COVID-19 and Coronavirus’ catastrophic impact through the direct physical loss, damage or

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<sup>91</sup> *The President’s Coronavirus Guidelines for America, 30 Days to Slow the Spread*, WHITE HOUSE & CDC (Mar. 16, 2020), [https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/03/03.16.20\\_coronavirus-guidance\\_8.5x11\\_315PM.pdf](https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf) (last visited Feb. 21, 2022).

destruction of property and lives and that the physical presence of Coronavirus in the indoor air of buildings open to the public made that air unsafe to breathe, rendering the buildings unsafe, unfit for their intended use and causing them to use their functional use, in whole or in part. As a consequence, each of the states the Resorts operate in issued “State of Emergency” or similar declarations in early March 2020.<sup>92</sup> Thereafter, many of the states Plaintiffs operate in issued “Stay Home” orders encouraging or requiring residents to stay home except for specified purposes and closing or sharply limiting non-essential businesses.<sup>93</sup>

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<sup>92</sup> Cal. Proclamation, *Proclamation of a State of Emergency* (Mar. 4, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf> (last visited Feb. 21, 2022); Colo. Exec. Order No. D 2020 003, *Declaring a Disaster Emergency Due to the Presence of Coronavirus Disease 2019 in Colorado* (Mar. 11, 2020), [https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20003%20Declaring%20a%20Disaster%20Emergency\\_1.pdf](https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20003%20Declaring%20a%20Disaster%20Emergency_1.pdf) (last visited Feb. 21, 2022); Conn. Declaration, *Declaration of Public Health and Civil Preparedness Emergencies* (Mar. 10, 2020), <https://portal.ct.gov/-/media/Office-of-the-Governor/News/20200310-declaration-of-civil-preparedness-and-public-health-emergency.pdf> (last visited Feb. 21, 2022); Fla. Exec. Order No. 20-51, *Establishes COVID-19 Response Protocol and Directs Public Health Emergency* (Mar. 1, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-51.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-51.pdf) (last visited Feb. 21, 2022); Haw. Proclamation (Mar. 4, 2020), [https://governor.hawaii.gov/wp-content/uploads/2020/03/2003020-GOV-Emergency-Proclamation\\_COVID-19.pdf](https://governor.hawaii.gov/wp-content/uploads/2020/03/2003020-GOV-Emergency-Proclamation_COVID-19.pdf) (last visited Feb. 21, 2022); Me. Proclamation, *Proclamation of State of Civil Emergency to Further Protect Public Health* (Mar. 15, 2020), <https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/Proclamation%20of%20State%20of%20Civil%20Emergency%20To%20Further%20Protect%20Public%20Health.pdf> (last visited Feb. 21, 2022); R.I. Exec. Order No. 20-02, *Declaration of Disaster Emergency* (Mar. 9, 2020), <http://web.archive.org/web/20200320222336/https://governor.ri.gov/documents/orders/Executive-Order-20-02.pdf> (last visited Feb. 21, 2022); Tex. Declaration, *Declaration of a Public Health Disaster in the State of Texas* (Mar. 19, 2020), <https://www.dshs.state.tx.us/coronavirus/docs/DECLARATION-PublicHealthDisaster.pdf> (last visited Feb. 21, 2022); Utah Exec. Order No. 2020-1, *Declaring a State of Emergency Due to Infectious Disease COVID-19 Novel Coronavirus* (Mar. 6, 2020), <https://governor.utah.gov/wp-content/uploads/sites/52/2020/09/EO-2020-1.pdf> (last visited Feb. 21, 2022).

<sup>93</sup> Cal. Exec. Order No. N-33-20 (Mar. 19, 2020), <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf> (last visited Feb. 21, 2022); Colo. Public Health Order No. 20-24, *Implementing Fifty Percent Reduction in Nonessential Business In-Person Work and Extreme Social Distancing*, DEP’T PUB. HEALTH (Mar. 22, 2020), <https://drive.google.com/file/d/1ndUBYTXVM7yULGMiDPRhjVrUj8qTF2pk/view> (last visited Feb. 21, 2022); Conn. Exec. Order No. 7H, *Protection of Public Health and Safety During COVID-29 Pandemic and Response – Restrictions on Workplaces for Non-*

119. Between March 15, 2020, and April 3, 2020, state, provincial or local authorities in the regions in which Plaintiffs operated a Resort, including Rhode Island,<sup>94</sup>

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*Essential Businesses, Coordinated Response Effort* (Mar. 20, 2020), <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7H.pdf> (last visited Feb. 21, 2022); *Business Exemptions for Coronavirus – Executive Order 7H*, CONN. DEP’T ECON. & CMTY. DEV., <http://web.archive.org/web/20210327115722/https://portal.ct.gov/DECD/Content/Coronavirus-Business-Recovery/Business-Exemptions-for-Coronavirus> (last visited Feb. 21, 2022); Fla. Exec. Order No. 20-91, *Essential Services and Activities During COVID-19 Emergency* (Apr. 1, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-91.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-91.pdf) (last visited Feb. 21, 2022); Haw. Proclamation, *Third Supplementary Proclamation* (Mar. 23, 2020), [https://hawaiiicovid19.com/wp-content/uploads/2020/03/2003162-ATG\\_Third-Supplementary-Proclamation-for-COVID-19-signed-12.pdf](https://hawaiiicovid19.com/wp-content/uploads/2020/03/2003162-ATG_Third-Supplementary-Proclamation-for-COVID-19-signed-12.pdf) (last visited Feb. 21, 2022); Me. Exec. Order No. 28 FY 19/20, *An Order Regarding Further Restrictions on Public Contact and Movement, Schools, Vehicle Travel and Retail Business Operations* (Mar. 31, 2020), [https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/Corrected%20\\_%20An%20Order%20Regarding%20Further%20Restrictions%20on%20Public%20Contact%20and%20Movement%2C%20Schools%2C%20Vehicle%20Travel%20and%20Retail%20Business%20Operations\\_0.pdf](https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/Corrected%20_%20An%20Order%20Regarding%20Further%20Restrictions%20on%20Public%20Contact%20and%20Movement%2C%20Schools%2C%20Vehicle%20Travel%20and%20Retail%20Business%20Operations_0.pdf) (last visited Feb. 21, 2022); R.I. Exec. Order No. 20-13, *Eleventh Supplemental Emergency Declaration – Staying at Home, Reducing Gatherings, Certain Retail Business Closures and Further Quarantine Provisions* (Mar. 28, 2020), <http://web.archive.org/web/20200331072556/https://governor.ri.gov/documents/orders/Executive-Order-20-13.pdf> (last visited Feb. 21, 2022); Tex. Exec. Order No. GA-14, *Relating to statewide continuity of essential services and activities during the COVID-19 disaster* (Mar. 31, 2020), [https://gov.texas.gov/uploads/files/press/EO-GA-14\\_Statewide\\_Essential\\_Service\\_and\\_Activity\\_COVID-19\\_IMAGE\\_03-31-2020.pdf](https://gov.texas.gov/uploads/files/press/EO-GA-14_Statewide_Essential_Service_and_Activity_COVID-19_IMAGE_03-31-2020.pdf) (last visited Feb. 21, 2022).

<sup>94</sup> See, e.g., R.I. Exec. Order No. 20-04, *Second Supplemental Emergency Declaration – Restaurants, Bars, Entertainment Venues, And Public Gatherings* (Mar 16, 2020), <http://web.archive.org/web/20200320222342/https://governor.ri.gov/documents/orders/Executive-Order-20-04.pdf> (last visited Feb. 21, 2022); R.I. Exec. Order No. 20-09, *Seventh Supplemental Emergency Declaration – Public Gatherings, Close-Contact Businesses, Public Recreation And Business Service Providers* (Mar 22, 2020), <http://web.archive.org/web/20200327110530/https://governor.ri.gov/documents/orders/Executive-Order-20-09.pdf> (last visited Feb. 21, 2022); R.I. Exec. Order No. 20-13, *Eleventh Supplemental Emergency Declaration – Staying At Home, Reducing Gatherings, Certain Retail Business Closures and Further Quarantine Provisions* (Mar. 28, 2020), <http://web.archive.org/web/20200329222608/https://governor.ri.gov/documents/orders/Executive-Order-20-13.pdf> (last visited Feb. 21, 2022).

California,<sup>95</sup> Colorado,<sup>96</sup> Connecticut,<sup>97</sup> Florida,<sup>98</sup> Hawaii,<sup>99</sup> Maine,<sup>100</sup> New Mexico,<sup>101</sup> Utah,<sup>102</sup> Texas,<sup>103</sup> Anguilla,<sup>104</sup> Fiji,<sup>105</sup> Greece,<sup>106</sup> and Mexico<sup>107</sup>—issued orders that

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<sup>95</sup> Cal. Exec. Order No. N-33-20 (Mar. 20, 2020), <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf> (last visited Feb. 21, 2022); *Napa County Issues Shelter-At-Home Order Starting Friday*, Press Release, CAL. HEALTH & HUM. SERVS. AGENCY (Mar. 18, 2020), [https://www.counties.org/sites/main/files/file-attachments/napa\\_shelter\\_at\\_home\\_3\\_18.pdf](https://www.counties.org/sites/main/files/file-attachments/napa_shelter_at_home_3_18.pdf) (last visited Feb. 21, 2022).

<sup>96</sup> Colo. Exec. Order No. D 2020 004, *Ordering Closure of Downhill Ski Resorts Due to the Presence of COVID-19 in the State of Colorado* (Mar. 14, 2020), [https://drive.google.com/file/d/1sBXFBnL\\_7VC47IA1-G4XssIwDSfwEV6g/view](https://drive.google.com/file/d/1sBXFBnL_7VC47IA1-G4XssIwDSfwEV6g/view) (last visited Feb. 21, 2022); Colo. Exec. Order No. D 2020 049, *Amending Executive Orders D 2020 004, D 2020 006, and D 2020 026 to Extend the Closure of Downhill Ski Areas Due to the Presence of COVID-19 in the State of Colorado* (Apr. 30, 2020), <https://drive.google.com/file/d/1fsckjwjPY2JhmlgzoF1wRjb6gMfnKeaU/view> (last visited Feb. 21, 2022); San Miguel Cnty., Colo. Public Health Agency Order No. 2020-02, *Limiting Gatherings of People as Necessary to Protect Public Health (Shelter in Place)*, DEP'T PUB. HEALTH & Env't (Mar. 19, 2020), <https://drive.google.com/drive/folders/1a1JZFHtE7Sj9H4tVQNSTkHqIKK5SXcGe> (last visited Feb. 21, 2022); *Standing Public Health Order: Third Amending Notice of Public Health Order Stay-At-Home*, PITKIN CNTY., COLO. (Mar. 23, 2020), <https://drive.google.com/file/d/1ztTAO4bxm5OfxLnHK-UNP8iMYPAP4KU9/view> (last visited Feb. 21, 2022).

<sup>97</sup> See, e.g., Conn. Exec. Order No. 7H, *Protection of Public Health and Safety During COVID-19 Pandemic and Response – Restrictions on Workplaces for Non-Essential Businesses, Coordinated Response Effort* (Mar. 20, 2020), <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7H.pdf> (last visited Feb. 21, 2022).

<sup>98</sup> See, e.g., Fla. Exec. Order No. 20-71, *Emergency Management – COVID-19 – Alcohol Sales, Restaurants, and Gyms* (Mar. 20, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-71.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-71.pdf) (last visited Feb. 21, 2022).

<sup>99</sup> Haw. Second Supplementary Proclamation (Mar. 21, 2020), [https://governor.hawaii.gov/wp-content/uploads/2020/03/2003152-ATG\\_Second-Supplementary-Proclamation-for-COVID-19-signed.pdf](https://governor.hawaii.gov/wp-content/uploads/2020/03/2003152-ATG_Second-Supplementary-Proclamation-for-COVID-19-signed.pdf) (last visited Feb. 22, 2022); Haw. Third Supplementary Proclamation (Mar. 23, 2020), [https://governor.hawaii.gov/wp-content/uploads/2020/03/2003162-ATG\\_Third-Supplementary-Proclamation-for-COVID-19-signed.pdf](https://governor.hawaii.gov/wp-content/uploads/2020/03/2003162-ATG_Third-Supplementary-Proclamation-for-COVID-19-signed.pdf) (last visited Feb. 22, 2022); Haw. Fourth Supplementary Proclamation (Mar. 31, 2020), [https://governor.hawaii.gov/wp-content/uploads/2020/03/2003248-ATG\\_Fourth-Supplementary-Proclamation-for-COVID-19-distribution-signed.pdf](https://governor.hawaii.gov/wp-content/uploads/2020/03/2003248-ATG_Fourth-Supplementary-Proclamation-for-COVID-19-distribution-signed.pdf) (last visited Feb. 22, 2022).

<sup>100</sup> See, e.g., Me. Exec. Order No. 14 FY 19/20, *An Order To Protect Public Health* (Mar. 18, 2020), <https://www.maine.gov/governor/mills/sites/maine.gov/governor.mills/files/inline-files/EO%2014%20An%20Order%20to%20Protect%20Public%20Health.pdf> (last visited Feb. 21, 2022); Me. Exec. Order No. 19 FY 19/20, *An Order Regarding Essential Businesses and Operations* (Mar. 24, 2020), <https://www.maine.gov/governor/mills/sites/maine.gov/governor.mills/files/inline->

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- files/An%20Order%20Regarding%20Essential%20Businesses%20and%20Operations%20\_0\_0.pdf (last visited Feb. 21, 2022); Me. Exec. Order No. 28 FY 19/20, *An Order Regarding Further Restrictions On Public Contact and Movement, Schools, Vehicle Travel and Retail Business Operations* (Mar. 31, 2020), [https://www.maine.gov/governor/mills/sites/maine.gov/governor.mills/files/inline-files/Corrected%20\\_%20An%20Order%20Regarding%20Further%20Restrictions%20on%20Public%20Contact%20and%20Movement%2C%20Schools%2C%20Vehicle%20Travel%20and%20Retail%20Business%20Operations\\_0.pdf](https://www.maine.gov/governor/mills/sites/maine.gov/governor.mills/files/inline-files/Corrected%20_%20An%20Order%20Regarding%20Further%20Restrictions%20on%20Public%20Contact%20and%20Movement%2C%20Schools%2C%20Vehicle%20Travel%20and%20Retail%20Business%20Operations_0.pdf) (last visited Feb. 21, 2022).
- <sup>101</sup> N.M. Pub. Health Order, *Public Health Emergency Order Closing All Businesses and Non-Profit Entities Except for those Deemed Essential and Providing Additional Restrictions on Mass Gatherings Due to COVID-19*, N.M. DEP'T HEALTH (Mar. 23, 2020), <https://www.governor.state.nm.us/wp-content/uploads/2020/03/COVID-19-DOH-Order-fv.pdf> (last visited Feb. 22, 2022).
- <sup>102</sup> Summit Cnty., Utah Joint Public Health Order No. 2020-06, *In the matter of: COVID-19 Pandemic within Summit County* (Mar. 14, 2020), <https://www.summitcounty.org/DocumentCenter/View/10982/Joint-Public-Health-Order-2020-06-ORANGE-Phase> (last visited Feb. 21, 2022).
- <sup>103</sup> Tex. Exec. Order No. GA 14, *Relating to statewide continuity of essential services and activities during the COVID-19 disaster* (Mar. 31, 2020), [https://gov.texas.gov/uploads/files/press/EO-GA-14\\_Statewide\\_Essential\\_Service\\_and\\_Activity\\_COVID-19\\_IMAGE\\_03-31-2020.pdf](https://gov.texas.gov/uploads/files/press/EO-GA-14_Statewide_Essential_Service_and_Activity_COVID-19_IMAGE_03-31-2020.pdf) (last visited Feb. 22, 2022).
- <sup>104</sup> *See, e.g., Coronavirus: Travel Restrictions, border shutdowns by country*, ALJAZEERA (June 3, 2020), <https://www.aljazeera.com/news/2020/6/3/coronavirus-travel-restrictions-border-shutdowns-by-country> (last visited Feb. 22, 2022).
- <sup>105</sup> *See, e.g., Statement by the Prime Minister Hon. Voreqe Bainimarama on COVID-19*, FIJIAN GOV'T (Mar. 23, 2020), [https://www.fiji.gov.fj/Media-Centre/Speeches/English/STATEMENT-BY-THE-PRIME-MINISTER-HON-VOREQE-BAI-\(2\)](https://www.fiji.gov.fj/Media-Centre/Speeches/English/STATEMENT-BY-THE-PRIME-MINISTER-HON-VOREQE-BAI-(2)) (last visited Feb. 22, 2022); *COVID-Safe Economic Recovery Framework*, MINISTRY COM., TRADE, TOURISM & TRANSP., <https://www.mctt.gov.fj/covid-safe-economic-recovery-framework/> (last visited Feb. 22, 2022); *Coronavirus: Travel Restrictions, border shutdowns by country*, ALJAZEERA (June 3, 2020), <https://www.aljazeera.com/news/2020/6/3/coronavirus-travel-restrictions-border-shutdowns-by-country> (last visited Feb. 22, 2022); Factiva®, *Pacific nations move to protect borders from coronavirus*, RADIO NEW ZEALAND NEWS (Feb. 3, 2020), Ex. 64; Anna Watanabe, *Focus: Vulnerable Pacific Islands “lock down” against coronavirus*, JAPAN ECONOMIC NEWswire (Mar. 27, 2020), Ex. 65
- <sup>106</sup> *See, e.g., Coronavirus: Travel Restrictions, border shutdowns by country*, ALJAZEERA (June 3, 2020), <https://www.aljazeera.com/news/2020/6/3/coronavirus-travel-restrictions-border-shutdowns-by-country> (last visited Feb. 22, 2022); Maria Spiliopoulou & Li Xiapeng, *Greece announces further measures to contain COVID-19*, XINHAU GEN. NEWS SERV. (Mar. 17, 2020), Ex. 66; *Which international destinations are reopening to tourists?*, MERCURY NEWS (May 30, 2020), Ex. 67; Oliver Smith et al., *Can I visit Greece? Latest advice on travel and quarantine*, TELEGRAPH (May 7, 2020), Ex. 68.
- <sup>107</sup> *See, e.g., Coronavirus: Travel Restrictions, border shutdowns by country*, ALJAZEERA (June 3, 2020), <https://www.aljazeera.com/news/2020/6/3/coronavirus-travel-restrictions-border-shutdowns-by-country> (last visited Feb. 22, 2022); *Which international destinations are reopening to tourists?*, MERCURY NEWS (May 30, 2020), Ex. 67; *Trump*

suspended all non-essential activities and/or impaired access to the Resorts or to critical amenities within the Resorts (amenities without which the Resorts could not operate) (the “Civil Authority Orders”).

120. The Civil Authority Orders were a recognition that the presence of Coronavirus in the indoor air and on the surfaces of business premises causes direct physical loss, damage or destruction to property by making it unfit and dangerous for intended uses. Indeed, many of the Civil Authority Orders expressly recognized that Coronavirus damages property—not just people. The orders issued in Napa County, California—where the Owned Resort Solage is located and the Owned Resort Calistoga Ranch was located—are prime examples.

121. For example, on March 18, 2020, the Health Officer of Napa County issued an order directing, among other things, all individuals to “Shelter at Home” and non-essential businesses to cease all activities at facilities located within the county.<sup>108</sup> Among other things, the March 18, 2020 order explicitly stated, among its justifications, that it was “issued based on evidence of . . . the physical damage to property caused by the virus.”<sup>109</sup>

122. On April 2, 2020, Napa County issued an order extending the Shelter at Home order and the continued closure of non-essential activities.<sup>110</sup> Among other things, the April

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*Closes U.S.-Mexico Border to Nonessential Traffic*, HUFFINGTON POST (Mar. 20, 2020), Ex. 69; *Now it is ... there is a wall!*, CE NOTICIAS FINANCIERAS ENGLISH (Mar. 21, 2020), Ex. 70.

<sup>108</sup> Napa Cnty., Cal. Order, *Order of the Napa County Health Officer Directing all Individuals Living in the County to Shelter at Home Except that they may Leave to Provide or Receive Certain Essential Services or Engage in Certain Essential Activities and Work for Essential Businesses and Essential Governmental Services* (Mar. 18, 2020), <https://www.countyofnapa.org/DocumentCenter/View/16687/3-18-2020-Shelter-at-Home-Order> (last visited Feb. 21, 2022).

<sup>109</sup> *Id.*

<sup>110</sup> Napa Cnty., Cal. Order, *Order of the Napa County Health Officer Directing all Individuals Living in the County to Continue to Shelter at Home Except that they may Leave to Provide or Receive Certain Essential Services or Engage in Certain Essential Activities and Work for Essential Businesses and Essential Governmental Services* (Apr. 2, 2020),

2, 2020 order expressly stated, among its justifications, that it was “issued based on evidence of . . . [COVID-19’s] proclivity to attach to surfaces and cause temporary physical damage to property.”<sup>111</sup>

123. Likewise, in Colorado—where the resorts Madeline and Jerome are located—Governor Polis issued Executive Order D 2020 024 on April 6, 2020, amending and extending the Governor’s “Stay at Home” directive, Executive Order D 2020 017, issued March 23, 2020.<sup>112</sup> Among other things, the April 6, 2020 order expressly stated, among its justifications, that “COVID-19 also physically contributes to property loss, contamination, and damage due to its propensity to attach to surfaces for prolonged periods of time.”<sup>113</sup>

124. These Civil Authority Orders and other government orders, though their forced closure of the Resorts, impaired access to the Resorts. The government orders were issued in response to the spread of Coronavirus and COVID-19 throughout the United States, including properties within five miles of the Resorts, and the resulting direct physical loss, damage or destruction caused therefrom.

125. As a result of these government orders, including the Civil Authority Orders, Plaintiffs’ businesses at the Resorts were interrupted. Specifically, by way of example, the following Owned Resorts were fully closed between March and July 2020:

- In Rhode Island, The Vanderbilt closed completely from March 25, 2020, to June 26, 2020.
- In Maine, White Barn Inn was closed from March 18, 2020, to July 1, 2020.

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<http://web.archive.org/web/20200406185546/https://www.countyofnapa.org/DocumentCenter/View/17112/Shelter-at-Home-Order-4-3-2020--?bidId=> (last visited Feb. 21, 2022).

<sup>111</sup> *Id.*

<sup>112</sup> Colo. Exec. Order No. D 2020 024, *Amending and Extending Executive Order D 2020 017 Ordering Coloradans to Stay at Home Due to the Presence of COVID-19* (Apr. 6, 2021), [https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20024%20Amending%20and%20Extending%20Executive%20Order%20D%202020%20017%20Stay%20at%20Home%20Order\\_0.pdf](https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20024%20Amending%20and%20Extending%20Executive%20Order%20D%202020%20017%20Stay%20at%20Home%20Order_0.pdf) (last visited Feb. 21, 2022).

<sup>113</sup> *Id.*

- In California, Calistoga Ranch, and Solage (the “Napa Resorts”) closed between March 20, 2020, and June 12, 2020.<sup>114</sup>
- In Colorado, the hotel portion of the Madeline was closed from March 16, 2020, to June 1, 2020. Hotel Jerome was closed from March 17, 2020, to June 18, 2020.

126. The forced closure of the Plaintiffs’ Resorts and their Leader Properties and the resultant interruption of Plaintiffs’ businesses triggered the Policies’ Civil or Military Authority Coverage.

127. In addition to the orders listed above, each of the states and countries where the Resorts are located also issued orders that did some or all of the following: (a) limited the Resorts to essential guests; (b) established capacity limits for the Resorts; and/or (c) established cleaning, disinfection, social distancing and other protocols with which hotels were required to comply. These orders also closed or subjected the Resorts' amenities (such as restaurants, bars, fitness centers, pools, spas, and event space) to similar restrictions.

128. These government orders impaired access to the Resorts or portions thereof. The government orders were issued in response to the spread of Coronavirus and COVID-19 throughout the United States, including properties within five miles of the Resorts, and the resulting direct physical loss, damage or destruction caused therefrom. These restrictions at the Resorts and the resultant interruption of Plaintiffs’ businesses also triggered the Policies’ Civil or Military Authority Coverage.

129. Moreover, in the midst of pervasive Coronavirus outbreaks, on September 29, 2020, the Calistoga Ranch fell victim to the Glass Fire that tore through Napa Valley, destroying homes, hotels, and decades-old family-owned wineries and was destroyed. Since then, it has since been closed.

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<sup>114</sup> The exact dates of the closures are as follows, which differ slightly based on the institution of safety protocols at each location: Calistoga Ranch - March 22, 2020 to June 11, 2020 and Solage - March 20, 2020 to June 11, 2020.



**H. As the Civil Authority Orders Lifted, the Owned Resorts Reopened but Operated Under Severe Restrictions and with Safety Measures that Forced Plaintiffs to Incur Extra Expenses to Continue Operating and Prevent Further Direct Physical Loss, Damage or Destruction to Plaintiffs' Property**

130. Beginning on May 23, 2020, as the Civil Authority Orders lifted, Auberge started reopening the Owned Resorts. By July 1, 2020, all of the Owned Resorts had reopened.

131. The reopening of the Owned Resorts did not abate the Hotel Owner Plaintiffs' losses arising from the direct physical loss, damage or destruction to their property or the nearby Leader Properties or the consequent losses to Auberge.

132. In order to prevent further direct physical loss, damage or destruction to the Owned Resorts and to stay open and continue operating the Owned Resorts, Plaintiffs incurred significant costs and extra expenses and imposed outright bans and/or restrictions on certain of their services and amenities and implemented numerous onerous and expensive new health, safety, scheduling and hygiene procedures with additional modifications for the Owned Resorts.

133. Auberge developed, and continually updated and revised, a comprehensive safety plan across the Owned Resorts, in which it and the Hotel Owner Plaintiffs undertook herculean efforts and incurred substantial expenses, covered as Extra Expense under the Policy, to make the Owned Resorts as safe as possible, to protect employees and customers, to resume and continue operating as close to normal (meaning, the way Auberge and the Owned Resorts ran and performed prior to the emergence of Coronavirus and COVID-19), and to ameliorate, as much as possible, the ongoing direct physical loss, damage or destruction to Plaintiffs' property caused by Coronavirus and COVID-19.

134. At various times during the relevant time period, some of the key protocols and features implemented at the Owned Resorts included:

- Customized sanitization and service protocols for each distinct resort area, including bar, culinary, engineering, fitness center, front office, housekeeping, pools, spas public areas, restaurants, and other areas;

- Implemented an extensive training and reopening orientation program for employees;
- Required employees to wear masks and, when necessary, face shields and gloves;
- Installed air filtration systems of the highest rating permitted for all specific pieces of equipment, with MERV-8 rated filtration systems at a minimum, and required filters to be inspected and changed more frequently to ensure optimal air quality;
- Placed wellness stations throughout each of the Owned Resorts, especially high-trafficked areas including elevators, team member entrances and exits, public areas, fitness centers, spas, and pool, stocked with hand sanitizer and disinfectant wipes;
- Implemented daily temperature screenings, including purchasing Infrared touchless thermometers, provided training for team member screeners, and erected plexiglass barriers to protect screeners;
- Implemented contact tracing program for guests and staff members, including a contact tracing approach whereby staff identified each area of the hotel where they spent more than ten minutes of time during their shift;
- Implemented greatly enhanced cleaning procedures, including:
  - Using only Ecolab EPA Approved for Novel Coronavirus (2019-nCoV) or equivalent products;
  - Sanitizing once per hour all door handles, handrails, touch screens, scanners, light switches, fridges, coffee makers, espresso machines, service stations, counters, trays, beverage stations, and other frequently touched areas;
  - Sanitizing any reusable guest items after each use;
  - At dining establishments, sanitizing table and chairs after each guest

seating, disinfecting bottles before delivery to table, and if coat check is offered, hanging coats in dry cleaning bags to reduce contact with heart of house areas and coats of other guests;

- Sanitizing housekeeping carts at the start and end of shifts, including before and after breaks, sanitizing cart and all equipment between the entrance to guest rooms, and using a new rag on every surface and new mop head for each room;
- Disinfecting cabanas, chaise lounges, chairs, tables, at pool;
- For any events or meetings, sanitizing all chairs prior to event, sanitizing door handles every 30 minutes, and sanitizing entire event space using UVL machine;
- Implementing extensive and detailed cleaning and sanitization of all spa facilities and areas that support spa operation, including hiring third party cleaning services for “deep cleans”;
- Issued reusable cloth masks and disposable single-use masks to all team members and making masks available to guests upon request;
- Implemented procedure for sanitizing washable masks, including turning in masks to designated location at ends of shift, laundering masks separately, and disinfecting all vessels containing used masks;
- Implemented revised time clock procedures that use timecards rather than biometric tools that require physical body contact;
- Installed of plexiglass barriers at host podiums;
- Provided gloves to all staff members for use when interacting with guests’ possessions;
- Created and placed signage to guide employees and guests in health and safety behaviors and to create “guest flow” paths to reduce crowding and ensure social distancing during check-in and check-out, during dining, and during use

of hotel amenities such as spas and fitness centers;

- Implemented social distancing through reduced seating capacity at all restaurants, bars, and employee dining areas on-site to allow for at least six feet between all persons;
- Limited pool capacity and fitness and wellness class sizes to allow for distancing during the class;
- Staggered spa bookings to allow for extra cleaning time between bookings; and
- Installed plexiglass shields to separate front and back of golf carts, and sanitizing carts between guest usage.

135. Besides implementing training and safety measures, Plaintiffs invested significant funds to procure PPE, cleaning products, air filters, physical barriers, and signage so that they could continue operating as close to normal as possible, and to lessen the risk of continued direct physical loss, damage or destruction to its property. To that end, Plaintiffs spent substantial funds to purchase PPE and other safety items, including social distancing panels, sanitizing wipes, cleaners, filters for the HVAC system, thermometers, alcohol wipes, plexiglass barriers, face shields, thermometers, gloves, hand sanitizer, masks, and mobile sanitation stations.

136. Despite these concerted safety processes, Plaintiffs have not completely escaped the risks of exposure to and infection from Coronavirus as at least 1,432 employees of the Resorts reported that they contracted COVID-19 since March 2020.

137. The presence of Coronavirus on Plaintiffs' properties caused Plaintiffs to suffer direct physical loss, damage or destruction to the Resorts as previously alleged herein. The presence of Coronavirus in the air and on the surfaces at the Resorts during the Period of Recovery has caused a significant impairment to and interruption of Plaintiffs' businesses. The reduced hours, reduced capacity, and significant restrictions and/or bans on the Resorts providing certain services and amenities have deprived Plaintiffs of the full functional use of

their property, causing further direct physical loss, damage or destruction to Plaintiffs' property. Moreover, these closures, restrictions, and related measures discussed herein have almost certainly alienated some of Plaintiffs' current and prospective guests, causing Plaintiffs to sustain yet more losses.

138. Auberge, as the exclusive manager or service provider to all of the Resorts, is compensated primarily by management and other fees that vary based on the financial performance of the Resorts, including the Owned Resorts. Accordingly, the above-referenced physical loss, damage or destruction of the Resorts resulted in greatly diminished management fees for Auberge, and such sums are therefore recoverable under the Policy.

#### **I. The Toll on Plaintiffs from Coronavirus and COVID-19**

139. Plaintiffs experienced direct physical loss, damage or destruction to their property in at least three ways:

- (1) the presence of Coronavirus in the indoor air and on surfaces at each of Plaintiffs' Resorts caused the loss, in whole or in part, of the functional use of those Resorts;
- (2) through the need to modify physical behaviors through the use of social distancing, avoiding confined indoor spaces, and avoiding congregating in the same physical area as others, in order to reduce or minimize the potential for viral transmission; and
- (3) through the need to mitigate the threat or actual physical presence of Coronavirus on frequently-touched surfaces and objects, including door handles, bathroom faucets, miscellaneous surfaces, as well as in heating and air conditioning systems and in or on any other of the multitude of places that Coronavirus has been or could be found.

140. Plaintiffs' losses are in the tens of millions of dollars.

141. From March 25, 2020, until June 12, 2020, all of the Owned Resorts were closed as a consequence of the Civil Authority Orders. Moreover, from March 15, 2020,

until May 23, 2020, a majority of Plaintiffs' Resorts were closed as a consequence of the Civil Authority Orders and other similar governmental orders impairing access to the Resorts. Since that time, all of the Resorts have been opened and remained open but, as a result of the direct physical loss, damage or destruction caused by Coronavirus, were not operating at full capacity.

142. Also, from the beginning of Plaintiffs' reopening of the Owned Resorts on June 12, 2020, all of the Owned Resorts, at varying points in time, were, as a result of the direct physical loss, damage or destruction caused by Coronavirus during the Period of Recovery, forced to operate under severe restrictions such as limiting their hours of operation and types of services provided (e.g., not offering, or restricting the capacity of, amenities such as spa services, fitness centers, and meeting rooms). Thus, the physical loss, damage or destruction to Plaintiffs' properties have dramatically decreased Plaintiffs' revenues.

143. Of course, the devastation to Plaintiffs' property and business should come as no surprise given the toll Coronavirus and COVID-19 have wreaked throughout the world, the United States, and in Rhode Island specifically. Coronavirus and COVID-19 could result in net losses starting at \$3.2 trillion and reaching \$4.8 trillion in U.S. gross domestic product over the course of two years.<sup>115</sup> From February to April 2020, there was a net loss of over 108,000 jobs in Rhode Island—an overall 21.3% of jobs across all industries.<sup>116</sup>

144. The economic devastation caused by the physical loss, damage or destruction to property from Coronavirus and COVID-19 has affected every industry sector across the globe, and the hospitality industry is amongst the hardest hit. U.S. hotels experienced all-

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<sup>115</sup> Emily Gersema, *Business closures and partial reopenings due to COVID-19 could cost the U.S. trillions*, USC NEWS (Nov. 30, 2020), <https://news.usc.edu/178979/business-closures-covid-19-pandemic-united-states-gdp-losses/#:~:text=The%20COVID%2D19%20pandemic%20could,years%2C%20a%20US%20study%20finds> (last visited Feb. 21, 2022).

<sup>116</sup> Michael Ettlinger & Jordan Hensley, *COVID-19 Economic Crisis: By State*, UNIV. N.H. CARSEY SCH. PUB. POL'Y (updated Oct. 22, 2021), <https://carsey.unh.edu/COVID-19-Economic-Impact-By-State> (last visited Feb. 21, 2022).

time lows with a paltry 44% occupancy rate in 2020, down 33% from 2019.<sup>117</sup> Revenue per room dropped to just \$45, down 48% from 2019.<sup>118</sup> 2020 is said to be the “worst year in living memory” for the “reeling” industry.<sup>119</sup> Hotel industry professionals estimate that “every hotel in America has lost 20 to 35 percent of its value” from April to October 2020 alone.<sup>120</sup> Indeed, the occupancy rate at the Solage Resort in 2020 was only 32.9%, down 40% from 2019.

145. The loss of life has also been devastating and reflective of the damage wrought by Coronavirus and COVID-19 and its pervasiveness in any business premises open to the public. As of February 21, 2022, COVID-19 has killed over 3,397 Rhode Islanders<sup>121</sup>, 930,811 Americans<sup>122</sup>, and 5.8 million people worldwide.<sup>123</sup> Recent reports estimate that the actual number of people worldwide killed by COVID-19 directly or indirectly is closer to 19.6 million people.<sup>124</sup> Coronavirus is now the third-leading cause of death in this country,

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<sup>117</sup> *COVID-19 Travel Industry Research*, U.S. TRAVEL ASS'N (Jan. 2021), <http://web.archive.org/web/20210203165028/https://www.ustravel.org/toolkit/covid-19-travel-industry-research> (last visited Feb. 21, 2022).

<sup>118</sup> *Id.*

<sup>119</sup> Konrad Putzier, *Hotel Owners Continue to Reel From the Pandemic*, WALL ST. J. (Jan. 2, 2021), <https://www.wsj.com/articles/hotel-owners-continue-to-reel-from-the-pandemic-11609563815> (last visited Feb. 21, 2022).

<sup>120</sup> C. J. Hughes, *Pummeled by the Pandemic, Hotel Owners Get Creative With Their Space*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/business/hotels-transformation-offices-shelters-coronavirus.html> (last visited Feb. 21, 2022).

<sup>121</sup> *Tracking Coronavirus in Rhode Island: Latest Map and Case Count*, N.Y. TIMES (updated Feb. 21, 2022), <https://www.nytimes.com/interactive/2021/us/rhode-island-covid-cases.html> (last visited Feb. 21, 2022).

<sup>122</sup> *United States COVID-19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction*, CDC (updated Feb. 19, 2022), [https://covid.cdc.gov/covid-data-tracker/#cases\\_casesper100klast7days](https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days) (last visited Feb. 21, 2022).

<sup>123</sup> *WHO Coronavirus (COVID-19) Dashboard*, WHO (updated Feb. 21, 2022), <https://covid19.who.int/> (last visited Feb. 21, 2022).

<sup>124</sup> *The pandemic's true death toll*, ECONOMIST (updated Feb. 21, 2022), <https://www.economist.com/graphic-detail/coronavirus-excess-deaths-estimates> (last visited Feb. 21, 2022).

surpassed only by heart disease and cancer.<sup>125</sup> At its peak, over 4,000 Americans were perishing per day from COVID-19.<sup>126</sup>

146. To protect their property and business income interests as well as that of the Resorts, Plaintiffs purchased the all-risk Policies. The Policies, for which the Defendant Insurers collected lucrative premiums, includes various business interruption coverages that are triggered when physical loss, damage or destruction to property occurs. But Defendant Insurers have refused to honor their full coverage obligations under the Policies, forcing Plaintiffs to turn to this Court for relief.

**J. The “All Risk” Commercial Property Policy and Potentially Applicable Coverages**

147. Plaintiffs purchased a quota share program—a type of sharing agreement where various insurers share a portion of the risk according to a fixed percentage—to which the Defendant Insurers subscribed.

148. Each of the Defendant Insurers issued separate Policies with unique market reference and/or policy numbers, setting forth their respective quota shares and adopting the terms of the main policy (the “Policy”). The Policy was issued by Allianz, bearing insurance policy number USP00073419, effective from June 4, 2019, to June 4, 2020.<sup>127</sup>

149. Plaintiffs fully paid the premium for the Policies and have complied with all conditions precedent therein to coverage.

150. Plaintiffs are all insureds under the Policies.

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<sup>125</sup> Gary Stix & Youyou Zhou, *COVID-19 Is Now the Third Leading Cause of Death in the U.S.*, SCI. AM. (Oct. 8, 2020), <https://www.scientificamerican.com/article/covid-19-is-now-the-third-leading-cause-of-death-in-the-u-s/> (last visited Feb. 21, 2022), Ex. 71; Farida B. Ahmad & Robert N. Anderson, *The Leading Causes of Death in the US for 2020*, 325 JAMA 18, 1829-30 (May 21, 2021), <https://jamanetwork.com/journals/jama/fullarticle/2778234> (last visited Feb. 21, 2022), Ex. 72.

<sup>126</sup> Eugene Garcia et al., *U.S. tops 4,000 daily deaths from coronavirus for 1st time*, AP NEWS (Jan. 8, 2021), <https://apnews.com/article/us-coronavirus-death-4000-daily-16c1f136921c7e98ec83289942322ee4> (last visited Feb. 21, 2022), Ex. 73.

<sup>127</sup> Ex. 1.



151. The Defendant Insurers drafted the Policies. Plaintiffs did not draft the Policies and played no role in drafting or negotiating the policies.

152. Allianz has a 40% quota share of the \$100,000,000 in limits provided by the Policy. The seven other Defendant Insurers provide the remainder of the Policy's limits through policies that each Defendant Insurer issued and which follow and adopt the terms of the Policy subject to certain endorsements and exclusions.

153. Plaintiffs paid a very substantial premium to Allianz to purchase the Policy.

154. Allianz and/or its affiliates drafted the Policy.

155. The Policy Allianz sold to Plaintiffs "insures against all risk of direct physical loss, damage or destruction to property described herein occurring during the term of insurance, except as hereinafter excluded," and provides coverage for property damage losses, Business Interruption losses, and other losses.

156. The phrase "physical loss, damage or destruction to property" is not defined or limited in the Policies. In plain English, "physical loss, damage or destruction to property" to property denotes at least the following meanings: (1) physical damage to that property; (2) the physical alteration of that property; (3) the interaction of an external physical substance or force with that property, including its presence in the air or on the surfaces of that property, rendering the property unfit, unsafe or uninhabitable for normal or intended use, causing that property to lose, in whole or in part, its functional use or otherwise negatively affecting the property's usability; or (4) the loss of use or the loss of functional use, whether in whole or in part, of that property.

157. The Policy Limit<sup>128</sup> is \$100,000,000 per **Occurrence**.

158. The Policy does not exclude viruses, pandemics, communicable diseases, COVID-19, or Coronavirus as causes of loss. Thus, the entire \$100,000,000 Policy Limits are potentially available for Plaintiffs' losses.

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<sup>128</sup> Unless otherwise noted, capitalized and bolded terms herein are capitalized and bolded in the Policy.

159. The Policy’s full terms and conditions are set forth therein, but as relevant here, the Policy provides as follows:

**Time Element Coverages**

160. The Policy defines “**Time Element**” as “Business Interruption (including Loss of Profits), Extra Expense, Rental Value, Royalties, and **Soft Costs** loss as insured under the **Policy** including Time Element Extensions and Provisions related thereto.”

161. The Policy covers Business Interruption loss “resulting from necessary interruption of business conducted by the **Insured**, whether total or partial, and caused by direct physical loss, damage or destruction insured herein.”

162. As set forth herein, Coronavirus and COVID-19 caused direct physical loss, damage or destruction to property at Plaintiffs’ insured locations, the Owned Resorts.

163. Coronavirus and COVID-19 also rendered such property unfit and unsafe for its normal usages, depriving Plaintiffs of their property.

164. Neither Coronavirus nor COVID-19 is excluded under the Policy.

165. The Policy’s Business Interruption coverage covers “Actual Loss Sustained by the **Insured**, consisting of the Net Profit which is thereby prevented from being earned and of all charges and expenses only to the extent that these must necessarily continue during the interruption of business....” Business Interruption coverage is subject to the Policy’s full Limit of Liability of \$100,000,000.

166. The Policy defines Net Profit as “[t]he net trading profit (exclusive of all capital receipts and accretions and all outlay properly chargeable to capital) resulting from the business of the **Insured** after due provision has been made for all standing and other charges including depreciation but before the deduction of any taxation chargeable on profits.”

167. The Policy also includes Business Interruption—Loss of Profits coverage which insures: “Loss of Gross Profit and Loss Adjustment Expenses resulting from interruption of or interference with the business, and caused by direct physical loss, damage

or destruction insured herein....” Business Interruption—Loss of Profits coverage is subject to the Policy’s full Limit of Liability of \$100,000,000.

168. The Policy defines Gross Profit as “[t]he sum produced by adding to the Net Profit the amount of all the standing charges of the business or if there is no Net Profit the amount of said standing charges less the amount of any net trading loss. Standing charges shall include, but not be limited to, Wages and depreciation on property.”

169. Plaintiffs’ primary revenue is derived from the operation of the Resorts. The Resorts were subject to total and partial closures as detailed above. To the extent the Resorts were able to reopen, it was at a drastically reduced capacity and subject to numerous and costly restrictions. As such, Plaintiffs have sustained and are sustaining a substantial Business Interruption loss as insured under the Policy. Auberge’s diminished management and other fees also constitute a Business Interruption loss insured under the Policy.

170. The Policy includes an Extended Period of Indemnity, providing in relevant part: “The length of time for which loss may be claimed: shall include an Extended Period of Indemnity, not to exceed [365 days] which is the additional length of time to restore the **Insured’s** business to the condition that would have existed had no loss occurred....”

171. The Policy provides Extra Expense coverage, covering “the excess of the total cost chargeable to the operation of the **Insured’s** business over and above the total cost that would normally have been incurred to conduct the business had no direct physical loss, damage or destruction occurred.”

172. As set forth herein, Plaintiffs incurred Extra Expenses to resume and continue as nearly as practicable their normal business activities that would otherwise be suspended due to direct physical loss, damage or destruction caused by Coronavirus and COVID-19, costs associated with altering their property to protect it from physical loss, damage or destruction, as well as the safety of employees and guests, erecting barriers, altering air circulation, reconfiguring indoor spaces, disinfecting surfaces and materials, and providing PPE to employees.

173. The Policy includes “Royalties” coverage, which coverages “[l]oss of income to the **Insured** under royalty, licensing fees, or commission agreements between the Insured and another party which is not realizable due to direct physical loss, damage or destruction insured herein during the term of this **Policy** to property of the other party of the type insured under this **Policy**.”

174. As set forth herein, Auberge incurred loss of income covered under the Policy’s “Royalties” because Auberge lost such income under royalty, licensing fees, or commission agreements between the Auberge and the owners of the Resorts, including the owners of the Owned Resorts, that was not realizable due to direct physical loss, damage or destruction during the term of the Policy to the Resorts, including the Owned Resorts, caused by Coronavirus and COVID-19.

175. The Policy includes “Cancellation of Bookings” coverage, which covers loss when there is an interruption or interference with the business of the Insured as a consequence of infectious or contagious disease manifested by any person while on the premises of the Insured and extends to cover loss when there is an interruption or interference with the business of the Insured as a consequence of closing of the whole or part of the premises of the Insured by order of a competent public authority consequent upon the existence or threat of hazardous conditions either actual or suspected at the premises of the Insured.

176. Plaintiffs have experienced interruption and interference with their business as a result of the presence of COVID-19 at the Resorts, as demonstrated by approximately 1,432 employees of the Resorts testing positive for COVID-19. The Resorts were also subject to complete and partial closure due to the threat of actual and suspected presence of hazardous conditions, namely the presence of Coronavirus and COVID-19.

**Time Element Extensions**

177. The Policy includes numerous Time Element Extensions that potentially apply to Plaintiffs’ losses from Coronavirus and COVID-19. These include the following, among others.

178. The Policy provides Interruption by Civil or Military Authority coverage for “**Time Element** losses resulting from: An interruption of business, whether total or partial, during the period of time when, in connection with or following a peril insured against, access to real or personal property is impaired by order or action of civil or military authority.” The Interruption by Civil or Military Authority coverage in the Policy is subject to a maximum time period “for up to 90 days Period of Recovery, subject to a 5 mile distance limitation.”

179. The Interruption by Civil or Military Authority provision also states: “The provisions of this paragraph shall extend to include the Time Element extensions of coverage described under subparagraphs... (1) (b), Contingent Business Interruption and Contingent Extra Expense; and (1) (d), Leader Property.” This means that when access to Plaintiffs’ suppliers, customers and attraction properties are impaired by order of civil or military authority following a peril insured against, such impairment will trigger those Time Element Extensions (as described in detail below) to cover Plaintiffs’ losses that arise.

180. Coronavirus, a physical substance that cannot be seen but can survive in the air or on the surface of property and can make persons within a premises sick and the premises uninhabitable, caused direct physical loss, damage or destruction to property throughout the cities and states where the Resorts are located, including property within five miles of the Resorts (including but not limited to each of the specific business premises located within five (5) miles of the Owned Resorts set forth above), giving rise to the actions of civil authority orders, including the Civil Authority Orders. These orders impaired access to the Resorts and these orders were the direct result of the direct physical loss, damage or destruction to the property described and/or referenced in this paragraph.

181. This impairment of access by the Civil Authority Orders and other civil authority orders to the Resorts, directly caused Plaintiffs to sustain an interruption of their businesses.

182. Under the Policy’s Cancellation of Bookings endorsement, “[i]nfectious or contagious disease manifested by any person” is a “peril insured against.” COVID-19 is an

infectious disease that manifested in persons at properties within five (5) miles of the Resorts, giving rise to the actions of civil authority, as set forth herein. These orders impaired access to the Resorts.

183. The Policy provides Contingent Business Interruption and Contingent Extra Expense coverage for “**Time Element** losses resulting from: Direct physical loss, damage or destruction as insured herein to property of the type insured that wholly or partially prevents any direct or indirect supplier of any tier of goods and/or services to the **Insured** from rendering their goods and/or services ... or property of the type insured that wholly or partially prevents any direct or indirect receiver of any tier of goods and/or services from the **Insured** from accepting the **Insured’s** goods and/or services, such supplier or receiver to be located anywhere in the world where permitted by law.”

184. The Policy provides Leader Property coverage for “**Time Element** losses resulting from: Direct physical loss, damage or destruction as insured herein to property not owned or operated by the **Insured**, located in the same vicinity as the **Insured**, which attracts business to the **Insured**.”

185. In plain English, the Policy provides coverage for Plaintiffs’ losses if the properties of their direct and indirect suppliers or customers, or nearby properties that attract business to the Resorts, suffer direct physical loss, damage or destruction of property unless expressly excluded under the Policy. The Policy will also cover Plaintiffs’ losses if those suppliers or Leader Properties experience impairment of access due to an order of civil or military authority “in connection with or following a peril insured against.” The Policy covers all risks of loss and does not contain any relevant exclusions for Plaintiffs’ losses.

186. Among other things, as set forth herein, Coronavirus and COVID-19 caused direct physical loss, damage or destruction at properties of direct and indirect suppliers and service providers to the Resorts, and properties that attract customers to the Resorts, including the many business amenities and tourist attractions within a short distance of the Resorts.

187. Additionally, as set forth herein, during the relevant time period, Coronavirus

and COVID-19 rendered such Resorts unfit and unsafe for their normal usages, and/or caused them to lose, in whole or in part, their functional use.

188. Similarly, as set forth herein, Coronavirus and COVID-19 caused direct physical loss, damage or destruction to the property of Auberge's customers, the Resorts (including the Owned Resorts) that wholly or partially prevented the Resorts from accepting Auberge's goods and/or services.

189. Additionally, as set forth herein, during the relevant time period, Coronavirus and COVID-19 rendered such Resorts unfit and unsafe for their normal usages, and/or caused them to lose, in whole or in part, their functional use.

190. The Policy provides Decontamination Costs of Insured Property coverage, which provides in relevant part: "If insured property is contaminated as a result of direct physical loss, damage or destruction insured by this **Policy** and there is in force at the time of loss any law or ordinance regulating contamination, including but not limited to the presence of pollution or hazardous material(s), then this **Policy** insures, as a direct result of enforcement of or compliance with such law or ordinance, the increased cost of decontamination and/or removal of such contaminated insured property in a manner to satisfy such law or ordinance." This coverage also provides: "With respect to **Time Element** loss insured herein, this **Policy** insures the additional period of time necessary for the decontamination and/or removal of contaminated insured property in a manner to satisfy any law or ordinance regulating contamination...."

191. The Policy contains a Sue and Labor clause which states, in relevant part: "In case of actual or imminent direct physical loss, damage or destruction insured by this **Policy**, except imminent direct physical loss, damage or destruction with respect to an **Accident**, it shall, without prejudice to this insurance, be lawful and necessary for the **Insured**, their factors, servants, or assigns to sue, labor and travel for, in and about the defense, the safeguard, and the recovery of property or any part of the property insured hereunder." "The **Company** shall pay the expenses so incurred including resulting **Time Element** loss."

192. Plaintiffs undertook costly measures necessary to protect the Owned Resorts from imminent and further loss, damage or destruction. This included, among other things, altering their property to protect it from physical loss, damage or destruction, as well as the safety of their occupants, erecting barriers, altering air circulation, reconfiguring indoor spaces, disinfecting surfaces and materials, and providing PPE to employees. Additionally, during times of low or no occupancy at the Owned Resorts, Plaintiffs incurred costs associated with security, fire monitoring, elevator maintenance, pest control, utilities, and maintenance.

193. The Policy has a number of enhancements that provide additional coverage on a per occurrence basis for direct physical loss, damage or destruction, including coverages with respect to Spoilage, Hazardous Substances and Professional Fees.

**Other Potentially Relevant Policy Provisions**

194. The Policy contains an exclusion at Section 4.F. (the “Contamination Exclusion”), which states: “This **Policy** does not insure: against direct physical loss, damage or destruction including costs or expenses in connection with any kind or description of seepage and/or pollution and/or contamination, direct or indirect, arising from any cause whatsoever. Nevertheless, if a peril not excluded from this **Policy** arises directly from seepage and/or pollution and/or contamination any direct physical loss, damage or destruction insured under this **Policy** arising directly from that peril shall be insured.”

195. The Policy’s Contamination Exclusion also states: “No part of this exclusion shall limit Coverage Extension 3.H., Decontamination Costs of **Insured** Property and Coverage Extension 3.M, Land and Water Contaminant or Pollutant Clean-up, Removal and Disposal.”

196. The Policy does not define the terms “seepage and/or pollution and/or contamination.”

197. “Seepage and/or pollution and/or contamination,” as used in the Policy’s Contamination Exclusion, refers to traditional environmental pollution and does not exclude



losses arising from Coronavirus or COVID-19.

198. The Policy does not exclude loss arising from viruses.

199. No policy exclusions apply to Plaintiffs' claim.

200. Plaintiffs also expect that additional coverages and provisions under the Policy may become relevant and applicable when the calculation of their full losses is fully known. The foregoing is not a comprehensive discussion of all potentially applicable Policy coverages, terms, and conditions, which are fully set forth in the Policy.

**The Other Program Insurers**

201. The Everest Policy, No. CA3X001392-191, provides a 20% share of the \$15,000,000 excess of \$10,000,000 layer of coverage and adopts the terms of the Policy.<sup>129</sup>

202. The Great Lakes Policy, No. GLSE180125, provides a 30% share of the \$15,000,000 excess of \$10,000,000 layer of coverage and adopts the terms of the Policy.<sup>130</sup>

203. The Homeland Policy, No. 795-01-00-50-0000, provides a 25% share of the \$75,000,000 excess of \$25,000,000 layer of coverage and adopts the terms of the Policy.<sup>131</sup>

204. The Interstate Policy, No. RTX20037519, provides a 10% share of the \$100,000,000 limits of coverage and adopts the terms of the Policy.<sup>132</sup>

205. The Landmark Policy, No. LHT908600, provides a 25% share of the \$75,000,000 excess of \$25,000,000 layer of coverage and adopts the terms of the Policy.<sup>133</sup>

206. The Westport Policy, No. NAP 2002513 00, provides a 20% share of the \$10,000,000 primary layer of coverage and adopts the terms of the Policy.<sup>134</sup>

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<sup>129</sup> Ex. 2.

<sup>130</sup> Ex. 3.

<sup>131</sup> Ex. 4.

<sup>132</sup> Ex. 5.

<sup>133</sup> Ex. 6.

<sup>134</sup> Ex. 7.

207. The National Fire and Marine Policy, No. DF00006419, provides a 30% share of the \$10,000,000 primary layer of coverage and adopts the terms of the Policy.<sup>135</sup>

**K. The Defendant Insurers Effectively Deny Plaintiffs’ Claim**

208. On or about July 7, 2020, Auberge gave notice to Defendant Insurers of its losses from Coronavirus and COVID-19 (“Plaintiffs’ Claim”). Auberge specifically cited “lost business income and expenses, business interruption and Time Element losses due to the suspension of its operations.”

209. None of Defendant Insurers sent an adjuster—or anyone on their behalf—to visit, inspect or set foot in the Resorts to investigate Plaintiffs’ Claim.

210. On July 10, 2020, National Fire and Marine, through Kemah Capital, acknowledged Auberge’s notice of loss (the “National Fire and Marine Letter”). Despite “assur[ing Auberge] that every effort is being made to promptly handle this matter,” National Fire and Marine never sent Auberge any information requests or otherwise investigated Plaintiffs’ Claim. Over nineteen months later, National Marine and Fire has yet to deny or provide coverage for Plaintiffs’ Claim.

211. The National Fire and Marine Letter, combined with the failure of National Fire and Marine to properly investigate and/or issue any coverage decision, is an effective denial of coverage. Moreover, National Fire and Marine still has not agreed to provide the urgently needed coverage – a further breach of its obligations to Plaintiffs under its policy.

212. On July 24, 2020, insurance adjuster Sedgwick issued a coverage letter on behalf of Great Lakes advising that Great Lakes was “investigating this claim under a full Reservation of Rights” and refusing to provide the urgently needed coverage (the “Great Lakes Coverage Letter”).

213. The Great Lakes Coverage Letter mentioned that “the Policy provides coverage for direct physical loss or damage to ‘Covered Property’” but did not deny or

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<sup>135</sup> Ex. 8.

address the presence of Coronavirus and COVID-19 at the Resorts, or the fact that such presence constitutes direct physical loss, damage or destruction to the Resorts.

214. Great Lakes cited additional coverage exclusions that do not apply to Plaintiffs' Claim.

215. Despite the passage of over nineteen months since Great Lakes sent its Coverage Letter, Great Lakes has neither denied nor provided coverage for Plaintiffs' Claim and has never visited or sent an adjuster to the Resorts to verify the accuracy of its assertions.

216. Likewise, on November 10, 2020, RSUI, acting on behalf of Landmark, sent a letter under which Landmark cited several irrelevant policy exclusions and reserved its rights under the Policy (the "Landmark Coverage Letter").

217. The Landmark Coverage Letter quoted the policy language that the "Policy insures against all risk of direct physical loss, damage or destruction to property," but did not deny or address the presence of Coronavirus and COVID-19 at the Resorts, or the fact that such presence constitutes direct physical loss, damage or destruction to the Resorts.

218. Landmark cited additional coverage exclusions that do not apply to Plaintiffs' claim.

219. On August 23, 2021, RSUI, acting on the behalf of Landmark sent a letter denying coverage for Plaintiffs' claim under the policy (the "Landmark Denial Letter"). Despite quoting the policy language that the "Policy insures against all risk of direct physical loss, damage or destruction to property", Landmark failed to deny or address the presence of Coronavirus and COVID-19 at the Resorts or the fact that such presence constitutes direct physical loss, damage or destruction to the Resorts, and Landmark never visited or sent an adjuster to the Resorts to verify the accuracy of its assertions. The Landmark Denial Letter cites instead several coverage exclusions that do not apply to Plaintiffs' claim.

220. Homeland has sent no less than a dozen letters stating that Homeland has not yet made any coverage determination and is continuing to investigate coverage, despite never sending an adjuster to any of the Resorts to investigate Plaintiffs' Claim (the "Homeland

Coverage Letters”).

221. The Great Lakes and Homeland Coverage Letters, combined with the failure of both Great Lakes and Homeland to properly investigate and/or issue any coverage decision, are an effective denial of coverage insofar as those Defendant Insurers still have not agreed to provide the urgently needed coverage.

222. Indeed, the Insurers’ cursory requests for information do not come close to constituting a substantive investigation of Plaintiffs’ claim. In the Great Lakes’ Coverage Letter, Great Lakes asked just three questions regarding Plaintiffs’ Claim.

223. Worse, Mark Voronin, an adjuster for McLarens acting on behalf of Allianz, sent an email to Auberge on August 30, 2020, asking for certain information related to Plaintiffs’ Claim (the “August 2020 RFI”). Mr. Voronin noted that the list of questions presented to Auberge represented questions of several of the Insurers, but “[n]ot all insurers responded,” but nevertheless he “need[ed] to begin gathering information to further my reporting and the insurance companies’ coverage evaluation.”

224. Despite acknowledging that he ‘needed to begin gathering information’ to evaluate Plaintiffs’ claim, no one representing McLarens, Allianz, or any of the other Insurers or their claims adjusters ever set foot on any one of Plaintiffs’ Resorts to investigate Plaintiffs’ Claim.

225. Mr. Voronin’s information request would be insufficient for the Insurers to issue coverage decisions. For example, Mr. Voronin posed the following question to Auberge: “Is any property claiming physical loss or damage?”

226. However, Auberge had already reaffirmed over a month prior, in a July 15, 2020, email and via telephone conversations, that “[a]s a reminder, the notice we provided—and my commentary on our call—was with respect to the suspension of operations at the properties / locations covered under the referenced policies.”

227. Further, other Insurers used Mr. Voronin’s email request to further delay, and therefore deny, investigating and deciding coverage under Plaintiffs’ Claim.

228. For example, the Landmark Coverage Letter was sent under a cover email that stated: “We will be handling this claim under the attached Reservation of Rights as we await for a response to the Request for Information submitted to you by the account adjuster, Mark Voronin.”

229. It is especially important to remember that in the fall of 2020, Plaintiffs were not only dealing with the severe impact that COVID-19 and Coronavirus were having on their Resorts worldwide, but with the impact of the California wildfires on their properties in the Napa Valley—Solage and Calistoga Ranch.

230. Indeed, after the Napa Valley resorts were evacuated, Calistoga Ranch fell victim to the Glass Fire that tore through Napa Valley and burned to the ground, destroying all physical structures on the property.

231. The damage wrought to the homes, hotels, and decades-old family-owned wineries in Napa Valley, including Calistoga Ranch, was widely covered by regional and national news outlets.

232. Indeed, in August 2020, Mr. Voronin himself was evacuated due to the California wildfires. On August 21, 2020, Mr. Voronin sent an email to Auberge, stating that he would have a list of questions from the insurers next week but that he had been evacuated to San Francisco due to the wildfire encroaching Guerneville.

233. The Defendant Insurers’ abandonment of Plaintiffs is particularly egregious in light of Allianz’s (the lead insurer in the program) “pledge” to, among other things:

- “Be there when you need us”;
- “Give you certainty about your coverage as early as possible”;
- “Support you with fast claims payments—in a major first-party loss we will always consider interim payments”;
- “Clearly explain what is covered”;
- “Request information in a timely and clear fashion and keep you up to date with claims developments”;

- Be “committed to being your loyal partner: before, during and after a claim”;
- And “[s]trive to operate a ‘no surprise’ culture. We work to deal with claims in a fair, fast and effective manner.”<sup>136</sup>

234. Rather than “be there when their insureds needed” and “give their insureds certainty about coverage as early as possible,” the Defendant Insurers have reserved their rights on specious grounds, issued scattershot requests for information, and delayed properly investigating and providing a coverage decision as to Plaintiffs’ Claim.

235. On January 12, 2021, Plaintiffs asked Westport to extend the date by which Plaintiffs were required to commence legal actions under the Policy to March 22, 2022, because Plaintiffs are still evaluating and quantifying their losses.

236. However, on January 19, 2021, Westport gave Plaintiffs until only June 22, 2021—an additional 90 days—to file suit.

237. On June 4, 2021, Plaintiffs asked Westport to extend the date by which Plaintiffs were required to commence legal actions under the Policy to September 30, 2021, because Plaintiffs are still evaluating and quantifying their losses.

238. On June 17, 2021, Westport approved Plaintiffs’ request for an extension of time to file suit against Westport until September 30, 2021, “to the extent any period is running.”

239. On September 20, 2021, Plaintiffs requested from the Insurers a further extension of the suit limitation beyond September 30, 2021 to allow the exchange of information concerning Plaintiffs’ Claim.

240. On September 29, 2021, Auberge sent a letter to Mr. Voronin responding to the August 2020 RFI and providing extensive details about Plaintiffs’ Claim.

241. The September Response notes that it “is not intended to address all aspects

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<sup>136</sup> *AGCS Claims Pledge Global*, ALLIANZ GLOB. CORP. & SPECIALTY SE (2017), <https://www.agcs.allianz.com/content/dam/onemarketing/agcs/agcs/claims/AGCS-Claims-Pledge-Global.pdf> (last visited Feb. 22, 2021).

of this matter, and silence as to any issue [Insurers] have raised should not be construed as acquiescence”, and “is subject to supplementation or amendment.”

242. In the September Response Plaintiffs also requested an extension on the proof of loss and service of suit deadlines until March 31, 2022, for all the Policies, which was “necessary given the complex nature of the losses and the fact that losses continue, making it impossible to submit a final proof of loss” and because “there has been almost no adjustment of the loss” making it unreasonable for the Insurers “to force [Plaintiffs] to file suit simply to protect their rights under the Policies.”

243. On September 30, 2021, Mr. Voronin acknowledged the Plaintiffs’ request for an extension and receipt of the September Response without responding to Plaintiffs’ request for an extension.

244. In response to this email, on September 30, 2021, Auberge stated once again that it would “provide more information on a rolling basis” and requested at minimum “an extension for 4-months until January 30, 2022 for the service of suit limitation and to the extent there is a proof of loss requirement” because September 30, 2021 was “the deadline per the prior extension.”

245. Later the same day, Westport through Mr. Voronin approved only a 60-day extension for the service of suit limitation, i.e., until November 29, 2021 (Mr. Voronin’s communication stated the extension expired on November 30, 2021, which would actually be 61 days). Mr. Voronin also confirmed that “based upon the detail [Auberge] provided [his] office last night, [he would] be reporting to insurers in the short term, and request a greater extension of all policy provisions.” Mr. Voronin also agreed to set up a call with Auberge to discuss the September Response.

246. Since that time, Auberge participated in a call with McLarens to discuss Plaintiffs’ Claim and the Insurers’ requests for information.

247. In an email dated October 12, 2021, Mr. Voronin provided Auberge with the same requests for information as were sent to Auberge in the August 2020 RFI (the “October

2021 RFI”). In response to Auberge’s requests for clarification, Mr. Voronin stated: “[t]here [was] no specific format for providing information from the properties”; “[i]f certain of the questions don’t apply, [he didn’t] *believe* they need to be addressed” (emphasis added); and recognized that “[c]ertain items are mute, and were addressed in the Auberge letter of September 29, 2021 (such as description of the property and number of rooms).” Nevertheless, Mr. Voronin confirmed there had “been no revisions” to the Insurers’ questions and characterized the information requests as “talking points rather than a demand that all these items be formally addressed by each property”.

248. On November 19, 2021, Auberge sent a letter to McLarens further supplementing the September Response to the August 2020 RFI and responding to the October 2021 RFI (the “November Response”).

249. The November Response notes that it “is not intended to be all inclusive” or “address all aspects of the matter, and silence as to any issue [Insurers] have raised should not be construed as acquiescence”, and “is subject to supplementation or amendment.” Auberge also stated that: “[t]o the extent Auberge needs to respond more specifically, [Auberge] is working on the response and will respond to the extent [the Insurers] require more information.”

250. In the November Response, Auberge also requested, for all Plaintiffs, an extension on the proof of loss and service of suit deadlines until March 31, 2022, for all Policies, which was “necessary given the complex nature of the losses and the fact that losses continue, making it impossible to submit a final proof of loss.”

251. On November 22, 2021, Mr. Voronin acknowledged receipt of the November Response and stated he would submit the November Response to the Insurers, “noting the request for extensions of time and any other points that bear a formal response.”

252. On November 26, 2021, Mr. Voronin notified Auberge that the filing deadline of November 30, 2021 had been extended to February 28, 2022.

253. On December 7, 2021, Westport, through McLarens, sent a letter denying



Auberge's claim for the losses it suffered due to Coronavirus and COVID-19 under the Policy (with the exception of claims under the Cancellation of Bookings Endorsement) and "in response to Auberge's letters of September 29, 2021 and November 19, 2021" (the "Westport Denial Letter"). Westport recognized that Auberge claimed "it has 'experienced physical loss, damage or destruction when Coronavirus and Covid-19 were onsite, in the interstitial air of the properties, and in the surrounding areas'" and "that it 'experienced physical loss of the functional use of the properties when it/they was/were subject to government orders requiring the closure and/or restriction of its and its customers' facilities.'" Yet, the Westport Denial Letter contends "the actual and/or suspected presence of SARS-CoV-2 and/or COVID-19 at insured locations does not constitute direct physical loss or damage" and "government orders aimed at slowing the spread of SARS-CoV-2 and/or COVID-19 also do not constitute direct physical loss or damage."

254. The Westport Denial Letter also contended that "Auberge has not provided any information establishing 'direct physical loss, damage or destruction,'" even though it admitted "Auberge provided certain information concerning positive COVID-19 cases at its locations [and] actions purportedly taken by Auberge in response to COVID-19." The Westport Denial Letter also relied on several exclusions that Plaintiffs contend do not apply to this claim.

255. With respect to Auberge's claims for coverage under the Cancellation of Bookings Endorsement, the Westport Denial Letter stated, "Westport requires certain additional information in order to evaluate coverage" and included additional requests for information. This information request was a stalling tactic designed to delay payment of an indisputably covered claim given that Auberge had already provided Westport with the bulk of the requested information. This included "information that demonstrates 'infectious or contagious disease manifested by any person while on the premises of the insured.'" Indeed, in making this request for additional information, the Westport Denial Letter states, "Westport understands that Auberge has reported positive tests occurring at [five] locations."

256. On January 21, 2022, Everest, Allianz, and Interstate, through McLarens, sent a letter denying Auberge’s claim for the losses it suffered due to Coronavirus and COVID-19 under their Policies (the “McLarens Denial Letter”). These Insurers, like Westport, recognized that Plaintiffs claimed they had “experienced physical loss, damage or destruction when Coronavirus and Covid-19 were onsite, in the interstitial air of the properties, and in the surrounding areas” and that they also “experienced physical loss of the functional use of the properties when it/they was/were subject to government orders requiring the closure and/or restriction of its and its customers’ facilities.” The McLarens Denial Letter also acknowledged that Plaintiffs claimed the “presence of Coronavirus in and on [their] properties, including in indoor air, on surfaces, and on objects, caused physical loss, damage or destruction by causing physical harm to and altering property, by rendering it unsafe, by making it incapable of being used for its intended purpose and by otherwise causing the loss, in whole or in part, of its functional use.” Ignoring these claims, the McLarens Denial Letter contends “any alleged presence of the virus that causes COVID-19 on any property does not constitute direct physical loss, damage or destruction” thus “the insurance coverage has not been triggered.”

257. The McLarens Denial Letter further contends that “Auberge has not shown that access was impaired by any civil or military authority” and that Auberge did not “provide any specific factual information concerning the nature of physical loss or damage to property” or “any specific information relating to mandated business closures or operating restrictions at its properties.” Yet, the letter admits Auberge provided “details of the COVID-19 positive cases of employees, customers and vendors at each of the subject properties” and that Auberge claimed the Civil Authority Orders “led to [the] closure or to restrictions on [the] use [of the Resorts]” and were “issued in direct response to the presence of Coronavirus in properties surrounding the Insured Locations.”

258. The McLarens Denial Letter also relied on several exclusions that Plaintiffs contend do not apply to this claim. Specifically, the Insurers attempt to rewrite the

Contamination Exclusion, citing the defined term “**Pollutants**” and its inclusion of the term “virus”, but the Contamination Exclusion does not exclude “**Pollutants**” or even include the term “**Pollutants.**” Rather, it excludes only “seepage and/or pollution and/or contamination” – terms left undefined in the Policies and that solely refer to traditional environmental pollution. As such, the Contamination Exclusion does not exclude losses arising from Coronavirus or COVID-19.

259. While Homeland, on January 21, 2021, approved Plaintiffs’ request for an extension of time to file suit until March 16, 2022, Westport delayed providing Auberge a coverage decision for over *eighteen months*, without ever offering to investigate the losses or sending an adjuster to any of Auberge’s properties, and has agreed only to extend the one-year deadline under the Policy for Plaintiffs to file a coverage action in piecemeal extensions until February 28, 2022.

260. Thus, the Insurers have forced Plaintiffs to bring the instant action now to preserve their coverage rights.

**COUNT I**  
**(Declaratory Judgment)**

261. Plaintiffs incorporate the above Paragraphs by reference.

262. This is a cause of action for declaratory judgment pursuant to R.I. Gen. Laws §9-30-1, *et seq.* and R.I. Super. Ct. R. Civ. P. 57.

263. An actual and justiciable controversy exists between Plaintiffs and Defendant Insurers concerning their respective rights and obligations under the Policies.

264. As such, this Court has the authority to issue a declaratory judgment concerning the respective rights and obligations of Plaintiffs and the Defendant Insurers under the Policies.

265. Plaintiffs seek a declaratory judgment declaring that the losses Plaintiffs have suffered by covered by the Policies.

266. Plaintiffs seek a declaratory judgment declaring that Defendant Insurers are

responsible for fully and timely paying Plaintiffs' Claim.

**COUNT II**  
**(Breach of Contract)**

267. Plaintiffs incorporate the above Paragraphs by reference.

268. The Policies are valid and enforceable contracts.

269. Plaintiffs paid substantial premiums for the Policies and the promises of coverage contained therein and otherwise performed all of its obligations owed under the Policies or were excused from performance.

270. The Defendant Insurers have denied Plaintiffs' Claim and have refused to pay or otherwise honor their promises. In denying coverage for Plaintiffs' Claim as alleged above, the Defendant Insurers breached the contract (that is, Policies). As a result, Plaintiffs have suffered and continue to suffer damage in an amount to be proven at trial, but currently estimated in the tens of millions of dollars.

271. Consequential damages for breach of the Policies were reasonably contemplated by the parties when the Defendant Insurers issued the Policies.

**PRAYER FOR RELIEF**

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

1. On Count I, a declaratory judgment that the losses Plaintiffs have suffered are covered by the Policies, and that Defendant Insurers are responsible for fully and timely paying Plaintiffs' losses;
2. On Count II, for an award of damages in favor of Plaintiffs in an amount to be proven at trial, plus pre- and post-judgment interest at the maximum legal rate;
3. An award of Plaintiffs' attorneys' fees and costs pursuant to contract, statute and by law including but not limited to R.I. Gen. Laws § 9-1-45; and
4. For such other and further relief as this Court deems just and proper.

PLAINTIFF DEMANDS TRIAL BY JURY ON ALL COUNTS SO TRIABLE

Plaintiffs  
Auberge Resorts, LLC,  
Calistoga Ranch Owner LLC,  
Solage Owners LLC,  
Iconic Properties – Jerome, L.L.C.,  
Telluride Resort Partners LLC,  
Vanderbilt Hotel, LLC and  
US Hotels New England LLC  
By their Attorneys.

Date: February 25, 2022

/s/ David A. Wollin  
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