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Attorneys for Plaintiffs

SWISS RE CORPORATE SOLUTIONS
CAPACITY INSURANCE COMPANY,
CERTAIN UNDERWRITERS AT LLOYD'S
OF LONDON SUBSCRIBING TO POLICY
NO. B0180-PG1902660, CERTAIN
UNDERWRITERS AT LLOYD'S OF
LONDON SUBSCRIBING TO POLICY NO.
B0180-PG1902653, CERTAIN
UNDERWRITERS AT LLOYD'S OF
LONDON SUBSCRIBING TO POLICY NO.
B0180-PG1902661, CERTAIN
UNDERWRITERS AT LLOYD'S OF
LONDON SUBSCRIBING TO POLICY NO.
B0180-PG1902722, CERTAIN
UNDERWRITERS AT LLOYD'S OF
LONDON SUBSCRIBING TO POLICY NO.
B0180-PG1902654,

Plaintiffs,

v.

CAPE RESORTS MANAGEMENT CO.,
INC.,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: CAPE MAY COUNTY

DOCKET NO. _____

Civil Action

**COMPLAINT FOR
DECLARATORY JUDGMENT**

Plaintiffs Swiss Re Corporate Solutions Capacity Insurance Company f/k/a First Specialty
Insurance Company ("Swiss Re"), and Certain Underwriters at Lloyd's of London

(“Underwriters”) – including Certain Underwriters at Lloyd’s of London subscribing to Policy No. B0180-PG1092660, Certain Underwriters at Lloyd’s of London subscribing to Policy No. B0180-PG1902653, Certain Underwriters at Lloyd’s of London subscribing to Policy No. B0180-PG1902661, Certain Underwriters at Lloyd’s of London subscribing to Policy No. B0180-PG1902722, and Certain Underwriters at Lloyd’s of London subscribing to Policy No. B0180-PG1902654 – (collectively, “Plaintiffs” or “Interested Insurers”), by their counsel, as and for their Complaint for Declaratory Judgment against Defendant Cape Resorts Management Company, Inc. (“Defendant” or “Cape Resorts”), allege as follows:

THE NATURE OF THE ACTION

1. This lawsuit arises out of an insurance dispute over a claim for coverage for alleged business losses arising out of the SARS-CoV-2 virus that causes COVID-19 in humans under insurance contracts issued by Interested Insurers to Cape Resorts.

2. Upon information and belief, Cape Resorts is the owner and manager of insured hotels in Cape May, New Jersey.

3. On or about April 8, 2020, Cape Resorts provided notice to its primary insurers, including Interested Insurers, of an alleged business interruption loss due to the actual or suspected presence of COVID-19 and governmental orders mandating the closure of businesses issued to generally stop the spread of the SARS-CoV-2 virus that causes COVID-19 (the “Claim”).

4. The Interested Insurers received notice of the Claim on or about April 13, 2020.

5. By letter dated June 25, 2020, McLarens, Inc. (“McLarens”), the independent adjuster assigned by the Interested Insurers to investigate the Claim, acknowledged receipt of the Claim, and fully reserved all rights of the Interested Insurers under their respective insurance contracts.

6. The Interested Insurers issued primary layer insurance contracts to Cape Resorts.
7. Swiss Re issued to Cape Resorts a first-party commercial property insurance contract with number ESP 1000729-00, with a policy period of June 30, 2019 to June 30, 2020 (the “Swiss Re Insurance Contract”). The Swiss Re Insurance Contract has a limit of liability of \$2,500,000 part of \$10,000,000.
8. Certain Underwriters at Lloyd’s of London subscribing to Policy No. B0180-PG1902660 issued to Cape Resorts a first-party commercial property insurance contract with number B0180-PG1902660, with a policy period of June 30, 2019 to June 30, 2020 (the “PG1092660 Insurance Contract”). The PG1092660 Insurance Contract has a limit of liability of \$3,200,000 part of \$10,000,000.
9. Certain Underwriters at Lloyd’s of London subscribing to Policy No. B0180-PG1902653 issued to Cape Resorts a first-party commercial property insurance contract with number B0180-PG1902653, with a policy period of June 30, 2019 to June 30, 2020 (the “PG1092653 Insurance Contract”). The PG1092653 Insurance Contract has a limit of liability of \$750,000 part of \$10,000,000.
10. Certain Underwriters at Lloyd’s of London subscribing to Policy No. B0180-PG1902661 issued to Cape Resorts a first-party commercial property insurance contract with number B0180-PG1902661, with a policy period of June 30, 2019 to June 30, 2020 (the “PG1092661 Insurance Contract”). The PG1092661 Insurance Contract has a limit of liability of \$2,350,000 part of \$10,000,000.
11. Certain Underwriters at Lloyd’s of London subscribing to Policy No. B0180-PG1902722 issued to Cape Resorts a first-party commercial property insurance contract with number B0180-PG1902722, with a policy period of June 30, 2019 to June 30, 2020 (the

“PG1092722 Insurance Contract”). The PG1092722 Insurance Contract has a limit of liability of \$200,000 part of \$10,000,000.

12. Certain Underwriters at Lloyd’s of London subscribing to Policy No. B0180-PG1902654 issued to Cape Resorts a first-party commercial property insurance contract with number B0180-PG1902654, with a policy period of June 30, 2019 to June 30, 2020 (the “PG1092654 Insurance Contract”). The PG1092654 Insurance Contract has a limit of liability of \$1,000,000 part of \$10,000,000.

13. Cape Resorts has noticed the Claim under the Swiss Re Insurance Contract, PG1092660 Insurance Contract, PG1902653 Insurance Contract, PG1902661 Insurance Contract, PG1902722 Insurance Contract, and PG1902654 Insurance Contract (collectively, the “Insurance Contracts”).

14. The Interested Insurers performed all their duties and obligations under their respective Insurance Contracts and have not breached any provisions of their respective Insurance Contracts.

15. An actual controversy exists between the parties as to the rights and obligations, if any, of the parties under the Insurance Contracts.

16. Interested Insurers have no adequate remedy at law.

17. Interested Insurers require a declaration of their rights and obligations under the Insurance Contracts from this Court, including that there is no coverage for Cape Resorts’ Claim under the Insurance Contracts.

PARTIES

18. Swiss Re is incorporated under the laws of the State of Missouri with its principal place of business in New York, New York.

19. Certain Underwriters at Lloyd's of London subscribing to Policy No. B0180-PG1902660 consist of an unincorporated association of "Names" who underwrite and issued the PG1902660 Insurance Contract. Those Names are members of Lloyd's syndicates 4020, 1225, 3268, 1969, 1945, and 1967 for the 2019 Year of Account and are United Kingdom corporations with their principal places of business in the United Kingdom.

20. Certain Underwriters at Lloyd's of London subscribing to Policy No. B0180-PG1902653 consist of an unincorporated association of "Names" who underwrite and issued the PG1902653 Insurance Contract. Those Names are members of Lloyd's syndicate 1861 for the 2019 Year of Account and are United Kingdom corporations with their principal place of business in the United Kingdom.

21. Certain Underwriters at Lloyd's of London subscribing to Policy No. B0180-PG1902661 consist of an unincorporated association of "Names" who underwrite and issued the PG1902661 Insurance Contract. Those Names are members of Lloyd's syndicates 4444, 2623/623, and 1947 for the 2019 Year of Account and are United Kingdom corporations with their principal places of business in the United Kingdom.

22. Certain Underwriters at Lloyd's of London subscribing to Policy No. B0180-PG1902722 consist of an unincorporated association of "Names" who underwrite and issued the PG1902722 Insurance Contract. Those Names are members of Lloyd's syndicate 1729 for the 2019 Year of Account and are United Kingdom corporations with their principal place of business in the United Kingdom.

23. Certain Underwriters at Lloyd's of London subscribing to Policy No. B0180-PG1902654 consist of an unincorporated association of "Names" who underwrite and issued the PG1902654 Insurance Contract. Those Names are members of Lloyd's syndicate 5151 for the

2019 Year of Account and are United Kingdom corporations with their principal place of business in the United Kingdom.

24. Upon information and belief, Cape Resorts is incorporated under the laws of the State of New Jersey with its principal place of business in Cape May, New Jersey.

JURISDICTION AND VENUE

25. A declaratory judgment action may properly be brought in this Court pursuant to N.J.S.A. 2A:16-52.

26. Venue is proper in this Court under R. 4:3-2(a)(3) because the Defendant has its principal place of business in Cape May County.

ALLEGATIONS COMMON TO ALL COUNTS

A. The Insurance Contracts

27. The Insurance Contracts include certain common provisions. A copy of the common provisions of the Insurance Contracts is attached as Exhibit A.

28. The Insurance Contracts includes, among others, the following provisions:

III. PERILS INSURED:

This policy insures against all risk of direct physical loss or damage to the insured property except as hereinafter excluded.

IV. PERILS EXCLUDED:

This policy does not insure against loss or damage:

1. Caused by any of the following perils:

a) delay, loss of market, indirect or consequential loss of any kind (except as specifically afforded by this policy);

...

V. BUSINESS INCOME PROTECTION:

This form is extended to insure the actual loss of business income including loss of rents sustained by the insured resulting from the interruption of business or delay in commencing business or the untenability of the premises due to loss or damage to real or business personal property at an insured premise(s) as a direct result of a peril not excluded.

Loss of business income shall be payable during the period of indemnity, and shall not be limited by the expiration date of this policy. The insured is required to resume or begin normal business operations as promptly as possible and shall use all available means to eliminate unnecessary delay.

1. Loss of Business Income means:

...

- c) This policy will pay for the loss of rents or other income, caused by any of the buildings insured hereunder being wholly or partially rendered untenable by a peril insured under this policy including such period of time required to relet an area where a lease is terminated as a result of a covered occurrence;

....

6. Period of Indemnity means:

The length of time required, commencing at the time of an insured loss, with exercise of due diligence and dispatch, to replace, rebuild or repair the damaged property for such length of time as the rental value shall be affected in consequence of the damage not to exceed the policy limit.

...

8. Extension of Business Income Protection Coverage:

This form also insures against the actual loss sustained arising out of damage or destruction to property by a peril insured against to:

...

- b) property of a supplier of goods or services or the receiver of goods or services to or from the insured or others for the insured's account resulting in interruption of business;
- c) the premises of the insured or other premises in the vicinity thereby preventing ingress or egress, to or from the insured premises;

...

VI. EXTENSIONS OF COVERAGE:

Subject to the liability of Insurers under this extension not exceeding the relevant sums insured this policy is extended to include:

...

- 5. Indemnity for extra expense incurred in an attempt to continue operations. For the purpose of this insurance extra expense means the excess, if any, of the cost incurred chargeable to the operation of the insured's business, over and above the cost that would normally have been incurred to conduct the business during the same period had no damage or destruction occurred. Any salvage value of the property obtained for temporary use which remains after the resumption of normal operations, shall be taken into consideration in the adjustment of any loss.

...

XXIII. OCCURRENCE:

Occurrence means any one loss, disaster, casualty, incident or series of losses, disasters, casualties or incidents, not otherwise excluded by this Policy and arising out of a single event or originating cause and includes all resultant or concomitant insured losses. The occurrence must occur during the policy period.

...

POLLUTION, CONTAMINATION, DEBRIS REMOVAL EXCLUSION ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY INSURANCE POLICY

In consideration of the premium charged, it is agreed that:

...

2. Pollution and Contamination Exclusion

This policy does not cover loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy.

...

CONTAMINANTS or POLLUTANTS means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, virus, or hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency. Waste includes materials to be recycled, reconditioned or reclaimed.

...

B. Claim Correspondence

29. On April 13, 2020, the Interested Insurers received a notice of claim from Cape

Resorts that stated:

We are providing notice that we have suffered loss or damage that we believe is covered under one or more sections of the primary property insurance policy Hugh Wood sold to us. Please be advised that the losses/damages are continuing and may

be further affected by developing circumstances and various actions being taken in connection with COVID-19.

30. On June 25, 2020, the Interested Insurers, by and through McLarens, issued a letter advising Cape Resorts that they were proceeding with their investigation under a full and complete reservation of rights under the Insurance Contract, at law, and in equity.

31. The June 25, 2020 letter included certain preliminary requests for information required to investigate the Claim.

32. Cape Resorts did not respond to the June 25, 2020 letter.

33. On August 31, 2020, McLarens issued follow-up correspondence to Cape Resorts seeking a response.

34. Cape Resorts again did not respond.

35. Having received no response to their correspondence, McLarens issued a letter on behalf of Interested Insurers on December 30, 2020, advising Cape Resorts that if no response was received within the next thirty (30) days McLarens would recommend that the Interested Insurers close their files.

36. On September 30, 2021, McLarens received a letter dated September 20, 2021 from counsel for Cape Resorts concerning the Claim (the “September 30 Cape Resorts Letter”). A true and correct copy of the September 30 Cape Resorts Letter is attached as Exhibit B.

37. The September 30 Cape Resorts Letter purported to be a “Proof of Loss and Proof of Consequential Losses.” The letter identified the following purported loss locations: (1) Barons Cove, 31 W. Water St., Sag Harbor, New York 11963; (2) Beach Shack, 205 Beach Avenue, Cape May, New Jersey 08204; (3) The Virginia, 25 Jackson Street, Cape May, New Jersey 08204; (4) Virginia Cottages – Red Cottage, 25 Jackson Street, Cape May, New Jersey 08204; (5) Virginia Cottages – Pink Cottage, 12 Jackson Street, Cape May, New Jersey, 08204; (6) Virginia Cottages

– White Cottage, 2 Atlantic Terrance, Cape May, New Jersey, 08204; (7) Sandpiper Beach Club, 11 Beach Avenue, Cape may, New Jersey 08204; (8) The Star Inn, 29 Perry Street, Cape May, New Jersey 08204; (9) Congress Hall, 200 Congress Place, Cape May, New Jersey 08204.

38. The September 30 Cape Resorts Letter did not respond to the Interested Insurers’ preliminary requests for information.

39. The September 30 Cape Resorts Letter did not identify any “direct physical loss or damage to insured property.” The September 30 Cape Resorts Letter merely referenced: “Governmental orders which closed non-essential businesses, as well as, stay-at-home and ‘shelter in place’ orders which prevented customers from patronizing businesses” and “the virus’s attachment to surfaces....”

40. On November 3, 2021, the Interested Insurers, by and through McLarens, issued a letter to Cape Resorts requesting that Cape Resorts provide specific responses to the preliminary requests for information that had been outstanding since June 25, 2020 (the “November 3 Insurers Letter”). A true and correct copy of the November 3 Insurers Letter is attached as Exhibit C.

41. The November 3 Insurers Letter also advised that the Sag Harbor, New York location is not an insured location under the Insurance Contracts.

42. The November 3 Insurers Letter reserved all the Interested Insurers’ rights under the Insurance Contracts.

43. On or about November 5, 2021, McLarens received a letter from counsel for Cape Resorts concerning the Claim (the “November 5 Cape Resorts Letter”). A true and correct copy of the November 5 Cape Resorts Letter is attached hereto as Exhibit D.

44. The November 5 Cape Resorts Letter purported to be a “Proof of Loss and Proof of Consequential Losses.”

45. The November 5 Cape Resorts Letter was identical to the September 30 Cape Resorts Letter save for the fact that the November 5 Cape Resorts Letter removed reference to the Sag Harbor, New York location that is not an insured location under the Insurance Contracts.

46. The November 5 Cape Resorts Letter was received by the Interested Insurers on or about November 8, 2021.

47. The November 5 Cape Resorts Letter did not provide any of the preliminary information requested by the Interested Insurers.

48. On or about December 8, 2021, the Interested Insurers, by and through McLarens, issued a letter to Cape Resorts (the “December 8 Insurers Letter”) requesting full and complete responses to the preliminary requests for information issued by the Interested Insurers and outstanding since June 25, 2020. A true and correct copy of the December 8 Insurers Letter is attached as Exhibit E.

49. To date, Cape Resorts has not responded to the preliminary requests for information issued by the Interested Insurers.

COUNT I
(For Declaratory Judgment)

50. Interested Insurers repeat and reallege each of the foregoing paragraphs as if fully set forth herein.

51. As a result of the foregoing, there is an actual controversy between Interested Insurers and Cape Resorts concerning coverage for Cape Resorts’ Claim under the Insurance Contracts.

52. Interested Insurers seek a judicial declaration regarding the rights and obligations, if any, of the parties to the Insurance Contracts.

53. Interested Insurers respectfully submit that they are entitled to a declaration that Cape Resorts is not entitled to coverage for the Claim under the terms, provisions, conditions, and exclusions of the Insurance Contracts, based on, but not limited to, the following reasons:

a. The SARS-CoV-2 virus responsible for COVID-19 does not cause “direct physical loss or damage” to property.

b. The Stay-at-Home and Executive Orders issued by Governor Phil Murphy of New Jersey, the Mayor of Cape May, and any other orders issued by any federal, local, or other governmental agency, mayor, and/or municipalities impacting business operations due to the threat of COVID-19 do not cause “direct physical loss or damage” to property.

c. There is no coverage for “Business Income Protection” on the grounds and to the extent that there was no “direct physical loss or damage” to Cape Resorts’ insured property.

d. There is no coverage for “Extra Expense” on the grounds and to the extent that there was no “direct physical loss or damage” to Cape Resorts’ insured property.

e. There is no coverage under the “ingress or egress” provision on the grounds and to the extent that ingress or egress to or from Cape Resorts’ insured property was not prevented by “a peril insured against.”

f. There is no coverage on the grounds and to the extent that the Pollution, Contamination, Debris Removal Exclusion Endorsement for “loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape, or dispersal of CONTAMINANTS or POLLUTANTS, all whether direct or indirect, proximate or remote” applies and where “CONTAMINANTS or POLLUTANTS” is defined to include “virus.”

g. There is no coverage on the grounds and to the extent that Exclusion 1(a) for “delay, loss of market, indirect or consequential loss of any kind (except as specifically afforded by this policy)” applies.

h. The coronavirus pandemic is a single Occurrence under the terms of the Insurance Contracts.

i. There is no coverage for the Barons Cove property at 31 W. Water St., Sag Harbor, New York 11963 because that property is not covered under the Insurance Contracts.

j. Interested Insurers’ grounds for asserting there is no coverage for the Claim under the Insurance Contracts reflect the facts available to Interested Insurers at this time. Interested Insurers reserve the right to raise any additional grounds should Interested Insurers determine such grounds to exist.

RELIEF REQUESTED

Plaintiffs respectfully request that the Court enter judgment in their favor against Cape Resorts and declare that (a) Cape Resorts is not entitled to coverage under the Insurance Contracts and (b) awarding Plaintiffs such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiffs demand trial by jury on all issues so triable.

Dated: November 2, 2022
New York, New York

DLA Piper LLP (US)

/s/ R. Brian Seibert
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Attorneys for Plaintiffs

DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:25-4, Plaintiffs hereby designate the below listed attorneys at the firm DLA Piper LLP (US) as trial counsel in this action.

Dated: November 2, 2022
New York, New York

DLA Piper LLP (US)

/s/ R. Brian Seibert
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Attorneys for Plaintiffs

RULE 4:5-1 CERTIFICATION

Plaintiffs hereby certify that the matter in controversy is the subject of the following action pending in Pennsylvania state court: *Cape Resorts Management Co. v. Certain Underwriters at Lloyds et al.*, No. 01706 (Ct. Common Pleas Phila. Cnty.) (the “Pennsylvania action”). Plaintiffs dispute that the Pennsylvania Court has personal jurisdiction over them and dispute that venue is proper in the Pennsylvania action concerning this dispute over insurance coverage between non-Pennsylvania insurers and a New Jersey insured related to coverage sought for properties in New Jersey. Plaintiffs have raised preliminary objections to the Pennsylvania action on this and other bases.

Plaintiffs further certify that they are not aware of any other nonparties who should be joined in this action.

Dated: November 2, 2022
New York, New York

DLA Piper LLP (US)

/s/ R. Brian Seibert
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RULE 1:38-7 CERTIFICATION

I certify that confidential personal identifiers have been redacted from documents now submitted to the court and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).

Dated: November 2, 2022
New York, New York

DLA Piper LLP (US)

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