

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK


-----X	:	Index No. _____
WESTPORT INSURANCE CORPORATION,	:	
	:	<b>SUMMONS</b>
Plaintiff,	:	
v.	:	Date filed: August 26, 2021
	:	
VULCAN INC.,	:	Plaintiff designates New York
	:	County as the place of trial
Defendant.	:	
	:	Basis of venue: CPLR §503,
	:	Westport is a resident of
	:	New York County.
-----X	:	

To the above-named Defendant:

**YOU ARE HEREBY SUMMONED** to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on the plaintiffs' attorney within twenty (20) days after the service of this summons, exclusive of the day of service (or within thirty (30) days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: New York, New York  
August 26, 2021

**DLA PIPER LLP (US)**

By   
Aidan M. McCormack  
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*Attorneys for Plaintiff Westport Insurance Corporation*

To: Vulcan Inc.  
505 Fifth Avenue South, Suite 900  
Seattle, Washington 98104

SUPREME COURT OF THE STATE OF NEW YORK  
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Plaintiff,	:		
v.	:		
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VULCAN INC.,	:		
	:		
Defendant.	:		
-----X		:	

**COMPLAINT FOR DECLARATORY JUDGMENT,  
BREACH OF CONTRACT, AND INJUNCTIVE RELIEF**

WESTPORT INSURANCE CORPORATION (“Westport”), by counsel, as and for their complaint against defendant VULCAN INC. (“Vulcan”), alleges as follows:

**INTRODUCTION**

1. This lawsuit arises out of an insurance dispute over a claim for coverage for alleged business losses arising out of the virus that causes COVID-19 in humans under a property insurance contract issued by Westport to Vulcan which is subject to New York law and exclusive New York jurisdiction.

2. Vulcan is the owner of a variety of companies involved in technology, telecommunications, multimedia, energy, real estate, professional sports teams, and event venues.

3. Westport issued to Vulcan, at 505 Fifth Avenue South, Suite 900, Seattle, Washington 98104, a first-party commercial property insurance contract, policy number NAP 0453640 07 with a policy period of November 1, 2019 to November 1, 2020 (“Insurance Contract”).

4. A copy of the Insurance Contract is attached as Exhibit A.

5. Endorsement No. 6 to the Insurance Contract, “Choice of Law and Court Jurisdiction” states that New York law “shall govern the construction and interpretation of this insurance” and that the parties – both Westport and Vulcan – “irrevocably submit to the exclusive jurisdiction of the Courts of the State of New York” and “expressly waive all rights to challenge or otherwise limit such jurisdiction.”

6. The Choice of Law and Court Jurisdiction clause is mandatory, binding, and enforceable.

7. Westport performed all its obligations under the Insurance Contract and has breached no provisions of the Insurance Contract.

8. On or about April 20, 2020, Vulcan, through its broker Marsh Risk & Insurance Service, tendered to Westport and various other insurers a claim for business interruption loss due to governmental orders relating to the closure of businesses issued to generally stop the spread of the virus that causes COVID-19 (“Claim”). The April 20, 2020 loss notification states:

We would like to tender claims on behalf of Vulcan and all other insureds under our property insurance program for any and all potentially available benefits related to COVID-19, government orders, suspension of business activities, and the like. This includes, but is not limited to, coverage for Property Damage, Time Element, Special Coverages, Described Causes of Loss, and the Interruption by Communicable Disease endorsement. Please be advised that these losses are continuing and may be further affected by developing circumstances and various actions being taken in connection with coronavirus / COVID-19.

While the tender is being made to preserve rights for all properties insured under the program, our immediate concern is an investigation of coverage for the following insured locations:

- CenturyLink Field and Event Center
- Rose Quarter, including Moda Center and Veterans Memorial Coliseum
- Museum of Pop Culture (MoPOP)
- hClub Los Angeles
- hClub London
- Flying Heritage and Combat Armor Museum
- Living Computer Museum

- Cinerama

9. A copy of the loss notification is attached as Exhibit B.

10. By letter dated June 3, 2020, Westport stated that it was investigating the Claim under a full and complete reservation of rights, and requested information from Vulcan.

11. By letter dated August 4, 2020, Vulcan provided incomplete information about its Claim for coverage under the Insurance Contract.

12. On February 4, 2021, Westport requested additional information from Vulcan regarding its claimed losses.

13. On February 4, 2021, Vulcan asked Westport and the other insurers to agree to toll the Suit Against the Company Clauses in their policies on the basis that the Insurers' coverage investigation of Vulcan's insurance Claim was incomplete. Vulcan sought a tolling until March 11, 2022.

14. One insurer, Endurance American Specialty Insurance Company, denied coverage for the Claim in a letter dated March 10, 2021.

15. On March 11, 2021, Vulcan filed a complaint for declaratory relief regarding coverage for Vulcan's Claim against Westport and the other insurers in the United States District Court for the Western District of Washington at Seattle, Case. No. 2:21-cv-00336 ("Washington Action").

16. On April 7, 2021, Vulcan provided additional information in response to Westport's February 4, 2021 letter.

17. On August 24, 2021, Westport and other insurers denied coverage for the Claim.

18. Westport is thus filing this lawsuit because (i) an actual justiciable controversy exists between the parties as to the rights and obligations, if any, of the parties under the Insurance

Contract, and (ii) Vulcan has breached the Choice of Law and Court Jurisdiction provision in the Insurance Contract by filing litigation against Westport in the United States District Court for the Western District of Washington.

19. Westport has no adequate remedy at law.

20. Westport requires a declaration of its rights and obligations under the Insurance Contract from this Court, including that there is no coverage for Vulcan for the Claim under the Insurance Contract.

### **THE PARTIES**

21. Westport is incorporated under the laws of Missouri with its principal place of business at 1301 Sixth Avenue, New York, New York 10019.

22. Vulcan is incorporated under the laws of Washington with a principal place of business in Seattle, King County, Washington.

### **JURISDICTION**

23. A declaratory judgment action may be properly sought in this Court under CPLR § 3001.

24. Personal jurisdiction over Vulcan is proper under CPLR § 301. Endorsement No. 6 of the Insurance Contract provides that:

#### **Choice of Law and Court Jurisdiction**

The Laws of the State of New York, without regard to its conflict of laws, rules, that would cause the application of the laws of any other jurisdiction, shall govern the construction and interpretation of this insurance.

The parties hereto do irrevocably submit to the exclusive jurisdiction of the Courts of the State of New York and to the extent permitted by law, the parties expressly waive all rights to challenge or otherwise limit such jurisdiction.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.

## VENUE

25. The parties to the Insurance Contract expressly agreed to the “Choice of Law and Court Jurisdiction” clause.

26. The “Choice of Law and Court Jurisdiction” clause states that the “parties hereto do irrevocably submit to the exclusive jurisdiction of the Courts of the State of New York, and to the extent permitted by law, the parties expressly waive all rights to challenge or otherwise limit such jurisdiction.”

27. Westport’s principal office in New York is in New York County at 1301 Sixth Avenue, New York, New York 10019. Westport is therefore a resident of New York County pursuant to CPLR § 503(c).

28. Venue for this action is therefore proper in this Court under CPLR §§ 503 and 509.

## THE WESTPORT INSURANCE CONTRACT

29. Westport issued the Insurance Contract to VULCAN INC. as the “First Named Insured.”

30. The Insurance Contract identifies several entities as “Insured.” They are:

The **First Named Insured**; and  
any subsidiary of the **First Named Insured**. The **First Named Insured**’s interest in any partnership, joint venture or other legal entity in which the **First Named Insured** has management control or ownership as now constituted or hereafter is acquired.

31. The Insurance Contract includes, among others, the following provisions:

### **1.01. INSURING AGREEMENT**

This Policy Insures against direct physical loss of or damage caused by a **Covered Cause of Loss** to Covered Property, at an Insured Location described in Section II-2.01., all subject to the terms, conditions and exclusions stated in this Policy

\* \* \*

## 2.03. POLICY LIMITS OF LIABILITY

The Policy Limit is **\$800,000,000** for the total of all coverages combined regardless of the number of **Locations** involved subject to the following provisions:

2.03.01. The Company will pay no more in any one (1) **Occurrence** than its proportionate share of the Policy Limit.

\* \* \*

### Proportionate Share of Company for Loss or Damage

This Policy's proportionate share of loss or damage after the application of any deductible amount is:

10.0% being \$70,000,000 part of a \$700,000,000 excess \$100,000,000 loss layer

\* \* \*

### 2.03.07. Limits of Liability

The following are the Limits of Liability in an Occurrence unless otherwise shown. If, **NCP- No Coverage Provided** -is shown, then no coverage is provided for that item.

The limit of Liability we show for a coverage part is the maximum amount we will pay for the coverage part.

Sublimits within a coverage part may reduce the amount payable under a coverage part.

\* \* \*

\$10,000,000 For **ATTRACTION PROPERTY** Located within 1 miles of the Insured Location, \$5,000,000 per **location** and in the **occurrence**

\* \* \*

2.03.09. Time and Distance Limitations: In addition to the Limits of Liability shown elsewhere in this Policy, the following limitations apply:

Located within 1 mile of the Insured Location	<b>ATTRACTION PROPERTY</b>
---	----------------------------

\* \* \*

60 day period for property within 1 mile but not to exceed a \$10,000,000 limit.	<b>CIVIL OR MILITARY AUTHORITY</b>
--	------------------------------------

\* \* \*

60 day period for property within 1 mile      INGRESS/EGRESS  
but not to exceed a \$10,000,000 limit.

\* \* \*

30 day period but not to exceed a      INTERRUPTION BY  
\$1,000,000 limit      COMMUNICABLE DISEASE

\* \* \*

## 2.04. QUALIFYING PERIOD

For the Coverages listed below the following Qualifying Period  
applies:

INTERRUPTION BY COMMUNICABLE DISEASE      24 hours

\*\*\*

## 2.05.06. Policy Deductible(s)

2.05.06.01.    \$50,000 combined Property Damage (PD) and Time  
Element (TE) ...

\* \* \*

## SECTION III – PROPERTY DAMAGE

\* \* \*

## 3.03. EXCLUSIONS

The following exclusions apply unless specifically stated elsewhere  
in this Policy:

3.03.01.    This Policy excludes the following unless it results from direct  
physical loss or damage not excluded by this Policy.

3.03.01.01. Contamination, and any cost due to Contamination including  
the inability to use or occupy property or any cost of making  
property safe or suitable for use or occupancy, except as  
provided by the Radioactive Contamination Coverage of this  
Policy.

\* \* \*

3.03.02. This Policy excludes:

3.03.02.01. Loss or damage arising from delay, loss of market, or loss of use.

3.03.02.02. Indirect or remote loss or damage.

\* \* \*

3.03.02.05. Loss or damage resulting from the Insured's suspension of business activities, except to the extent provided by this Policy.

\* \* \*

## SECTION IV - TIME ELEMENT

### 4.01. LOSS INSURED

4.01.01. The Company will pay for the actual Time Element loss the Insured sustains, as provided in the Time Element Coverages, during the Period of Liability. The Time Element loss must result from the necessary **Suspension** of the Insured's business activities at an Insured Location. The **Suspension** must be due to direct physical loss of or damage to Property (of the type insurable under this Policy other than **Finished Stock**) caused by a **Covered Cause of Loss** at the **Location**, or as provided in Off Premises Storage for Property Under Construction Coverages.

The Company will also pay for the actual Time Element loss sustained by the Insured, during the Period of Liability at other Insured Locations. The Time Element loss must result from the necessary **Suspension** of the Insured's business activities at the other Insured Locations. Such other Location must depend on the continuation of business activities at the **Location** that sustained direct physical loss or damage caused by a **Covered Cause of Loss**.

\* \* \*

### 4.02.03. EXTRA EXPENSE

The Company will pay for the reasonable and necessary Extra Expenses incurred by the Insured, during the Period of Liability, to resume and continue as nearly as practicable the Insured's normal business activities that otherwise would be necessarily suspended, due to direct physical loss of or damage caused by a **Covered Cause of Loss** to Property of the type insurable under this policy at a Location.

The Company will reduce the amount payable as Extra Expense by the fair market value remaining at the end of the Period of Liability for property obtained in connection with the above.

Extra Expenses mean that amount spent to continue the Insured's business activities over and above the expenses the Insured would have normally incurred had there been no direct physical loss of or damage caused by a **Covered Cause of Loss** to Property of the type insurable under this policy at a **Location**. Extra Expense does not include any Gross Earnings loss or Gross Profit loss, the cost of permanent repair or replacement of property that has suffered direct physical loss or damage, or expenses otherwise payable elsewhere in the Policy.

\* \* \*

#### 4.02.06. EXCLUSIONS

In addition to the exclusions elsewhere in this Policy, the following exclusions apply to Time Element Coverage;

4.02.06.01. This Policy does not insure against:

4.02.06.01.01. Any loss during any idle period that would have been experienced had the Suspension of business activities not occurred. This includes, but is not limited to, when production, operation, services, delivery or receipt of goods or services or any other business activities would have ceased, or would not have taken place or would have been prevented due to:

\* \* \*

4.02.06.01.01.03. Any reason other than physical loss or damage insured by this Policy.

4.02.06.01.02. Any increase in Time Element loss due to:

\* \* \*

4.02.06.01.02.04. Any other consequential or remote factors.

\* \* \*

#### SECTION V - SPECIAL COVERAGES & DESCRIBED CAUSES OF LOSS

\* \* \*

#### 5.02.03. CIVIL OR MILITARY AUTHORITY

The Company will pay for the actual Time Element loss sustained by the Insured, as provided by this Policy, resulting from the necessary **Suspension** of the Insured's business

activities at an Insured Location if the **Suspension** is caused by order of civil or military authority that prohibits access to the **Location**. That order must result from a civil authority's response to direct physical loss of or damage caused by a **Covered Cause of Loss** to property not owned, occupied, leased or rented by the Insured or insured under this Policy and located within the distance of the Insured's Location as stated in the Declarations. The Company will pay for the actual Time Element loss sustained, subject to the deductible provisions that would have applied had the physical loss or damage occurred at the Insured Location, during the time the order remains in effect, but not to exceed the number of consecutive days following such order as stated in the Declarations up to the limit applying to this Coverage.

\* \* \*

#### 5.02.05. CONTINGENT TIME ELEMENT

This Policy covers the actual Time Element loss as provided by the Policy, sustained by the Insured during the Period of Liability directly resulting from the necessary **Suspension** of the Insured's business activities at an Insured Location if the **Suspension** results from direct physical loss of or damage caused by a **Covered Cause of Loss** to Property (of the type insurable under this Policy) at **Direct Dependent Time Element Locations, Indirect Dependent Time Element Locations, and Attraction Properties** located worldwide ...

\* \* \*

#### 5.02.15. INGRESS/EGRESS

The Company will pay for the actual Time Element loss sustained by the Insured, as provided by this Policy, resulting from the necessary **Suspension** of the Insured's business activities at an Insured Location if ingress or egress to that Insured Location by the Insured's suppliers, customers or employees is prevented by physical obstruction due to direct physical loss of or damage caused by a **Covered Cause of Loss** to property not owned, occupied, leased or rented by the Insured or insured under this Policy and located within the distance of the Insured Location as stated in the Declarations. The Company will pay for the actual Time Element loss sustained, subject to the deductible provisions that would have applied had the physical loss or damage occurred at the Insured Location, during the time ingress or egress remains prevented by physical obstruction but not to exceed the number of consecutive days as

stated in the Declarations following such obstruction up to the limit applying to this Coverage.

\* \* \*

#### 5.02.22. PROFESSIONAL FEES

This Policy covers the actual costs incurred by the Insured, of reasonable fees paid to the Insured's accountants, architects, auditors, engineers, or other professionals and the cost of using the Insured's employees, for producing and certifying any details contained in the Insured's books or documents, or such other proofs, information or evidence required by the Company resulting from loss or damage payable under this Policy for which the Company has accepted liability.

This Coverage will not include the fees and costs of attorneys, Public Adjusters, and loss appraisers, all including any of their subsidiary, related or associated entities either partially or wholly owned by them or retained by them for the purpose of assisting them, nor the fees and costs of loss consultants who provide consultation on coverage or negotiate claims.

\* \* \*

### SECTION VI – GENERAL POLICY CONDITIONS

#### 6.09. JURISDICTION

Any disputes arising hereunder will be exclusively subject to the jurisdiction of a court of competent jurisdiction within the USA.

\* \* \*

### SECTION VII -- DEFINITIONS

\* \* \*

**7.04. Attraction Properties** - A property within the distance described in the declarations of an **Insured Location** that attracts customers to the **Insured's** business.

\* \* \*

**7.09. Contamination(Contaminated)** - Any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, **Fungus**, mold or mildew.

**7.10. Contaminant(s)** - Any solid, liquid, gaseous, thermal or other irritant, pollutant or contaminant, including but not limited to smoke,

vapor, soot, fumes, acids, alkalis, chemicals, waste (including materials to be recycled, reconditioned or reclaimed), asbestos, ammonia, other hazardous substances, **Fungus or Spores**.

\* \* \*

**7.45. Occurrence** - All loss(es) or damage that is attributable directly or indirectly to one cause or a series of similar or related causes. All such loss(es) or damage will be treated as one **Occurrence**. However, if **Occurrence** is specifically defined anywhere in this **Policy**, that definition will apply to the applicable coverage provided.

\* \* \*

### **INFECTIOUS OR CONTAGIOUS DISEASE**

This policy covers the Actual Loss Sustained incurred by the Insured during the Period of Liability due to the necessary interruption of the Insured's business when such interruption is a result of competent regulatory authority prohibiting access to an insured location in consequence of:

- 1) a reportable disease or condition manifested by any person while at the insured location or an outbreak of a reportable disease or condition within the insured location

\* \* \*

- 5) an enquiry [sic] being carried out by a competent regulatory authority, or by the Insured as a result of a reportable disease or condition

\* \* \*

**Endorsement Number: 6**

\* \* \*

### **MISCELLANEOUS CHANGES ENDORSEMENT**

\* \* \*

The following provision(s) is (are) hereby attached to and made a part of this policy.

\* \* \*

### **Choice of Law and Court Jurisdiction**

The Laws of the State of New York, without regard to its conflict of laws, rules, that would cause the application of the laws of any other jurisdiction, shall govern the construction and interpretation of this insurance.

The parties hereto do irrevocably submit to the exclusive jurisdiction of the Courts of the State of New York and to the extent permitted by law, the parties expressly waive all rights to challenge or otherwise limit such jurisdiction.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.

\* \* \*

### **FIRST CAUSE OF ACTION**

### **DECLARATORY JUDGMENT**

32. Westport repeats and realleges each of the foregoing paragraphs as if fully set forth herein.

33. Westport seeks a judicial declaration regarding the rights and obligations, if any, of the parties to the Insurance Contract.

34. Westport respectfully submits that it is entitled to a judicial declaration that Vulcan is not entitled to coverage for the Claim under the terms, provisions, conditions and exclusions of the Insurance Contract, based on, but not limited to, these reasons:

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

b. The Governmental Executive Orders issued by any federal, local or other government agency, governor, 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 Infectious or Contagious Disease on the grounds and to the extent that Vulcan did not suffer a “necessary interruption” to its business as a result of

a “competent regulatory authority prohibiting access to an insured location in consequence of”:

(1) “a reportable disease or condition manifested by any person while at the insured location or an outbreak of a reportable disease or condition within the insured location,” or (2) “an enquiry [sic] being carried out by a competent regulatory authority, or by the Insured as a result of a reportable disease or condition.”

d. To the extent the Court determines that there is coverage for Infectious or Contagious Disease, it is limited to a 30-day period but not to exceed a \$1,000,000 sublimit for Interruption by Communicable Disease. There is therefore no coverage for Infectious or Contagious Disease because the sublimit of \$1,000,000 is below the attachment point of the Insurance Contract of \$100,000,000.

e. There is no coverage under the Extra Expense provision on the grounds and to the extent that there was no “direct physical loss or damage” to Vulcan’s insured property and, therefore, no “Period of Liability.”

f. There is no coverage under the “Attraction Property” provision on the grounds and to the extent that Vulcan’s alleged loss did not result from “direct physical loss or damage” to property within 1 mile of an insured location that attracts customers to the Insured's business.

g. To the extent the Court determines that there is coverage for Attraction Property, it is limited to the sublimit of \$5,000,000. There is therefore no coverage for Attraction Property because the sublimit of \$5,000,000 is below the attachment point of the Insurance Contract of \$100,000,000.

h. There is no coverage under the Contingent Time Element provisions on the grounds and to the extent that there was no “direct physical loss or damage” to the property of

customers, suppliers, contract manufacturers or contract service providers to the Insured that prevented suppliers from supplying goods or services to Vulcan or customers from receiving goods or services from Vulcan.

i. To the extent the Court determines that there is coverage for Contingent Time Element – Direct Dependent Time Element Location, it is limited to the sublimit of \$10,000,000. There is therefore no coverage for Contingent Time Element – Direct Dependent Time Element Location because the sublimit of \$10,000,000 is below the attachment point of the Insurance Contract of \$100,000,000.

j. To the extent the Court determines that there is coverage for Contingent Time Element – Indirect Dependent Time Element Location, it is limited to the sublimit of \$5,000,000. There is therefore no coverage for Contingent Time Element – Indirect Dependent Time Element Location because the sublimit of \$5,000,000 is below the attachment point of the Insurance Contract of \$100,000,000.

k. There is no coverage under the Ingress / Egress provision on the grounds and to the extent that there was no “necessary Suspension of” Vulcan’s business activities at an Insured Location resulting from prevention of ingress or egress to an Insured Location “by physical obstruction due to direct physical loss of or damage caused by a covered cause of loss to property.”

l. To the extent the Court determines that there is coverage for Ingress / Egress, it is limited to a 60-day period and the sublimit of \$10,000,000. There is therefore no coverage for Ingress / Egress because the sublimit of \$10,000,000 is below the attachment point of the Insurance Contract of \$100,000,000.

m. There is no coverage under the Civil or Military Authority provision on the grounds and to the extent that there was no “necessary Suspension of” Vulcan’s business activities

“caused by order of a civil or military authority that prohibits access to” an Insured Location where the order referenced above results from a civil authority’s response to direct physical loss of or damage caused by a Covered Cause of Loss to property.

n. To the extent the Court determines that there is coverage for Order of Civil or Military Authority, it is limited to a 60-day period and the sublimit of \$10,000,000. There is therefore no coverage for Order of Civil or Military Authority because the sublimit of \$10,000,000 is below the attachment point of the Insurance Contract of \$100,000,000.

o. There is no coverage under the Professional Fees provision on the grounds and to the extent that, among other things, Vulcan did not incur “reasonable expenses” for “accountants, architects, auditors, engineers, or other professionals” for producing and certifying the details of a claim insured by the Insurance Contract.

p. To the extent the Court determines that there is coverage for Professional Fees, it is limited to \$2,500,000. There is therefore no coverage for Professional Fees because the sublimit of \$2,500,000 is below the attachment point of the Insurance Contract of \$100,000,000.

q. There is no coverage on the grounds and to the extent that Exclusion 3.03.02.01 for “delay, loss of market” applies.

r. There is no coverage on the grounds and to the extent that Exclusion 3.03.02.02 for “indirect or remote loss or damage” applies.

s. There is no coverage on the grounds and to the extent that Exclusion 3.03.02.05 for “suspension of business activities” applies.

t. There is no coverage on the grounds and to the extent that Exclusion 3.03.01.01 applies, for “Contamination, and any cost due to Contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy”

where Contamination is defined as “Any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, Fungus, mold or mildew.”

u. There is no coverage on the grounds and to the extent that any deductibles and/or retentions in the Insurance Contract apply.

v. There is no coverage on the grounds and to the extent that Vulcan’s loss does not exceed the coverage of the underlying limits of \$100,000,000, which is excess of deductibles, per Occurrence.

w. There is no coverage on the grounds and to the extent that Vulcan’s loss exceeds Westport’s proportionate share of the Policy Limit or any Sublimit(s) of Liability, which is \$70,000,000 (that being 10%) part of \$700,000,000 excess of \$100,000,000 which is excess of deductibles, per Occurrence.

x. The coronavirus pandemic is a single OCCURRENCE under the terms of the Insurance Contract.

35. Westport’s grounds for asserting that there is no coverage for the Claim under the Insurance Contract reflect the facts available to Westport right now. Westport reserves the right to raise any additional grounds should Westport determine such grounds to exist.

## **SECOND CAUSE OF ACTION**

### **BREACH OF CONTRACT**

36. Westport repeats and realleges each of the foregoing paragraphs as if fully set forth herein.

37. The Insurance Contract is a valid and enforceable contract between Vulcan and Westport.

38. Westport performed all its obligations under the Insurance Contract and has not breached any provisions of the Insurance Contract.

39. The Insurance Contract contains an “irrevocable” and “exclusive” Choice of Law and Court Jurisdiction provision in Endorsement 6 calling for all disputes to be brought in the “Courts of the State of New York.”

### **Choice of Law and Court Jurisdiction**

The Laws of the State of New York, without regard to its conflict of laws, rules, that would cause the application of the laws of any other jurisdiction, shall govern the construction and interpretation of this insurance.

The parties hereto do irrevocably submit to the exclusive jurisdiction of the Courts of the State of New York and to the extent permitted by law, the parties expressly waive all rights to challenge or otherwise limit such jurisdiction.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.

40. In blatant breach of this choice of law and forum provision, Vulcan sued Westport in the Washington Action in Washington Federal Court.

41. Vulcan waived its right to challenge or otherwise limit jurisdiction in the “Courts of the State of New York.”

42. Due to Vulcan’s breach of contract, Westport suffered damages or will suffer damages as a direct result of Vulcan’s breach. Among others, Westport was required to incur or will incur significant costs, fees, and expenses litigating the Washington Action and seeking its dismissal pursuant to the valid and enforceable exclusive forum provision.

## **THIRD CAUSE OF ACTION**

### **INJUNCTIVE RELIEF**

#### **Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction**

43. Westport repeats and realleges each of the foregoing paragraphs as if fully set forth herein.

44. Concurrently with the filing of this Complaint, Westport will move for a temporary restraining order (“TRO”) and a preliminary injunction asking the Court to enjoin Vulcan, its subsidiaries and affiliates, agents, and any persons working on their behalf or in concert with them from the commencement or prosecution of any proceeding or action against Westport in any other court, forum, or venue in the United States arising out of, or relating in any way to, the Insurance Contract, including but not limited to the Washington Action.

45. As explained above, Westport seeks a declaratory judgment of the rights and obligations of the parties under the Insurance Contract.

46. The Insurance Contract contains, among other things, Endorsement Number 6, which contains a “Choice of Law and Court Jurisdiction” provision. This provision states that New York law “shall govern the construction and interpretation of this insurance” and that the parties – both Westport and Vulcan – “irrevocably submit to the exclusive jurisdiction of the Courts of the State of New York” and “expressly waive all rights to challenge or otherwise limit such jurisdiction.”

47. The Choice of Law and Court Jurisdiction clause is binding, mandatory, and enforceable.

48. Vulcan’s assertion in the Washington Action of the application of Washington law under Washington cases is contrary to the agreed Choice of Law and Court Jurisdiction in the Insurance Contract.

49. On March 11, 2021, Vulcan filed a complaint for declaratory relief regarding coverage for Vulcan’s Claim against Westport and the various insurers in the Washington Action.

50. The State of Washington does not respect or enforce choice of law or exclusive forum provisions in insurance contracts. New York public policy, however, applies the choice of law analysis under New York law. And under New York law, the Insurance Contract's Choice of Law and Court Jurisdiction provision must be honored.

51. Thus, if a temporary restraining order and preliminary injunction is not granted here, Westport will be irreparably harmed if Vulcan is allowed to breach its contractual obligations because a court in Washington State will not enforce the Insurance Contract's New York choice of law provision and exclusive New York forum selection provision.

52. Westport is likely to succeed on the merits of its declaratory judgment claim that the New York choice of law and exclusive jurisdiction provision governs this action.

53. The balance of the equities also favors Westport in this case, in which it seeks to enforce contractual provisions that designate New York as the exclusive forum for actions or proceedings relating to, or arising out of, the Insurance Contract and New York law as the rule of decision.

54. Vulcan has sued Westport in Washington and attempting to avoid the New York forum to which it agreed, as well as avoid the application of New York law altogether.

### **PRAYER FOR RELIEF**

Westport respectfully requests:

(a) the Court enter judgment in its favor and against Vulcan and all subsidiaries or other insureds and declaring that:

(1) this Court is the proper venue to litigate any disputes between the parties,

(2) this Court should determine the rights and obligations of the parties under the

Insurance Contract under New York law, and

(3) Vulcan is not entitled to coverage under the Insurance Contract;

(b) an award of damages in favor of Westport for Vulcan's breach of the Insurance Contract;

(c) entry of a temporary restraining order enjoining Vulcan, its subsidiaries and affiliates, agents, and any persons working on their behalf or in concert with them from the commencement or prosecution of any proceeding or action against Westport in any other court, forum, or venue in the United States arising out of, or relating in any way to, the Insurance Contract;

(d) entry of a preliminary injunction enjoining Vulcan, its subsidiaries and affiliates, agents, and any persons working on their behalf or in concert with them from the commencement or prosecution of any proceeding or action against Westport in any other court, forum, or venue in the United States arising out of, or relating in any way to, the Insurance Contract; and

(e) an award in favor of Westport of such other and further relief as the Court deems just and proper.

**JURY DEMAND**

Westport demands trial by jury of all issues so triable.

Dated: New York, New York

August 26, 2021



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