

CAUSE NO. \_\_\_\_\_

AMERICAN LIBERTY  
HOSPITALITY, INC.  
*Plaintiff,*

v.

CONTINENTAL CASUALTY  
COMPANY

*Defendant.*

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IN THE DISTRICT COURT OF

HARRIS COUNTY

\_\_\_\_\_ JUDICIAL DISTRICT

**PLAINTIFF'S ORIGINAL PETITION AND REQUEST FOR DECLARATORY RELIEF**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, AMERICAN LIBERTY HOSPITALITY, INC. (referred hereto as "Plaintiff") and file this its Original Petition and Request for Declaratory Relief complaining of the Defendant CONTINENTAL CASUALTY COMPANY (referred hereto as "Defendant") and would respectfully show the Court as follows:

**I. DISCOVERY LEVEL**

1. This case will be a Level II case for discovery purposes.

**II. PARTIES JURISDICTION AND VENUE**

2. Plaintiff, American Liberty Hospitality, Inc. ("ALH"), is a Texas corporation formed under the laws of the State of Texas with its principal place of business in Houston, Harris County, Texas. Plaintiff is a hotel management company which was covered under its Policy with Defendant.

3. Defendant Continental Casualty Company ("Continental") is a foreign insurance company with its principal place of business in the State of Illinois and licensed to do business in

the State of Texas. Defendant can be served with process through its registered agent, CT Corporation System, 1999 Bryan Street, Suite 900, Dallas, Texas 75201-3136, or wherever he may be found. Issuance of citation is requested to be issued at this time.

4. The Court has personal jurisdiction over the Defendant because it is a corporation that does substantial business in the State of Texas, such that it has substantially more than minimum contacts in Texas generally. Specifically, with respect to this suit, the Defendant engaged in the business of insurance in Texas and issued the Policy at issue in this case. The Policy covered property and activities in Houston, Texas that pertain specifically to Plaintiff, which is a Texas resident.

5. This Court also has personal jurisdiction over Defendant pursuant to the Texas Long-Arm Statute. TEX. CIV. PRAC. & REM. CODE §§ 17.041-.042. By virtue of its business dealings and other significant contacts in Texas, Defendant should reasonably anticipate that they are subject to the jurisdiction of Texas and her courts. Defendant has certainly and purposefully availed itself of the rights and privileges of doing business in Texas, including operating facilities, insuring Texas assets, soliciting business from Texas residents and conducting regular business in Texas.

6. The amount in controversy in this case is within the jurisdictional limits of this Court. Jurisdiction is proper pursuant to TEX. CIV. PRAC. & REM. CODE §37.001, et seq.

7. Venue is proper in Harris County, Texas because (1) the insurance Policy which is the basis of this suit was issued in Harris County; (2) the Policy covers property in Harris County; (3) Plaintiff operates in Harris County, and (4) a substantial part of the events giving rise to the claim occurred in Harris County, Texas. TEX. CIV. PRAC. & REM. CODE §15.002(a)(1).

8. Additionally, venue is proper under TEX. CIV. PRAC. & REM CODE §15.020 because the insurance agreement was a major transaction covering property in Harris County.

### **III. NATURE OF THE ACTION**

#### **A. The Insurance Policy**

9. This is a breach of contract and bad faith dispute involving a carrier who provided commercial business interruption coverage and other elements of coverage to Plaintiff. The policy in question, (hereinafter referred to as “the Policy”) contained coverage for loss of business income, extra expense coverage, civil authority coverage and ingress and egress coverage. At all times pertinent hereto, Plaintiff fully complied with all the terms and conditions of the Policy.

10. Defendant is in the business of selling insurance. In essence, it is in the business of purchasing the risk of loss in exchange for the payment of premiums. That is defendant’s “one job.”

11. Plaintiff is in the business of providing restaurant and hotel locations in Texas and Louisiana.

12. American Liberty Hospitality, Inc. bought business interruption insurance from Continental Casualty Company to transfer its risk and provide coverage for events known and unknown including risks just like the outbreak of the Covid 19 virus. In pertinent part, the policy that Continental Casualty issued promised to provide coverage for losses incurred due to a “necessary suspension” of American Liberty Hospitality, Inc.’s business operations. The Policy also expressly promised to cover American Liberty Hospitality, Inc.’s business interruption losses in the event that the government forced them to close. Plaintiff paid its premiums under the policy and properly filed its claim, but Continental Casualty Company wrongfully denied coverage to American Liberty Hospitality, Inc.’s and refused to pay under the claim.

13. Plaintiff's Policy was in force from May 30, 2019, through May 30, 2020. Plaintiff suffered losses beginning March 23, 2020 and continuing into August of 2021. On August 5, 2020, CNA issued a position statement denying coverage under the Policy.

14. Plaintiff's loss was "direct." American Liberty Hospitality, Inc. is asking Continental Casualty Company to pay its loss of business income because the property was physically altered and directly damaged. As a result, Plaintiff was unable to use its insured properties in the manner intended.

15. Plaintiff's loss was also "physical." The probability and risk of illness prevented the use of the space in no less of a way than a hurricane could render the interior space of a business unusable. There was a clear loss of functionality of the space for business purposes, making American Liberty Hospitality, Inc.'s ability to use its physical space inaccessible. The loss was both physical and tangible in that the properties were initially in a satisfactory state and changed by an external event – the presence of the Corona virus – into an unsatisfactory and dangerous state.

16. Defendant drafted the insurance policy or policies in question.

17. Plaintiff purchased the insurance policy number 6023402859. A copy of the policy is attached as Exhibit 1 (the "Policy").

18. The Insurance Services Office, Inc. ("ISO") publishes policy forms for use by the insurance industry.

19. The Policy utilizes, in part, policy forms and language published by the ISO, as reflected by the ISO copyright designation at the bottom of numerous pages of the Policy.

20. Prior to the effective date of the Policy, ISO published and made available for use a standard virus exclusion form.

21. Defendant chose not to include the ISO standard virus exclusion form in the Policy.

22. Plaintiff's Policy provides coverage for loss of Business Income ("BI"), Extra Expense ("EE") coverage, Denial of Access by Civil Authority, and Ingress Egress.

23. Despite its representations that it would provide Plaintiff coverage for Business Interruption and related coverages mentioned above, Defendant chose to deny Plaintiff's legitimate claims under BI, EE coverage, coverage for loss due the actions of a Civil Authority, and Ingress-Egress provisions.

24. While the Policy was in force, Plaintiff sustained loss(es) due physical alteration of the properties caused by the physical presence of SARS-CoV-2 and COVID-19 at, in, on, and/or around its premises described in the Policy.

25. Plaintiff seeks a declaration that there is in fact coverage for the business interruption losses sustained as a result of direct physical loss of or damage to property arising from SARS-CoV-2 virus (the "Coronavirus") and the disease it causes, Coronavirus Disease 2019 ("COVID-19") being physically at, in, on, and around Plaintiff's premises described in the Policy. Additionally, Plaintiff suffered direct physical loss and damage because of the civil authority orders issued by the Governor Greg Abbot of Texas and Governor Jon Bel Edwards and the Departments of Health for Plaintiff's states and municipalities.

26. Defendant's decision not to provide coverage and refuse to pay claims under the common policy form(s) issued to Plaintiff gives rise to Plaintiff's right to seek declaratory judgment pursuant to Tex. Civ. Prac. & Rem. Code §37.004 and articles 541 and 542 of the Texas Insurance Code. Plaintiff it is entitled to receive the benefit of the insurance coverage it purchased and for indemnification of the business losses it has sustained.

## **B. The Coronavirus and COVID-19**

27. COVID-19 is a severe infectious disease caused by the Coronavirus. The Coronavirus can cause serious systemic illness and death.<sup>1</sup> To date, there have been over 78.4M confirmed COVID-19 cases in the United States.<sup>2</sup> Due to pervasive spread and presence of the Coronavirus and COVID-19 across the planet, both are presumed to be present or imminently present everywhere.<sup>3</sup>

28. The existence and/or presence of Coronavirus and COVID-19 is not simply reflected in reported cases or individuals' positive test results, which necessarily underestimate the number of cases because only a portion of the population gets tested. The Centers for Disease Control and Prevention ("CDC") estimates that the number of people in the U.S. who have been infected with COVID-19 was ten times higher than the number of reported cases in June 2020.<sup>4</sup> Additionally, at least 40% of people infected with COVID-19 are asymptomatic.<sup>5</sup> COVID-19 also includes a pre-

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<sup>1</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 Apr. 9, 2021).

<sup>2</sup> *New York Times* last updated Feb. 20, 2022.

<sup>3</sup> See, e.g., Christopher Ingraham, *At the population level, the coronavirus is almost literally everywhere*, WASH. POST (Apr. 1, 2020), <https://www.washingtonpost.com/business/2020/04/01/population-level-coronavirus-is-almost-literally-everywhere/> (last visited Apr. 9, 2021).

<sup>4</sup> Lena H. Sun & Joel Achenbach, *CDC chief says SARS-Co-V-2 cases may be 10 times higher than reported*, WASH. POST (June 25, 2020), <https://www.washingtonpost.com/health/2020/06/25/SARS-Co-V-2-cases-10-times-larger/> (last visited Apr. 9, 2021).

<sup>5</sup> Ellen Cranley, *40% of people infected with SARS-Co-V-2 are asymptomatic, a new CDC estimate says*, BUS. INSIDER (July 12, 2020), <https://www.businessinsider.com/cdc-estimate-40-percent-infected-with-SARS-Co-V-2-asymptomatic-2020-7> (last visited Apr. 9, 2021).

symptomatic incubation period of up to 14 days, during which time infected people can transmit COVID-19 to people, release infectious droplets and aerosols into the air and onto surfaces without having experienced symptoms and without realizing that they are contagious or infected.<sup>6</sup>

29. 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>7</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>8</sup>

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

31. COVID-19 is highly contagious, uniquely resilient, and potentially deadly. The degree to which an infectious disease is contagious is measured by  $R_0$ , a term that defines the

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<sup>6</sup> See *SARS-CoV-2 disease 2019 (SARS-CO-V-2) 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 Apr. 9, 2021); Minghui Yang et al., *SARS-CoV-2 Detected on Environmental Fomites for Both Asymptomatic and Symptomatic Patients with SARS-CO-V-2*, 203 AM. J. RESPIRATORY & CRITICAL CARE MED. 3 (Dec. 16, 2020), <https://www.atsjournals.org/doi/10.1164/rccm.202006-2136LE> (last visited Apr. 9, 2021).

<sup>7</sup> See, e.g., Xi He et al., *Temporal dynamics in viral shedding and transmissibility of SARS-CO-V-2*, 26 NATURE MED. 672, 674 (Apr. 15, 2020), <https://www.nature.com/articles/s41591-020-0869-5> (last visited Apr. 10, 2021); Lirong Zou, M.Sc., et al., *SARS-CoV-2 Viral Load in Upper Respiratory Specimens of Infected Patients*, NEW ENG. J. MED. 382, 1177-79 (Mar. 19, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMc2001737> (last visited Apr. 10, 2021).

<sup>8</sup> Seyed M. Moghadas et al., *The implications of silent transmission for the control of SARS-CO-V-2 outbreaks*, 117 PNAS 30, 17513-15 (July 28, 2020), <https://www.pnas.org/content/117/30/17513> (last visited Apr. 9, 2021).

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 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>9</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>10</sup>

32. The Coronavirus can remain infectious for “much longer time periods than generally considered possible.”<sup>11</sup> In the *Journal of Virology*, researchers demonstrated that the SARS-CoV-2 can survive up to 28 days at room temperature (68°F) on a variety of surfaces including glass, steel, vinyl, plastic, and paper.<sup>12</sup> A CDC report from March 27, 2020, stated that the Coronavirus

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<sup>9</sup> Anthony R. Ives & Claudio Bozzuto, *Estimating and explaining the spread of SARS-CO-V-2 at the county level in the USA*, 4 *COMMC’NS BIOLOGY* 60 (Jan. 20, 2021), <https://www.nature.com/articles/s42003-020-01609-6> (last visited Apr. 10, 2021).

<sup>10</sup> M. Cevik, C.C.G. Bamford & A. Ho, *SARS-CO-V-2 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 Apr. 9, 2021).

<sup>11</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://virologyj.biomedcentral.com/articles/10.1186/s12985-020-01418-7> (last visited Apr. 9, 2021).

<sup>12</sup> *Id.*



was identified on surfaces of the cabins on the Diamond Princess cruise ship 17 days after the cabins were vacated but before they were disinfected.<sup>13</sup>

33. Numerous other scientific studies and articles have identified the persistence of SARS-Co-V-2 on doorknobs, toilets, faucets and other high-touch points, as well as on commonly overlooked surfaces such as floors.<sup>14</sup>

34. While the detection of viral RNA on surfaces or in the air does not necessarily mean that the Coronavirus is currently present and infectious, it demonstrates that the Coronavirus was in fact present. Studies have demonstrated the transmission of laboratory-confirmed Coronavirus infection via surfaces.<sup>15</sup>

35. The World Health Organization (“WHO”) states 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

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<sup>13</sup> Leah F. Moriarty et al., *Public Health Responses to SARS-CO-V-2 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 Apr. 9, 2021).

<sup>14</sup> Zhen-Dong Guo et al., *Aerosol and Surface Distribution of Severe Acute Respiratory Syndrome SARS-Co-V-2 2 in Hospital Wards, Wuhan, China, 2020*, 26 EMERGING INFECTIOUS DISEASE 7, 1583-91 (July 2020), <https://pubmed.ncbi.nlm.nih.gov/32275497/> (last visited Apr. 9, 2021).

<sup>15</sup> Nancy HL Leung, *Transmissibility and transmission of respiratory viruses*, Nature Revs. Microbiology 1-18 (Mar. 22, 2021), <https://pubmed.ncbi.nlm.nih.gov/33753932/> (last visited Apr. 10, 2021); G. Kampf et al., *Persistence of SARS-Co-V-2es on inanimate surfaces and their inactivation with biocidal agents*, J. HOSP. INFECTIONS (Mar. 2020), <https://pubmed.ncbi.nlm.nih.gov/32035997/> (last visited Apr. 10, 2021).

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>16</sup>

36. 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 the Coronavirus and resultant COVID-19 disease if they breathe in these droplets or aerosols from an infected person. Droplets and aerosols can be expelled in close proximity (1-2 meters) or can be carried on air currents tens of meters.<sup>17</sup>

37. The toll of COVID-19 on human lives, property and businesses in the U.S. and around the world has been calamitous and is among the worst public health and economic catastrophes of the last 100 years. The widespread physical loss of, or damage to property throughout United States (specifically in California) and the world caused by COVID-19 has been disastrous for businesses like American Liberty Hospitality, Inc.’s.

38. Prior to the complete reopening of various consumer interacting businesses (after vaccinations had reached a critical mass) masks were required for employees and for customers as much as possible and social distancing measures needed to be adhered to.

39. Some commonly used items may require more frequent cleaning, as often as several times each day. These include:<sup>18</sup>

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<sup>16</sup> *Q&A on SARS-Co-V-2es (SARS-CO-V-2)*, WHO (updated Apr. 17, 2020), <https://web.archive.org/web/20200506094904/https://www.who.int/emergencies/diseases/novel-SARS-Co-V-2-2019/question-and-answers-hub/q-a-detail/q-a-SARS-Co-V-2es> (last visited Apr. 9, 2021).

<sup>17</sup> Lidia Morawska & Donald K. Milton, *It Is Time to Address Airborne Transmission of SARS-Co-V-2 Disease 2019 (SARS-CO-V-2)*, 71 *CLINICAL INFECTIOUS DISEASES* 9, 2311-13 (Dec. 3, 2020), <https://pubmed.ncbi.nlm.nih.gov/32628269/> (last visited Apr. 10, 2021).

<sup>18</sup> *Id.*; see also: “Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes.” Centers for Disease Control and Prevention. 28 April 2020.

- a. Doorknobs;
- b. Elevator buttons;
- c. Light switches;
- d. Faucet handles;
- e. Publicly used telephones;
- f. Computer monitors, mice and keyboards;
- g. Countertops and conference tables; and
- h. Cafeteria tables, coffee pots and vending equipment.

40. The Coronavirus can and does remain capable of being transmitted and active on floors, walls, furniture, desks, tables, chairs, countertops, touch screens, cardboard packages, food items, silverware, plates, serving trays, glasses, straws, menus, pots, pans, kitchen utensils, refrigerators, freezers, and other items of property for a period of time. And no amount of routine surface cleaning could have removed the aerosolized Coronavirus suspended in the air in American Liberty Hospitality, Inc.'s store, which made that air and American Liberty Hospitality, Inc.'s store dangerous and potentially lethal, and thus rendered them uninhabitable, unsafe and unfit for their intended uses.

41. It is undisputed, and indeed is the law all across this country, that there is insurance coverage if drinking water and the water table contains a virus or any other impurity that is an agent of illness or death because they are "damaged." The damage stems from the virus/impurities that make the water unsafe for drinking. The same rule must apply to Coronavirus and COVID-19 in the air of a building – the building has been damaged because the virus invades and physically transforms the air and makes it unsafe for breathing.

**C. The Coronavirus and COVID-19 Caused Direct Physical Loss of or Damage to Property.**

42. Coronavirus and COVID-19 caused direct physical loss of and damage to American Liberty Hospitality, Inc.'s insured premises.

43. The presence of the Coronavirus and SARS-CO-V-2 is enabled by multiple modes of viral transmission, including respiratory droplet, airborne/aerosolized and fomite transmission (i.e., transmission from surfaces and objects).<sup>19</sup> These transmission methods demonstrate that the Coronavirus and/or SARS-CO-V-2 caused direct physical loss of or damage to property.

44. Respiratory transmission of SARS-CO-V-2 occurs through exposure to an infected person's respiratory particles, such as from saliva or mucus.<sup>20</sup> Respiratory transmission of the Coronavirus is commonly divided into droplets (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>21</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>22</sup> Respiratory particles produced by the average person can

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<sup>19</sup> See, e.g., *Transmission of SARS-CoV-2: implications for infection prevention precautions*, WHO (Jul. 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions> (last visited Apr. 9, 2021).

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

<sup>21</sup> Kevin P. Fennelly, *Particle sizes of infectious aerosols: implications for infection control*, 8 LANCET RESPIRATORY MED. 9, P914-24 (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 Apr. 9, 2021).

<sup>22</sup> *Id.*

travel almost 20 feet by sneezing.<sup>23</sup> An M.I.T. researcher has found that virus-laden “clouds” containing clusters of droplets can travel 23 to 27 feet.<sup>24</sup> A recent review article on viral, host and environmental factors reported on the “abundant evidence” that proximity is a determinant to Coronavirus transmission risks.<sup>25</sup>

45. Airborne transmission involves the spread of the infectious agent caused by the dissemination of droplet nuclei (aerosols) from, for example, exhaled breath, that remain infectious when suspended in the air over long distances and time.<sup>26</sup> These tiny particles can remain suspended “for indefinite periods unless removed by air currents or dilution ventilation.”<sup>27</sup> As a

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<sup>23</sup> *Id.*

<sup>24</sup> Lydia Bourouiba, *Turbulent Gas Clouds and Respiratory Pathogen Emissions, Potential Implications for Reducing Transmission of SARS-CoV-2*, 323 JAMA 18, 1837-38 (Mar. 26, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2763852> (last visited Apr. 9, 2021).

<sup>25</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 Apr. 10, 2021).

<sup>26</sup> *Id.*; see also Jose-Luis Jimenez, *SARS-CoV-2 Is Transmitted Through Aerosols. We Have Enough Evidence, Now It Is Time to Act*, TIME (Aug. 25, 2020), <https://time.com/5883081/SARS-Co-V-2-transmitted-aerosols/> (last visited Apr. 9, 2021); Ramon Padilla & Javier Zarracina, *WHO agrees with more than 200 medical experts that SARS-CoV-2 may spread via the air*, USA TODAY NEWS (last 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 Apr. 9, 2021); 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/pii/S0360132320302183> (last visited Apr. 10, 2021).

<sup>27</sup> Kevin P. Fennelly, *Particle sizes of infectious aerosols: implications for infection control*, 8 LANCET RESPIRATORY MED. 9, P914-24 (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 Apr. 9, 2021).

result, the risk of disease transmission increases substantially in enclosed environments, compared to outdoor settings.<sup>28</sup>

46. The WHO and the scientific community have studied the spread of the Coronavirus through aerosols in indoor settings via air circulation systems. For example, the CDC published a research letter concluding that a restaurant's air conditioning system triggered the transmission of the Coronavirus, spreading it to people who sat at separate tables downstream of the restaurant's airflow.<sup>29</sup> Moreover, a study detected the Coronavirus inside the HVAC system connected to hospital rooms of patients sick with SARS-CO-V-2. The study found the Coronavirus in ceiling vent openings, vent exhaust filters and ducts located as much as 56 meters (over 183 feet) from the rooms of the sick SARS-CO-V-2 patients.<sup>30</sup>

47. Additionally, the CDC has stated that "there is evidence that under certain conditions, people with SARS-CO-V-2 seem to have infected others who were more than 6 feet away" and infected people who entered the space shortly after the person with SARS-CO-V-2 had

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<sup>28</sup> Muge Cevik et al., *Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) Transmission Dynamics Should Inform Policy*, CLINICAL INFECTIOUS DISEASES (Sept. 23, 2020), <https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1442/5910315> (last visited Apr. 9, 2021).

<sup>29</sup> Jianyun Lu et al., *SARS-CO-V-2 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 Apr. 9, 2021); *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. 23, 2020), <https://jkms.org/DOIx.php?id=10.3346/jkms.2020.35.e415> (last visited Apr. 9, 2021).

<sup>30</sup> Karolina Nissen et al., *Long-distance airborne dispersal of SARS-CoV-2 in SARS-CO-V-2 wards*, SCI. REPS. 10, 19589 (Nov. 11, 2020), <https://www.nature.com/articles/s41598-020-76442-2>(last visited Apr. 9, 2021).

left.<sup>31</sup> A recently published (February 2021) systematic review of airborne transmission of the Coronavirus corroborated the CDC’s concerns and recommended procedures to improve ventilation of indoor air environments to decrease bioaerosol concentration and reduce the Coronavirus’ spread.<sup>32</sup>

48. The CDC has recommended “ventilation interventions” to help reduce exposures to the airborne Coronavirus in indoor spaces, including increasing airflow and air filtration (such as with high-efficiency particulate air (HEPA) fan/filtration systems).<sup>33</sup> These and other remedial measures must be implemented, at a high cost and extra expense, to reduce the amount of the Coronavirus present in the space and to make the property safe for its intended use. These extreme measures demonstrate that the Coronavirus and COVID-19 cause direct physical loss of or damage to interior spaces. And even then, those interventions, at most, reduce – but do not eliminate – the aerosolized Coronavirus in an indoor space. Nor do they reduce it immediately.

49. 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

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<sup>31</sup> *How SARS-CO-V-2 Spreads*, CDC (updated Oct. 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited Apr. 9, 2021).

<sup>32</sup> Zahra Noorimotlagh et al., *A systematic review of possible airborne transmission of the SARS-CO-V-2 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 Apr. 9, 2021).

<sup>33</sup> *Ventilation in Buildings*, CDC (updated Mar. 23, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html#:~:text=HEPA%20filters%20are%20even%20more,with%20SARS%2DCoV%2D2> (last visited Apr. 9, 2021).

infectious agents, altering these objects to become vectors of disease.<sup>34</sup> Fomite transmission has been demonstrated as highly efficient for viruses, both from object-to-hand and from hand-to-mouth.<sup>35</sup>

50. In addition, while fomite transmission may not be the primary route of transmission for SARS-CO-V-2, fomite transmission is significant and cannot be overlooked as it has been estimated to be responsible for up to 25% of all deaths due to Covid-19 since lockdowns were imposed.<sup>36</sup>

51. The WHO has described fomite transmission as follows:

1. 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 SARS-CO-V-2 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>37</sup> (Emphasis added).

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<sup>34</sup> *Fomite*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/fomite> (last visited Apr. 9, 2021).

<sup>35</sup> Jing Cai et al., *Indirect Virus Transmission in Cluster of SARS-CO-V-2 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 Apr. 9, 2021).

<sup>36</sup> A. Meiksin, *Dynamics of SARS-CO-V-2 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 Apr. 9, 2021).

<sup>37</sup> See, e.g., *Transmission of SARS-CoV-2: implications for infection prevention precautions*, WHO (Jul. 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions> (last visited Apr. 9, 2021).



52. In addition to studies cited by the WHO,<sup>38</sup> numerous other studies and scientific articles have discussed fomite transmission as a mode of virus transmission, including, but not limited to:

- a. 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>39</sup>
- b. A National Institutes of Health study published in the *New England Journal of Medicine* finding that the Coronavirus survives up to four hours on copper, up to 24 hours on cardboard, and up to three days on plastic and stainless steel and suggesting that people may acquire the virus through the air and after touching contaminated objects.<sup>40</sup>
- c. 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 clothing merchandise).<sup>41</sup> According to the researchers in this study, “[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>42</sup> Generally, frequently touched surfaces can become highly transmissive fomites.<sup>43</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> Jing Cai et al., *Indirect Virus Transmission in Cluster of SARS-CO-V-2 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 Apr. 9, 2021).

<sup>40</sup> *New coronavirus stable for hours on surfaces*, NAT’L INSTS. HEALTH (Mar. 17, 2020), <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last visited Apr. 9, 2021).

<sup>41</sup> Stephanie A. Bone & 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://aem.asm.org/content/73/6/1687> (last visited Apr. 9, 2021).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

- d. A CDC research letter reporting that the Coronavirus can remain viable on polystyrene plastic, aluminum, and glass for 96 hours in indoor living spaces.<sup>44</sup>
- e. 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 9 days.<sup>45</sup>

53. Importantly, the Coronavirus has been detected on environmental objects and surfaces from symptomatic, pre-symptomatic and asymptomatic individuals.<sup>46</sup> Fomites transform the surface of property into a potentially deadly Coronavirus transmission device.

54. Accordingly, the presence of the Coronavirus in and on property, including in indoor air, on surfaces, and on objects, causes direct physical loss of or damage to property by causing physical harm to and altering property and otherwise making it incapable of being used for its intended purpose.

55. Among other things, the presence of the 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 SARS-CO-V-2 expressly recognizes this physical alteration of property, describing viral droplets as “**creating**

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<sup>44</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 Apr. 9, 2021).

<sup>45</sup> G. Kampf et al., *Persistence of coronaviruses on inanimate surfaces and their inactivation with biocidal agents*, J. HOSP. INFECTION 104, 246-51 (Feb. 6, 2020), <https://www.journalofhospitalinfection.com/action/showPdf?pii=S0195-6701%2820%2930046-3> (last visited Apr. 9, 2021).

<sup>46</sup> See *Coronavirus disease 2019 (SARS-CoV-2) 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 Apr. 9, 2021); Minghui Yang et al., *SARS-CoV-2 Detected on Environmental Fomites for Both Asymptomatic and Symptomatic Patients with SARS-CoV-2*, 203 AM. J. RESPIRATORY & CRITICAL CARE MED. 3 (Dec. 16, 2020), <https://www.atsjournals.org/doi/10.1164/rccm.202006-2136LE> (last visited Apr. 9, 2021).

fomites (contaminated surfaces)”<sup>47</sup> (emphasis added). “Creating” involves making or bringing into existence something new<sup>48</sup> – such as something that is in an altered state from what it was before the Coronavirus was present on, in and around the property.

56. The Coronavirus adheres to surfaces and objects, harming and 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. Once the 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 or damage.

57. 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. 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 and uninhabitable. In addition to being found in air samples,<sup>49</sup> the Coronavirus remains stable in body secretions (respiratory, urine, feces), on surfaces, and in sewage, particularly at lower temperatures.<sup>50</sup>

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<sup>47</sup> See, e.g., *Transmission of SARS-CoV-2: implications for infection prevention precautions*, WHO (Jul. 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions> (last visited Apr. 9, 2021).

<sup>48</sup> See, e.g., *Create*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/create> (last visited Apr. 9, 2021).

<sup>49</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 Apr. 9, 2021).

<sup>50</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 Apr. 9, 2021).

58. People in Texas and Louisiana where Plaintiff operates businesses have been diagnosed with SARS-CoV-2. Their diagnosis was directly related to exposure to the fomites – physical alterations – or properties to which they were exposed.

59. People all over the United States and the world, and have had, SARS-CoV-2 but have not been diagnosed.

60. American Liberty Hospitality, Inc. sustained direct physical loss and/or damage to its premises described in the Policy as a result of the physical alteration to its property. It also sustained losses due to civil authority closure and ingress-egress orders.

61. The outbreak and presence of SARS-CoV-2 and COVID-19 caused direct physical loss of or damage to the Covered Property under American Liberty Hospitality, Inc.'s policy by causing (i) direct physical loss of or damage to Covered Property; (ii) denying use of and damaging the Covered Property; (iii) requiring physical repair and/or alterations to the Covered Property; and/or (iv) by causing a necessary suspension of operations.

62. Because of the spread or presence of COVID-19, the air in American Liberty Hospitality, Inc.'s Covered Property was physically altered by fomites that caused it to be unsafe during the policy period.

63. Further, the functional space in American Liberty Hospitality, Inc.'s insured premises was severely diminished by the presence of SARS-CoV-2 and COVID-19.

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

64. The insurance industry has advanced the false proposition that an indoor space containing the Coronavirus can be made safe and fit for its functional use because the Coronavirus can be removed by routine surface cleaning.

65. In fact, the CDC has recently released guidance stating that there is little evidence to suggest that routine use of disinfectants can prevent or could have prevented the transmission of the Coronavirus from fomites in community settings.<sup>51</sup> Indeed, the CDC concluded that according to a more quantitative microbial risk assessment study, “surface disinfection once- or twice-per-day had little impact on reducing estimated risks” of Coronavirus transmission.<sup>52</sup>

66. While American Liberty Hospitality, Inc. employees could have conducted perfunctory “cleaning” or even disinfection of workplace surfaces, there is no definitive consensus or metric for “how clean is clean.” Unlike dust, Coronavirus is invisible to the naked eye. Accordingly, confirmation of disinfection of Coronavirus even from surfaces could not have been verified by managers or staff.

67. More importantly, unlike surface cleaning of visible substances like dust or debris, where the degree of “clean” can be visually confirmed to a reasonable degree of certainty, that is not the case for the cleaning and disinfection of Coronavirus because:

- Coronavirus is not visible to the naked eye;
- the degree and magnitude of Coronavirus would be unknown, so the rigorousness required and effectiveness of disinfection cannot be determined; and
- viral inactivation through disinfection is different for different substrates and surfaces (i.e., cardboard, plastic, stainless steel or copper) and varies for porous vs. non-porous surfaces.

68. As compared to the cleaning of visible soiling, dirt and debris, which typically does not require “disinfection” of surfaces as required for viral contamination, the uncertainty involved

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<sup>51</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 Apr. 10, 2021).

<sup>52</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)).

in the effectiveness of disinfection of surfaces for something invisible (i.e., Coronavirus) makes cleaning a much more complicated and less effective process. There is no degree of certainty as to the “cleanliness” or, more importantly, the degree of disinfection that would be or would have been possible by American Liberty Hospitality, Inc. employees (who would be naïve as to the tools, techniques, and requirements to disinfect myriad surfaces for a highly dangerous and infectious virus) in order to effectively remove all SARS-Co-V-2. Nor is there any method or technique to confirm the disinfection of the invisible SARS-Co-V-2 from the surfaces in the restaurants.

69. The presence of the Coronavirus in the air and on surfaces made American Liberty Hospitality, Inc.’s premises uninhabitable, unsafe, and unfit for their normal and intended uses – just as if radon gas, ammonia, asbestos, fumes, a mold infestation or a salmonella outbreak were in the air or on surfaces of the premises. Nor could the Coronavirus or the risk of Coronavirus transmission be completely removed with routine surface cleaning.

70. Moreover, no amount of routine surface cleaning could have removed the aerosolized Coronavirus suspended in the air in American Liberty Hospitality, Inc.’s store, which made the air in the store even more dangerous and potentially lethal, and further rendered the stores uninhabitable, untenable, unsafe and unfit for their intended uses. As a result, American Liberty Hospitality, Inc.’s store was forced to close or operate at a severely reduced capacity.

71. State and local governmental authorities, and public health officials around the Country, acknowledge that SARS-CoV-2 and the COVID-19 Pandemic cause direct physical loss and damage to property. For example:

- a. The state of Colorado issued a Public Health Order indicating that “COVID-19... physically *contributes to property loss, contamination, and damage...*” (Emphasis added);

- b. The City of New York issued an Emergency Executive Order in response to COVID-19 and the Pandemic, in part “because the virus *physically is causing property loss and damage.*” (Emphasis added);
- c. Broward County, Florida issued an Emergency Order acknowledging that COVID-19 “*is physically causing property damage.*” (Emphasis added);
- d. The State of Washington issued a stay-at-home Proclamation stating the “COVID-19 pandemic and its progression... remains a public disaster affecting life, health, [and] *property*...” (Emphasis added);
- e. The State of Indiana issued an Executive Order recognizing that COVID-19 has the “propensity to *physically* impact surfaces and personal *property.*” (Emphasis added);
- f. The City of New Orleans issued an order stating “there is reason to believe that COVID-19 may spread amongst the population by various means of exposure, including the propensity to attach to surfaces for prolonged period of time, thereby spreading from surface to person and *causing property loss and damage* in certain circumstances.” (Emphasis added);
- g. The State of New Mexico issued a Public Health Order acknowledging the “threat” COVID-19 “poses” to “*property.*” (Emphasis added); and
- h. North Carolina issued a statewide Executive Order in response to the Pandemic not only “to assure adequate protection for lives,” but also to “assure adequate protection of... *property.*” (Emphasis added).

72. The coronavirus, like a bacterium, has a material existence and is something that exists in nature that physically alters and damages tangible property by rendering it unusable as it adheres to surfaces creating a dangerous property condition.

**E. Civil Authority Orders Triggered Coverage Under Plaintiff’s Policy**

73. Beginning in March 2020, in an effort to slow the spread of COVID-19, and as a consequence of physical damage caused COVID-19, executive officials across the country issued a series of unprecedented civil orders and advisements.

74. Loss and damage caused by COVID-19 and the related Closure Orders triggered multiple coverage provisions of Plaintiff’s Policy issued by Defendant.

75. Indeed, many governmental bodies specifically found that COVID-19 caused property damage when issuing stay at home orders. See N.Y.C. Emergency Exec. Order No. 100, at 2 (Mar. 16, 2020)<sup>53</sup> (emphasizing the virulence of COVID-19 and that it “physically is causing property loss and damage”); Harris Cty. Tex. Office of Homeland Security & Emergency Mgmt., Order of Cty. J. Lina Hidalgo, at 2 (Mar. 24, 2020)<sup>54</sup> (emphasizing that the COVID-19 virus can cause “property loss or damage” due to its contagious nature and transmission through “person-to-person contact, especially in group settings”); Napa Cty. Cal. Health & Human Service Agency, Order of the Napa Cty. Health Officer (Mar. 18, 2020)<sup>55</sup> (issuing restrictions based on evidence of the spread of COVID-19 within the Bay Area and Napa County “and the physical damage to property caused by the virus”); City of Key West Fla. State of Local Emergency Directive 2020-03, at 2 (Mar. 21, 2020)<sup>56</sup> (COVID-19 is “causing property damage due to its proclivity to attach to surfaces for prolonged periods of time”); City of Oakland Park Fla. Local Public Emergency Action Directive, at 2 (Mar. 19, 2020)<sup>57</sup> (COVID-19 is “physically causing property damage”); Panama City Fla. Resolution No. 20200318.1 (Mar. 18, 2020)<sup>58</sup> (stating that the resolution is necessary because of COVID-19’s propensity to spread person to person and because the “virus

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<sup>53</sup> <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-100.pdf>

<sup>54</sup> [https://www.taa.org/wp-content/uploads/2020/03/03-24-20-Stay-Home-Work-Safe-Order\\_Harris-County.pdf](https://www.taa.org/wp-content/uploads/2020/03/03-24-20-Stay-Home-Work-Safe-Order_Harris-County.pdf)

<sup>55</sup> [https://www.cityofkeywest-fl.gov/egov/documents/1584822002\\_20507.pdf](https://www.cityofkeywest-fl.gov/egov/documents/1584822002_20507.pdf)

<sup>56</sup> <https://www.countyofnapa.org/DocumentCenter/View/16687/3-18-2020-Shelter-at-Home-Order>

<sup>57</sup> <https://oaklandparkfl.gov/DocumentCenter/View/8408/Local-Public-Emergency-Action-Directive-19-March-2020-PDF>

<sup>58</sup> <https://www.pcgov.org/AgendaCenter/ViewFile/Item/5711?fileID=16604>



physically is causing property damage”); Exec. Order of the Hillsborough Cty. Fla. Emergency Policy Group, at 2 (Mar. 27, 2020)<sup>59</sup> (in addition to COVID-19’s creation of a “dangerous physical condition,” it also creates “property or business income loss and damage in certain circumstances”); Colorado Dep’t of Pub. Health & Env’t, Updated Public Health Order No. 20-24, at 1 (Mar. 26, 2020)<sup>60</sup> (emphasizing the danger of “property loss, contamination, and damage” due to COVID-19’s “propensity to attach to surfaces for prolonged periods of time”); Sixth Supp. to San Francisco Mayoral Proclamation Declaring the Existence of a Local Emergency, 26 (Mar. 27, 2020)<sup>61</sup> (“This order and the previous orders issued during this emergency have all been issued... also because the virus physically is causing property loss or damage due to its proclivity to attach to surfaces for prolonged periods of time”); and City of Durham NC, Second Amendment to Declaration of State of Emergency, at 8 (effective Mar. 26, 2020)<sup>62</sup> (prohibiting entities that provide food services from allowing food to be eaten at the site where it is provided “due to the virus’s propensity to physically impact surfaces and personal property”).

76. The Closure Orders typically required businesses to close their doors and stop all in-person work, at least for a period of time. Although “essential” businesses were permitted to partially operate in some states (e.g., allowing businesses to offer takeout or delivery services), they did not escape the devastating financial impacts of the Closure Orders.

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<https://www.hillsboroughcounty.org/library/hillsborough/mediacenter/documents/administrator/epg/saferathomeorder.pdf>

<sup>60</sup> <https://www.pueblo.us/DocumentCenter/View/26395/Updated-Public-Health-Order---032620>

<sup>61</sup> [https://sfgov.org/sunshine/sites/default/files/sotf\\_061020\\_item3.pdf](https://sfgov.org/sunshine/sites/default/files/sotf_061020_item3.pdf)

<sup>62</sup> [https://durhamnc.gov/DocumentCenter/View/30043/City-of-Durham-Mayor-Emergency-Dec-Second- Amdmt-3- 25-20\\_FINAL](https://durhamnc.gov/DocumentCenter/View/30043/City-of-Durham-Mayor-Emergency-Dec-Second- Amdmt-3- 25-20_FINAL)

77. The Closure Orders relevant to this have directly impacted Plaintiff's businesses by forcing them to limit operations across all locations and some have had to cease operations completely.

78. The damage caused by COVID-19, the transmission of COVID-19, and Plaintiff's efforts to preserve and protect their property from COVID-19, in compliance with the terms of the Policy, have had a devastating impact on Plaintiff's business.

79. The Closure Orders at issue that affected Plaintiff are detailed below.

**1. State of Texas Closure Orders**

80. On March 13, 2020, Governor of the State of Texas, Greg Abbott, issued a Proclamation declaring a state of disaster for all counties in the State of Texas.

81. On March 18, Governor Abbott issued a waiver that allowed businesses to deliver alcoholic beverages with food purchases to patrons.

82. On March 19, the Commissioner of the Department of Health Services, John W. Hellerstedt, M.D. and, issued a Declaration of a Public Health Disaster in the State of Texas, which among other things, prohibited Texans from gathering in groups of ten or more. In addition, Governor Abbott issued Executive Order GA 08 directing everyone in Texas to avoid social gatherings in groups of more than 10, to avoid eating or drinking at bars, businesses and food courts, and encouraging the use of drive-thru, pickup or delivery options. The Order was to remain in effect until April 3, 2020, unless modified, amended, rescinded or superseded by the governor.

83. On April 27, Governor Abbott issued Executive Order GA 18 directing everyone in Texas to avoid social gatherings and permitting dine-in business services only for businesses that operate at up to 25 percent of their total listed occupancy. The Order contained an exception for establishments in counties that attested to having five or fewer cases of COVID-19. The Order was

to remain in effect until May 15, 2020, unless modified, amended, rescinded or superseded by the governor.

84. On May 5, 2020, Governor Abbott issued Executive Order GA 21 relating to the expanded reopening of services as part of the safe, strategic plan to Open Texas. The Order permitted dine-in business services for businesses that operate at up to 25 percent of their total listed occupancy and stipulated that the occupancy limit would not apply to customers seated in outdoor areas. The order directed people to continue avoiding bars. The Order was to remain in effect until May 19, 2020, unless modified, amended, rescinded or superseded by the governor.

85. On May 12, 2020, Governor Abbott issued a Proclamation renewing the disaster proclamation for all counties in Texas.

86. On May 18, 2020, Governor Abbott issued Executive Order GA 23 permitting dine-in business services for businesses that operate at up to fifty percent (50%) of their total listed occupancy. The Order also permitted bars to reopen provided they operate at up to twenty-five percent (25%) of their total listed occupancy. The Order was to remain in effect until June 3, 2020, unless modified, amended, rescinded or superseded by the governor.

87. On June 3, 2020, Governor Abbott issued Executive Order GA 26 permitting dine-in business services for businesses that operate at up to seventy-five percent (75%) of their total listed occupancy. The Order also permitted bars to serve only seated customers. The Order was to remain in effect until modified, amended, rescinded or superseded by the governor.

88. On June 26, 2020, Governor Abbott issued Executive Order GA 28 permitting dine-in business services for businesses that operate at up to seventy-five percent (75%) of their total listed occupancy until June 29, 2020, at which point businesses were limited to operating at fifty percent (50%) of the total listed occupancy of the business. The Order also directed people not to

visit bars except by use of drive-thru, pickup or delivery options for food and drinks. The Order was to remain in effect until modified, amended, rescinded or superseded by the governor.

89. On July 2, 2020, Governor Abbott issued Executive Order GA 29 requiring every person in Texas to wear a face covering over the nose and mouth when inside a commercial entity or other building or space open to the public or when in an outdoor public space wherever it is not feasible to maintain six feet of social distancing from another person. The Order was to remain in effect until modified, amended, rescinded or superseded by the governor. Governor Abbott eventually lifted the order.

90. On March 2, 2021, Governor Abbott issued Executive Order GA 34 opening Texas businesses and removing the statewide mask mandate.

## **2. City of Houston Closure Orders**

91. On March 11, 2020, Houston Mayor Sylvester Turner and Harris County Judge Lina Hidalgo, to minimize the risk of exposure to COVID-19 and to promote the health and safety of Harris County residents, issued a Declaration of Local Disaster for Public Health Emergency.

92. On March 16, 2020, the Commissioners Court of Harris County extended the March 11, 2020, Declaration of Local Disaster for Public Health emergency and mandated the closure of all bars and dine-in businesses, limiting businesses to provide only take out, delivery, or drive through services.

93. On March 19, 2020, Harris County Judge Hidalgo issued an Order amending the March 16 Order. The Order prohibited dining on the premises of businesses until April 3, 2020. The Order specifically allowed to-go, take out or delivery services. The Order also prohibited consuming alcoholic beverages on the premises of any business or bar until April 3, 2020.

94. On March 24, 2020, Harris County Judge Hidalgo, extended the Declaration of Local Disaster for Public Health Emergency to April 29, 2020, and issued a “Stay Home, Work Safe” Order prohibiting public or private gatherings of any number of people and providing that all residents in the county remain at home other than to perform essential services as defined in the Order. The Order defined businesses as essential retail, but only for delivery, drive-thru or carry-out services. The Order was to remain in effect until April 3, 2020.

95. On April 3, 2020, Harris County Judge Hidalgo issued an Order Extending and Amending the “Stay Home, Work Safe” order. The Order was to remain in effect until April 30, 2020, unless modified, amended, rescinded or superseded.

96. On May 1, 2020, Harris County Judge Hidalgo issued Harris County’s Second Amended Stay Home, Work Safe Order which restated the requirement that bars remain closed for on-premises service. The Order provided that essential services may operate at full occupancy but encouraged operation at less-than-total occupancy. The Order encouraged the continued use of delivery, drive-thru or carry-out services. The Order was set to remain in effect until May 22, 2020.

97. On May 19, 2020, Harris County Commissioner’s Court extended Harris County’s Disaster Declaration through June 10, 2020.

98. On May 21, 2020, Harris County Judge Hidalgo issued a Fourth Amended Stay Home, Work Safe. The Order encouraged the continued use of delivery, drive-thru or carry-out services. The Order was set to remain in effect until June 10, 2020.

99. On June 19, 2020, Harris County Judge Hidalgo, issued an Executive Order Regarding Health and Safety Policy and Face Coverings, providing that the Harris County Commissioners Court’s Declaration of Local Disaster for Public Health Emergency was effective unless extended, modified, or terminated early by Harris County Judge Hidalgo, that all

commercial entities develop, post, and implement a health and safety policy, and that face coverings must be worn in public.

100. On July 1, 2020, Harris County Judge Hidalgo, issued an Amended Order Regarding Health and Safety Policy and Face Coverings, providing that the Harris County Commissioner Court's Declaration of Local Disaster for Public Health Emergency was effective through August 26, 2020, unless extended, modified or terminated early by Judge Hidalgo and incorporated and adopted Governor Abbott's, Executive Order GA28.

### **3. State of Louisiana Closure Orders**

101. On March 9, 2020, Louisiana confirmed its first case of COVID-19. On March 11, 2020, Governor John Bel Edwards declared a public health emergency in the State of Louisiana.

102. By March 13, 2020, Governor Edwards issued a proclamation closing all public schools.

103. A day later, on March 14, 2020, Louisiana confirmed its first COVID-19 related death. On March 22, 2020, with COVID-19 running rampant, Governor Edwards took the extraordinary measure of issuing a "stay-at-home order" in Louisiana. Under this order, citizens of Louisiana were directed to stay home unless performing an "essential function." The Governor also closed all state office buildings to the public. Local public entities were also closed under the Order.

104. The Governor's Order to shutter businesses was designed to eliminate the spread of the deadly COVID-19 virus. Additionally, Governor Edwards and other local officials issued orders prohibiting gatherings of people.

105. On March 26, 2020, LaToya Cantrell, Mayor of the City of New Orleans issues a "Mayoral Proclamation to Promulgate Emergency Orders During the COVID-19 State of Emergency" which prohibited activities. The New Orleans Department of Health issued "City of

New Orleans Health Department Guidelines for COVID-19 Response and Stay at Home Directives”.

106. Unfortunately, due to the early opening and a second wave of COVID-19, by July 11, 2020, Louisiana led the nation in deaths due to COVID-19 according to the Louisiana Department of Health.

107. COVID-19 raged on in Louisiana with January 2021 being the second deadliest day from COVID-19 deaths according to the Louisiana Department of Health

**F. The Impact of COVID-19 and the Closure Orders**

108. As a direct result of COVID-19 and the Closure Orders, issued directly because of COVID-19’s direct physical damage to property and to prevent further immediately impending physical damage to property, Plaintiff suffered direct physical loss and/or damage or destruction, experienced lost and/or limited functionality, and has been impaired by the existence of COVID-19.

109. Aerosol, droplet, and fomite transmission are the basis for masking, eye protection, use of gowns and gloves in the healthcare setting, social distancing, hand-washing, stay-at-home orders, home-shelter orders, distance learning, reduced capacity and/or occupancy limits, and other measures implemented in these executive orders. The virus is physically present in the community, including in the air and on objects and surfaces. Aerosol and fomite transmission are real, and due to constant recontamination of air and surface areas, it is simply impossible to entirely eradicate the virus from indoor spaces and such surfaces if there continue to be unmasked people in the area.

110. Reducing capacity in public settings is one way to reduce the presence of virus on objects and surfaces and, therefore, reduce the risk of transmission, especially during times of rising

infection rates. Wearing masks reduces, but does not eliminate, the likelihood of virus being aerosolized and transferred to objects and hard surfaces.

111. Even with cleaning and disinfecting, the presence of virus on objects and surfaces, though reduced, cannot be reliably eliminated because these surfaces will continue to become contaminated as people spread the virus through. The only way to ensure the absence of virus on objects and surfaces is to prevent access to an environment.

112. The physical presence of COVID-19 on the premises physically altered and damaged the property and forced Plaintiff to substantially reduce or shut down its business. Additionally, governmental orders mandated that Plaintiff's businesses cease doing business as it ordinarily would, greatly reducing its income

113. COVID-19 and COVID-19-containing respiratory droplets and nuclei are physical substances that are active on physical surfaces and are also emitted into the air. Such substances are not theoretical, intangible, or incorporeal, but rather have a material existence and are physically dangerous.

114. Individuals, including employees, with COVID-19 or otherwise carrying COVID-19 have been physically present at Plaintiff's businesses. COVID-19 and/or coronavirus-containing fomites (i.e., inanimate objects), respiratory droplets, and nuclei from those individuals come into contact with, adhere to, and attach to the surfaces of the property upon which they land, including without limitation, the real property, furniture, fixtures, and personal property at Plaintiff's businesses.

115. COVID-19 or COVID-19-containing fomites, respiratory droplets, and nuclei physically alter property to which they adhere, attach, or come in contact with including without



limitation by altering the surfaces of that property and/or by making physical contact with those previously safe, inert materials dangerous.

116. When individuals carrying COVID-19 breathe, talk, cough, or sneeze, they expel aerosolized droplet nuclei that remain in the air and, like dangerous fumes, they physically alter the premises, making it unsafe and affirmatively dangerous. In addition, COVID-19 physically alters the air. Air inside buildings that was previously safe to breathe is no longer safe to breathe due to COVID-19, because it has undergone a physical alteration.

117. The presence of COVID-19, including but not limited to COVID-19 droplets or nuclei on solid surfaces and in the air at insured property caused direct physical damage to physical property and ambient air at the premises. COVID-19, a physical substance, has attached and adhered to Plaintiff's property, and by doing so, altered that property. Such presence has also directly resulted in loss of functionality of that property.

118. Persons who tested positive for COVID-19 were present at insured property on various dates during 2020 and 2021. Persons who came into contact with persons diagnosed with COVID-19 were present at insured property on various dates during 2020 and 2021.

119. Persons who were pre-symptomatic or asymptomatic and unknowingly carrying the coronavirus, including but not limited to employees, customers, and other business visitors, were present at the insured property on various dates during 2020 and 2021.

120. COVID-19 droplets were conveyed from infected persons (whether symptomatic, pre-symptomatic, or asymptomatic) to solid surfaces, including but not limited to furniture, doors, floors, bathroom facilities, equipment, and supplies, and into the air and HVAC system at Plaintiff's businesses, causing damage and alteration to physical property and ambient air at the premises. Aerosolized COVID-19 has entered the air in Plaintiff's businesses.

121. The physical losses to Plaintiff's businesses include without limitation physical alteration to the property including the rendering of its insured properties from a satisfactory state to a state dangerous and/or unusable state because of the presence and effect of the COVID-19, fomites, and respiratory droplets or nuclei directly upon its property.

122. The presence of COVID-19 caused "direct physical loss, damage to the property of the type insured under the" Policy by: (i) causing direct physical loss of or damage to the covered property; (ii) denying use of and damaging the covered property; (iii) requiring physical repair and/or alterations to the covered property; and/or (iv) by causing a necessary suspension of operations during a period of restoration.

123. Because of the presence of COVID-19, the air in Plaintiff's businesses and Plaintiff's physical properties were altered, damaged, and became unsafe, necessitating repairs and/or remediations.

124. In an effort to remediate the air in Plaintiff's businesses and to repair the physical loss or damage, including the infestation on the surface of covered property caused by COVID-19, Plaintiff took several measures, including but not limited to, the changing and installation of new air filters at multiple locations.

125. Thus, there have been many obvious structural alterations, changes, and/or repairs made to Plaintiff's businesses so that Plaintiff could continue their business after experiencing direct property damage which was caused by COVID-19 and to avoid further property damage.

126. The threat, presence and transmission COVID-19, caused "direct physical loss of or damage" to each "Covered Property" under the Plaintiff's Policy, by: (i) impairing the function of, infesting, causing loss and damaging the Covered Property; (ii) denying use of and damaging the Covered Property; (iii) structurally altering the air, surface, and the character of the Covered

Property and thus requiring physical repair and/or alterations to the Covered Property; and/or (iv) causing necessary suspension of operations during a period of restoration.

127. The Closure Orders prohibited access to Plaintiff's covered properties and the area immediately surrounding covered properties, in response to dangerous physical conditions resulting from a covered cause of loss.

128. As a result of the presence of COVID-19 and the Closure Orders, Plaintiff lost business income and incurred extra expenses as further detailed below.

129. Plaintiff has submitted a claim for loss to Defendant under its Policy due to the presence of COVID-19 and the Closure Order, but Defendant denied that claim.

130. SARS-CoV-2 and the COVID-19 Pandemic have caused direct physical loss and damage to Plaintiff's properties.

131. Tens of thousands of people in Texas and Louisiana where Plaintiff does business have been diagnosed with COVID-19.

132. SARS-CoV-2 particles have been physically present on surfaces and items of property located at Plaintiff's premises described in the Policy, or within 1000 feet of the described premises, or on Dependent properties, during the time the Policy was in effect.

133. Plaintiff has sustained direct physical loss and damage to items of property located at its premises and direct physical loss and damage to its premises described in the Policy as a result of the presence of COVID-19 particles.

134. Plaintiff sustained a suspension and diminishment of its operations caused by direct physical loss of or damage to insured properties at the covered premises. This loss or damage was caused by or resulted from a Covered Cause of Loss.

135. Plaintiff sustained loss of Business Income and necessary Extra Expense caused by the direct physical alteration and direct physical damage to its property. Plaintiff also experienced covered losses resulting from the actions of civil authorities that have prohibited access to the described premises due to direct physical loss of or damage to property, including properties other than at the described premises that were caused by or resulting from a Covered Cause of Loss.

136. Plaintiff submitted a timely insurance claim to Defendant.

137. Defendant has denied Plaintiff's claim.

#### **IV. COUNT I: DECLARATORY JUDGMENT**

138. The allegations contained in the foregoing paragraphs are hereby incorporated by reference.

139. There is a dispute about whether Plaintiff is entitled to coverage under the Policy for its losses sustained and to be sustained in the future. Accordingly, Plaintiff is entitled to declaratory relief from this Court pursuant to Tex. Civ. Prac. Rem. Code § 37.004.

140. Plaintiff is entitled to and demands a declaration that:

- a. Plaintiff sustained direct physical loss or damage to property at its premises described in the Policy as a result of COVID-19 and/or the Pandemic;
- b. COVID-19 is a covered cause of loss under the Policy;
- c. The Pandemic is a covered cause of loss under the Policy;
- d. The losses incurred by Plaintiff as the result of the orders issued by the Governor of Texas and the Governor of Louisiana, and their related state and municipal Departments of Health are covered losses under the Policy;
- e. Defendant has no applicable exclusion or limitation to the coverage for Plaintiff's losses alleged herein;
- f. Plaintiff is entitled to coverage for its past and future Business Income loss(es) and Extra Expense resulting from COVID-19 for the time period set forth in the Policy;

- g. Plaintiff is entitled to coverage for loss(es) due to the actions of Texas and Louisiana's civil authorities, including the Governor of Texas, the Texas Department of Health and the Harris County Judge, the Governor of Louisiana, etc.;
  - h. Plaintiff has coverage for any substantially similar civil authority order in the future that limits or restricts the access to Plaintiff's places of business and/or its operations; and
  - i. Any other issue that may arise during the course of litigation that is a proper issue on which to grant declaratory relief.
141. Plaintiff does not seek a determination of its damages resulting from COVID-19.

**V. COUNT II: BREACH OF CONTRACT – PROPERTY LOSS AND/OR DAMAGE**

142. Plaintiff repeats and realleges all prior allegations, as if fully set forth herein.
143. The Policy is a valid and enforceable contract between Plaintiff and Defendant.
144. In the Policy, Defendant agreed to cover property against all risks of physical loss, damage or destruction not otherwise excluded.
145. COVID-19 caused direct physical loss and/or physical damage to Plaintiff's property.
146. No exclusions apply to bar coverage.
147. Plaintiff is entitled to coverage for the physical loss and/or damage up to the Policy's \$24,400,000 dollars in coverage. (Business Interruption plus Civil Authority.)
148. Plaintiff has complied with all applicable policy provisions, including the paying of premiums and providing timely notice of its claim.
149. Nonetheless, Defendant unjustifiably refused to pay for Plaintiff's physical loss or damage in breach of the Policy.
150. Plaintiff has suffered damages as a result of Defendant's breach(es) of the Policy.

151. Plaintiff is entitled to damages as a result of Defendant's breach in an amount to be determined at trial, including pre- and post-judgment interest and any other costs and relief that this Court deems appropriate.

**VI. COUNT III: BREACH OF CONTRACT – BUSINESS INTERRUPTION COVERAGE**

152. Plaintiff repeats and realleges all prior allegations, as if fully set forth herein.

153. The Policy is valid and enforceable contracts between Plaintiff and Defendant.

154. In the Policy, Defendant agreed to cover Business Interruption Gross Earnings, Business Interruption Loss of Profits, and Extra Expense, as provided in the Time Element coverage, resulting from the necessary interruption or reduction of Plaintiff's business operations caused by direct physical loss, damage or destruction, of the property of the type insured under the Policy.

155. COVID-19 has caused and, upon information and belief, is continuing to cause, physical loss and/or damage or destruction to Plaintiff's property and the property of others that has caused Plaintiff to suffer business interruption losses and incur extra expense.

156. No exclusions apply to bar coverage.

157. Plaintiff is entitled to coverage for its business interruption losses and incurred extra expense related to COVID-19 up to the Policy's per occurrence limits of liability for business interruption losses per occurrence or any applicable sublimits.

158. Plaintiff complied with all applicable policy provisions, including paying premiums and providing timely notice of its claim.

159. Nonetheless, Defendant unjustifiably refuses to pay for these losses and expenses in breach of the Policy.

160. Plaintiff has suffered damages as a result of Defendant's breach of the Policy.

161. Plaintiff is entitled to damages as a result of Defendant's breach in an amount to be determined at trial, including pre- and post-judgment interest and any other costs and relief that this Court deems appropriate.

**VII. COUNT IV: BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING**

162. Plaintiff repeats and realleges the allegations in the preceding paragraphs as if fully set forth herein.

163. Defendant implicitly denied Plaintiff's claim for coverage relating to its losses from COVID-19 by failing to timely pay the claim within the timeframe required by Article 542 of the Texas Insurance Code. Other than sending untimely reservation of rights letters, Defendant failed to conduct a thorough and timely investigation of Plaintiff's claim, failed to timely communicate as required by each Policy and Texas law, and unreasonably delayed the payment of Plaintiff's covered claim without a reasonable basis to do so and when contractual liability under each Policy was reasonably clear (or *should have been reasonably clear* had Defendant done a thorough and reasonable investigation of the claim).

164. Defendant's implicit denial of Plaintiff's claim by simply ignoring it for months on end lacked any reasonable basis based on the existing facts and existing Texas law.

165. Defendant failed to conduct a thorough and reasonable investigation of Plaintiff's claim under the Policy and, therefore, Defendant's basis for its unreasonable delay and its implicit denial is unreasonable. Specifically, Defendant failed to timely test the insured Property to evaluate the extent and scope of the existing property damage at the time the claim was submitted, failed to interview any representatives of Plaintiff regarding the extent of covered losses and the resulting damages and failed to consider or address the governmental closure orders specific to this insured and this Property.

166. Defendant employed a systematic “one-size-fits-all” approach to adjusting and denying coverage for *all COVID-19 claims*, including Plaintiff’s claim. Without investigating the insured Property or talking to its insured’s representatives, Defendant engaged in a systemic denial of *ALL COVID-19 claims* submitted under the false assumption that every COVID-19 claim was the same, every COVID-19 claim was not covered, and every COVID-19 claim should be denied. That overly broad, institutional handling of every COVID-19 claim submitted, including Plaintiff’s, without considering the unique facts of each insured property, each submitted claim, each applicable governmental closure order and each damage claim amounts to fraud, institutional bad faith, illegal insurance practices and reprehensible claims conduct. Defendant’s conduct should subject Defendant to additional damages as allowed by law, including statutory penalties and punitive damages.

167. Defendant knew and were actually aware of Defendant’s own lack of any reasonable basis to deny coverage. Defendant’s claim adjusters and claim managers made an intentional and knowing decision to forgo testing of Plaintiff’s Property, forgo interviewing Plaintiff’s representatives, forgo considering the specific governmental closure orders specific to Plaintiff and its insured Property and forgo examination of Plaintiff’s business interruption losses and damages. Defendant knew there were reasonable actions it could have taken to thoroughly investigate Plaintiff’s claim but knowingly failed to do so because such actions might have uncovered facts demonstrating that Plaintiff’s claims were in fact covered. Defendant had previously made the institutional decision to not physically investigate COVID-19 claims and not pay such claims regardless of the claim circumstances or applicable policy language.

168. Defendant acted with reckless disregard as to the unreasonableness of the non-existent investigations, non-existent claim communications and implicit denials.



169. Defendant breached the duty of good faith and fair dealing by failing to reasonably investigate Plaintiff's claim and provide coverage.

170. Defendant's implicit denial of coverage constitute bad faith as that term has been repeatedly defined by the Texas Supreme Court.

171. As a result of Defendant's bad faith, Plaintiff suffered and is continuing to suffer tremendous economic damages.

172. Plaintiff is entitled to an award of actual and additional damages as a result of Defendant's bad faith in an amount to be determined at trial, including consequential damages caused by Defendant's bad faith denial of Plaintiff's claim, punitive damages as allowed by Texas law, pre- and post-judgment interest and any other costs and relief that this Court deems appropriate.

**VIII. COUNT X: VIOLATION OF THE TEXAS UNFAIR CLAIM  
SETTLEMENT PRACTICES ACT – TEX. INS. CODE §542.001 AND TEX. INS.  
CODE § 541**

173. Plaintiff repeats and realleges the allegations in the preceding paragraphs as if fully set forth herein.

174. Defendant's systemic practice of either ignoring or mischaracterizing the facts provided by policyholders in connection with claims for coverage for losses from COVID-19 constitutes an unfair or deceptive act or practice in the business of insurance prohibited by Tex. Ins. Code §542.003(b)(1). Rather than conduct any meaningful investigation of Plaintiff's claim Defendant merely wrote a "reservation of rights" letter and then, without investigating anything further, implicitly denied Plaintiff's claim by failing to timely pay the claim within the timeframe required by Article 542 of the Texas Insurance Code. Although Defendant had an opportunity to inspect Plaintiff's damaged property, it chose to do nothing. Although Defendant had an opportunity to interview representatives of Plaintiff regarding its covered losses, Defendant chose to do nothing.

Although Defendant had an opportunity to consider and discuss multiple city, county and state closure orders specific to this insured and this Property, Defendant chose to do nothing. These failures are violations of Section 541 of the Texas Insurance Code and subject Defendant to statutory penalties under Section 542 of the same Code.

175. Defendant's pre-determined conclusions regarding coverage for claims based on losses from COVID-19 without consideration of the particular facts or applicable law constitute an unfair or deceptive act or practice in the business of insurance pursuant to Tex. Ins. Code §542.003(b)(1), (3) and §541.060(3).

176. Defendant's systemic practice and policy of denying coverage for claims by policyholders for losses from COVID-19 without conducting an adequate investigation of the facts and applicable law constitutes an unfair or deceptive act or practice in the business of insurance, pursuant to Tex. Ins. Code §542.003(b)(1), (3) and §541.060(3).

177. Defendant failed to adopt and implement reasonable standards for the prompt investigation and processing of claims related to losses based on COVID-19, which constitutes a violation of Tex. Ins. Code §542.003(3) and §541.060(3). In fact, the systematic and institutional practices adopted were intended to treat all COVID-19 claims exactly the same, minimize its investigative time and expenses, and deny all without regard to any unique factors indicating the existence of coverage under the Policy and the compensability of covered losses suffered by Plaintiff. These acts and omissions constitute gross violations of Section 541 of the Texas Insurance Code for which Plaintiff is entitled to damages and penalties under Section 542 of the same Code.

178. Defendant's systemic practices and procedures to delay and deny COVID-19 claims have compelled Plaintiff to initiate this litigation to recover amounts due under the Policy in response

to Defendant's attempt to unreasonably delay or deny Plaintiff's claim, which constitutes a violation of Tex. Ins. Code §542.003(b)(5).

179. As a result of Defendant's unfair or deceptive acts or practices, Plaintiff suffered and continues to suffer actual contractual damages, actual consequential damages, additional damages, and attorneys' fees.

180. Plaintiff is entitled to an award of actual and additional damages as a result of Defendant's unfair or deceptive acts or practices in an amount to be determined at trial, including actual contractual damages, actual consequential damages, statutory penalties, attorneys' fees, pre- and post-judgment interest and any other costs and other relief that this Court deems appropriate.

181. Plaintiff has been required to retain the services of attorneys to commence this action and is further entitled to all reasonable and necessary attorneys' fees, costs and expenses in the amounts allowed by Texas law.

#### **IX. REQUEST FOR RELIEF**

**WHEREFORE**, Plaintiff respectfully requests that the Court enter judgment in its favor and against Defendants as follows:

1. Judgment against Defendants for actual damages in an amount to be determined by the jury as allowed by the Policies made the basis of this suit;
2. Additional damages and/or punitive damages as allowed by applicable Texas law;
3. Statutory penalties under Texas Insurance Code 542 as allowed by Texas law;
4. Reasonable and necessary attorney's fees, expenses and costs of court as allowed by Texas law;
5. Pre and pos-judgment interest, as provided by law;
6. For such other and further relief as the Court deems just and proper.

**X. RULE 47 STATEMENT**

182. Plaintiff's damages are estimated at this time, to be in excess of \$1,000,000. Plaintiff reserves the right to amend this statement as discovery proceeds.

**XI. REQUEST FOR JURY TRIAL**

183. Plaintiff requests a jury trial of all applicable causes of action herein and pursuant to TEX. CIV. PRAC. & REM. CODE §37.007. Plaintiff has paid the jury fee.

**XII. PRAYER**

Plaintiff requests that Defendant be cited to appear and answer, and that on final trial Plaintiff have:

1. Judgment against Defendant for sum in excess of the minimum jurisdictional limits of the Court;
2. Extra-contractual damages at the maximum amount permitted by the Texas Insurance Code;
3. Prejudgment interest as provided by law;
4. Post judgment interest as provided by law;
5. Attorney's fees and expenses;
6. Costs of Suit; and
7. Such other and further declaratory, legal and equitable relief as sought and prayed for herein to which Plaintiff may be justly entitled.

Respectfully Submitted,

**HEARD MERMAN LAW FIRM**

/s/ Derek Merman

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The following is the above-signed attorneys designation of electronic service e-mail address for all electronically served documents and notices, filed and unfiled, pursuant to TEX. R. CIV. P. 21(f)(2) & 21(a).

HLMpi@HeardMerman.com This is the above signed attorneys ONLY electronic service e-mail address, and service through any other e-mail address will be considered invalid.