

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY**

THE ONE GROUP HOSPITALITY INC.,

Plaintiff,

v.

**EMPLOYERS INSURANCE COMPANY
OF WAUSAU,**

Serve: Registered Agent
CSC-Lawyers Incorporating Service
Company
221 Bolivar St.
Jefferson City, MO 65101

Defendant.

Case No. _____

PETITION FOR DECLARATORY JUDGMENT AND BREACH OF CONTRACT

Plaintiff, The One Group Hospitality Inc. (“TOG”), files this Petition for Declaratory Judgment and Breach of Contract against Defendant, Employers Insurance Company of Wausau (“Wausau”), alleging as follows:

I. NATURE OF ACTION

1. This is an action for declaratory judgment and breach of contract arising out of the refusal of Wausau to live up to its promise to its policyholder, TOG. Wausau promised to pay for, in exchange for premiums paid, physical loss or physical damage to, and related business interruption losses and expenses, TOG’s covered locations under an “all risk” insurance policy, Policy Number YAC-L9L-471218-019 for the period December 10, 2019 to December 10, 2020 (the “All Risk Policy”). A copy of the All Risk Policy is attached hereto as **Exhibit A**, and is incorporated herein by reference.

2. TOG is a global hospitality company that owns and operates upscale and elevated casual restaurants worldwide, including 35 restaurants across the United States under the trade

names STK and Kona Grill (collectively, the “TOG Restaurants”). As of March 2020, TOG owned and operated TOG Restaurants in Missouri, as well as in Alabama, Idaho, New Jersey, Indiana, Maryland, Nebraska, Michigan, Minnesota, Georgia, Colorado, Tennessee, Ohio, Texas, New York, Nevada, Washington, Florida, Arizona, Illinois, California, and Puerto Rico.

3. This all changed in 2020 with the COVID-19 pandemic. The pandemic had an unprecedented and catastrophic effect on TOG’s property and business operations, as well as the operations of its direct and indirect suppliers, causing millions of dollars in losses.

4. The havoc wrought by the pandemic is well-documented. According to the Centers for Disease Control and Prevention (“CDC”), as of February 28, 2022, COVID-19 has infected more than seventy-eight million people and killed nearly 945,000 in the United States. The states where TOG’s properties are located have not been spared from this tragedy.

5. Beyond the human toll, the pandemic has had a devastating impact on the economies where TOG’s properties are located, causing widespread physical losses, property damage and loss for many businesses, including the TOG Restaurants. As a result of the pandemic, TOG has been prevented from conducting normal business operations and deprived of the use of its business properties. Even when permitted to open, as a result of the spread of COVID-19, TOG’s properties required substantial physical alterations and other protective measures. Further, the presence of COVID-19 and SARS-CoV-2 within TOG Restaurants also caused direct physical loss or damage to properties (or both) by transforming the properties from usable and safe into properties that are unsatisfactory and prohibited for use, uninhabitable, unfit for their intended function, and extremely dangerous and potentially deadly for humans. TOG also suffered losses as a result of the interruption of business at its direct and indirect suppliers.

6. SARS-CoV-2 and COVID-19 caused direct physical loss or damage to properties

(or both) throughout the locales where the TOG Restaurants are based, including to TOG's covered properties and surrounding properties, and those of its direct and indirect suppliers, by altering the physical conditions of the properties so that they were no longer safe or fit for occupancy or use, and/or permitted to be used. Specifically, SARS-CoV-2 attaches itself to surfaces and properties, thereby producing physical change in the condition of the surfaces and properties—from safe and touchable to unsafe and deadly. SARS-CoV-2 and COVID-19 also physically alter and damage the air within buildings such that the air is no longer safe to breathe.

7. It is often the case that the source of a covered property insurance loss can ultimately be cleaned, removed, contained, or remediated, yet that does not mean that there was no “loss or damage to” property in the first place. This was true for mold, odors, smoke, fumes, and asbestos fibers that triggered coverage in other cases and the same is true here. That is especially significant when it comes to business interruption losses, where even modest impacts to property lead to covered losses. There are plenty of cases in which a right to claim business interruption loss was found where nothing had to be done to fix the property damage, which cleared by natural action. SARS-CoV-2 can be disinfected or cleaned, but it still causes a distinct and demonstrable alteration to property. That is what has triggered coverage for TOG's significant losses here.

8. Because of the physical alterations of its properties, including the air, airspaces, and surfaces in its properties, which rendered the insured properties incapable of performing their essential functions, TOG sustained direct physical loss or damage to its property (or both). The disruption of normal business operations, and the operations of its direct and indirect suppliers, resulted in the severe and substantial losses more particularly described below.

9. As a direct cause from the COVID-19 pandemic and/or the closure orders, together

with Wausau's failure to live up to its obligations under the All Risk Policy, TOG was forced to file this action. TOG would not have had to file and incur the cost of this legal proceeding if TOG had paid the loss and damage it was obligated to pay. To date, TOG has suffered millions of dollars in loss and damage, all of which remains unreimbursed by Wausau despite being covered under the terms of the All Risk Policy purchased.

10. TOG's purchase of this broad "all risk" coverage created a reasonable expectation that the coverage will apply if TOG has a business interruption resulting from unforeseen and fortuitous events, such as the physical damage to and inability to use its properties or a forced government shutdown of its businesses as a result of a pandemic or other large-scale natural disaster. In particular, TOG could not foresee the physical damage produced by the COVID-19 pandemic or the government orders shuttering its properties as a result of the physical damage produced by the COVID-19 pandemic. After faithfully paying a high premium for "all risk" coverage, business owner-insured TOG, who was forced to close its properties from these unprecedented events, had a reasonable expectation that its "all risk" business interruption insurance would apply and protect it. TOG had such expectations and sought coverage from Wausau for the losses.

11. Despite the coverage provided and the expectations of TOG, who paid a significant premium for it, Wausau preemptively denied claims submitted by businesses for "all risk" coverage during the COVID-19 pandemic. In violation of state law, Wausau denied coverage without conducting an investigation or considering supporting evidence. Through its conduct, Wausau wrongfully breached its obligations under the All Risk Policy and left TOG without the insurance benefits it paid for, relied upon, and desperately needed during the business closures and interruptions and to remediate its ongoing property damage.

12. The insurance industry has repeatedly and falsely warned courts and the media that COVID-19-related claims will bankrupt insurers and force them to raise premiums and restrict coverages – but they have reaped enormous profits by denying covered claims and have continued to raise premiums despite refusing to uphold their coverage obligations.

13. TOG seeks a declaration that the presence, statistically certain presence, or suspected presence of the SARS-CoV-2 virions in or on TOG's property and the ubiquitous presence of the virions throughout the locales and states where TOG's covered properties are located, causes direct physical loss or direct physical damage to property within the meaning of those phrases as used in the All Risk Policy sufficient to trigger coverage under the All Risk Policy.

14. TOG also seeks a declaration that various orders issued by governmental officials on account of the presence of persons infected with and/or suffering from COVID-19 and the presence of SARS-CoV-2 in places of business and gathering prevented TOG from accessing and using its insured properties to conduct its ordinary business activities and deprived TOG of its property and the functionality of its property, thereby constituting "physical loss or damage" to property within the meaning of that phrase as used in the All Risk Policy sufficient to trigger coverage in favor of TOG under the All Risk Policy.

15. TOG also seeks monetary damages for Wausau's breach of its obligations under the All Risk Policy as declared by the Court and to pay TOG's losses in full including, without limitation, loss mitigation expenses.

II. PARTIES

16. The One Group Hospitality Inc. is a Delaware corporation with its principal place of business in Colorado. TOG operates a Kona Grill restaurant in this County.

17. Employers Insurance Company of Wausau is a Wisconsin corporation with its principal place of business in Wisconsin. Upon information and belief, Employers Insurance

Company of Wausau is a wholly-owned subsidiary of Liberty Mutual Holding Company Inc.

18. Wausau is, and at all relevant times herein has been, engaged in the business of selling “all risk” insurance policies, other insurance policies and other products and services to, among others, companies like TOG.

III. JURISDICTION AND VENUE

19. This Court has personal jurisdiction over Wausau because it is registered to do business in the State of Missouri and has consistent and significant commercial interactions within the State of Missouri. Further, Wausau purposefully availed itself of the laws of Missouri by insuring properties, such as those owned and operated by TOG, located in Missouri.

20. Jurisdiction is also proper in this Court pursuant to R.S. Mo. §§ 506.500.1(1), (2) & (5) and 526.010 because Wausau transacted business and entered into contracts for the performance of services within this State, including contracting to insure risks and property located within this State at the time of contracting, and the relief being requested results from Wausau’s conduct within this State

21. This Court has jurisdiction to grant declaratory relief under R.S. Mo. § 526.010 because an actual controversy exists between the parties as to their respective rights and obligations under the All Risk Policy.

22. Venue is proper in this Court under R.S. Mo. § 508.010 because Wausau transacts business in Jackson County, and TOG suffered loss and/or damage to property located in this County.

IV. FACTUAL BACKGROUND

The COVID-19 Global Pandemic

23. In December 2019, during the term of the All Risk Policy, an outbreak of illness known as COVID-19 caused by a novel coronavirus formally known as SARS-CoV-2 was first

identified in Wuhan, Hubei Province, China. In an unprecedented event that has not occurred in more than a century, a pandemic of global proportions then ensued, with the illness and virus quickly spreading to Europe and then to the United States.

24. In 2020, COVID-19 decimated the economies of the states and cities where the TOG Restaurants, and its direct and indirect suppliers, are located, including TOG's business operations.

25. COVID-19 is highly transmissible and spreads rapidly. For example, as of March 1, 2020 there were 87,137 confirmed COVID-19 cases across the globe.¹ That number increased to over 800,000 confirmed cases in April and over 3,000,000 cases in May.² According to the CDC, to date, COVID-19 has infected more than thirty-three million people and killed nearly 600,000 in the United States alone.

26. At the pandemic's peak, over 4,000 Americans were perishing per day from COVID-19.³ A substantial number of Americans are still dying daily, with surges of cases and new and ever more contagious variants of COVID-19 occurring throughout the U.S and worldwide.⁴ COVID-19 is now the third-leading cause of death in this country, surpassed only by heart disease and cancer.⁵

¹ See <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200301-sitrep-41-covid-19.pdf>.

² See <https://graphics.reuters.com/CHINA-HEALTH-MAP/0100B59S39E/index.html>.

³ Eugene Garcia, Lisa Marie Pane and Thalia Beaty, *U.S. tops 4,000 daily deaths from coronavirus for 1st time*, AP NEWS, Jan. 8, 2021, <https://apnews.com/article/us-coronavirus-death-4000-daily-16c1f136921c7e98ec83289942322ee4> (last visited May 25, 2021).

⁴ https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendsdeaths (last visited May 25, 2021); Johns Hopkins Medicine, *Coronavirus Second Wave? Why Cases Increase*, updated Nov. 17, 2020, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/first-and-second-waves-of-coronavirus> (last visited May 25, 2021).

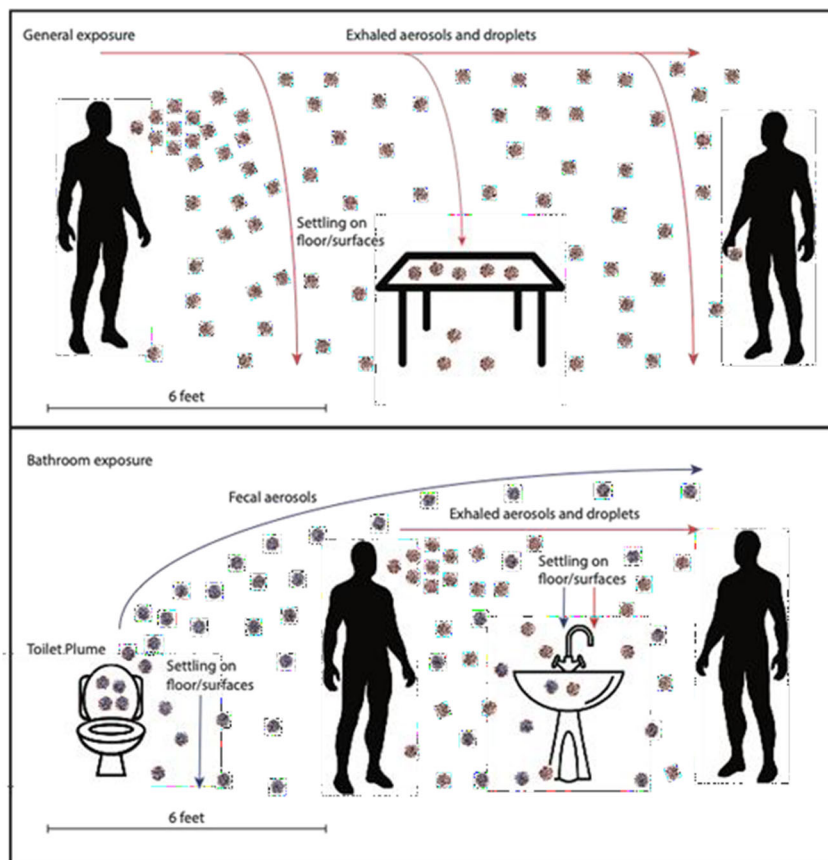
⁵ Gary Stix & Youyou Zhou, *COVID-19 Is Now the Third Leading Cause of Death in the U.S.*, SCI. AM. (Oct. 8, 2020), <https://www.scientificamerican.com/article/covid-19-is-now-the-third-leading-cause-of-death-in-the-u-s/> (last visited June 3, 2021).

27. COVID-19 can be transmitted in several ways, including via human-to-human contact, airborne viral particles, particularly within enclosed properties like the insured locations, and touching surfaces or objects that have SARS-CoV-2 virions on them.

28. COVID-19 spreads easily from person to person and person to surface or object. Research has revealed that COVID-19 primarily is spread by small, physical droplets expelled from the nose or mouth when an infected person talks, yells, sings, coughs, or sneezes. A person who sneezes can release a cloud of SARS-CoV-2-containing droplets that can span as far as 23 to 27 feet. The CDC has stated that SARS-CoV-2 is most likely to spread when people are within six feet of each other, but has also recognized that SARS-CoV-2 may spread from an infected person who is more than six feet away or who has left a given space. Further, according to the CDC, longer exposure time likely increases exposure risk to COVID-19.

29. Infected people shed copious amounts of SARS-CoV-2 into the air and surfaces around them by several different mechanisms, as illustrated in the below figure.⁶ SARS-CoV-2 damages the air and surfaces of a property.

⁶ TOG already has engaged a virologist expert, Dr. Angela Rasmussen, Ph.D., who at the appropriate phase of this litigation will substantiate and elaborate on SARS-CoV-2 and the physical damage it causes to property. Dr. Rasmussen is an affiliate of the Georgetown Center for Global Health Science and Security and a research scientist III (Associate Professor equivalent) at the Vaccine and Infectious Disease Organization-International Vaccine Centre (VIDO-InterVac), as well as an adjunct professor in the department of biochemistry, microbiology, and immunology at the University of Saskatchewan.



30.

31. SARS-CoV-2 is exhaled in respiratory particles through normal breathing, as well as coughing, speaking, singing, shouting, or exerted breathing, into the air by persons with COVID-19, including symptomatic and asymptomatic persons, where it persists in respiratory aerosols and droplets. Aerosols can remain suspended in the air for prolonged periods of time, where they can travel distances greater than 6 feet and eventually settle on surfaces to become fomites (infectious objects). Infectious aerosols can accumulate in enclosed spaces and present a significant infection risk in a manner that is dependent on concentration, not distance. Notably, without adequate ventilation and air filtration, the transformation of indoor air by people in an enclosed space for a long period of time presents a substantial infection hazard that cannot be mitigated solely with masks and distancing, resulting in damage to the property.

32. In addition to damage to the property via transformation of the indoor air, SARS-CoV-2 can be deposited on surfaces either through direct contact with respiratory secretions or

saliva of an infected person (transfer by hand or tissue) or by settling of particles from the air.

33. Inhalation of infectious aerosols is a major mode of SARS-CoV-2 transmission, providing a clear mechanism for SARS-CoV-2 in the air to damage property. Although fomite transmission is thought to be uncommon, it is still a viable mode of transmission along with the more dominant modes of transmission by direct contact and inhalation of infectious SARS-CoV-2, and risk of fomite transmission is dependent on prevalence in the community, virus shedding, environmental features such as heat or humidity, mitigation efforts such as masks, distancing, or ventilation, rate of deposition of virus particles onto surfaces, frequency of exposure to those surfaces, and achieving minimum infectious dose.

34. All three modes of transmission have been demonstrated in multiple experimental models. Exhaled respiratory particles and fecal bioaerosols present a significant transmission risk even after they have settled and are no longer suspended in the air, and disturbances can resuspend them in the air.

35. Thus, SARS-CoV-2 causes property damage by rendering property unsafe and unfit for habitation and use, by transforming both the shared air breathed by the property's occupants and the physical surfaces of the property itself.

36. The presence of infected people on the property ensure that infectious SARS-CoV-2 will inevitably be shed into the air and onto surfaces, damaging the property by rendering it unsafe for occupation and use without extreme mitigation measures.

37. Making matters worse, pre-symptomatic and asymptomatic individuals can also transmit COVID-19.⁷ Over 40% of all infections occur from people without any symptoms.⁸ Thus,

⁷ See <https://www.nature.com/articles/s41591-020-0869-5>.

⁸ See *id.*; <https://www.nbcnews.com/health/healthnews/asymptomatic-covid-19-cases-may-be-more-common-suspected-n1215481>.

even individuals who appear healthy and present no identifiable symptoms of the disease have and continue to spread the virus by breathing, speaking, or touching objects and surfaces. These activities deposit SARS-CoV-2 virions in the air and on surfaces rendering the air and surfaces changed from their previous condition. According to the World Health Organization (the “WHO”), the incubation period for COVID-19, *i.e.*, the time between exposure to SARS-CoV-2 and symptom onset, can be up to 14 days. Other studies suggest that the period may be up to 21 days.

38. Before infected individuals exhibit symptoms, *i.e.*, the so-called “pre-symptomatic” period, they are most contagious, as their viral loads will likely be very high, and they may not know they have become carriers. In addition, studies from the CDC and others estimate that between 40% to 70% of infected individuals may never become symptomatic (referred to as “asymptomatic” carriers). Pre-symptomatic and asymptomatic carriers are likely unaware that they are spreading SARS-CoV-2 by merely touching objects and surfaces, or by expelling droplets into the air. The National Academy of Sciences has found that the majority of transmission is attributable to people who are not showing symptoms, either because they are pre-symptomatic or asymptomatic.

39. Although these virus-containing droplets are very small, they are still physical, tangible objects that can travel and attach to other surfaces, “such as tables, doorknobs, and handrails,” and cause harm, loss, and damage, and physically alter the property and/or the integrity of the property. Viruses, themselves, are microscopic and made up of genetic material surrounded by a protein shell⁹, but they are capable of being observed and can attach themselves to other things they encounter. When droplets and viruses contact objects, they alter those objects, although not in way perceptible by the naked human eye. These virus-containing droplets physically exist

⁹ See <https://rockedu.rockefeller.edu/component/what-are-viruses-made-of/>.

ubiquitously in the communities and buildings in which TOG operates.

40. According to the CDC and the WHO, a person may become infected by touching these surfaces or objects that have SARS-CoV-2 on them, and then touching his or her mouth, eyes, or nose. And, when an uninfected person touches a surface containing SARS-CoV-2, the uninfected person may transmit COVID-19 to another person, by touching and infecting a second surface, which is subsequently touched by that other person. The CDC has thus recommended certain physical and structural remedial measures for businesses to put into place in order to limit transmission and continued surface alteration.

41. Numerous scientific studies have reported that SARS-CoV-2 can survive and persist within the air and on surfaces and buildings after infected persons are present at a given location. Studies have found that SARS-CoV-2 remains active and dangerous in the air in properties and on common surfaces, including plastic, stainless steel, glass, wood, cloth, ceramics, rubber, and even money.¹⁰ All of these materials are widely present at TOG's insured locations and subject to touch by the multitudes of people visiting the TOG Restaurants daily. A business reliant on a high volume of patrons physically occupying space, dining, and conversing, such as TOG, is particularly vulnerable to this danger.

42. Generally enclosed spaces where large numbers of people gather in close proximity for social and business purposes, including highly trafficked indoor restaurants like TOG's, are reportedly particularly susceptible to circumstances favorable to the spread of SARS-CoV-2 virions. An article published in April 2020 analyzed a case study of three families (families A, B,

¹⁰ See, e.g., [https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247\(20\)30003-3/fulltext](https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247(20)30003-3/fulltext); <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4659470/>; See <https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days>; <https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html>.

and C) who had eaten at an air-conditioned restaurant in Guangzhou, China.¹¹ One member of family A, patient A1, had recently traveled from Wuhan, China. On January 24, 2020, that family member ate at a restaurant with families A, B, and C. By February 5, 2020, 4 members of family A, 3 members of family B, and 2 members of family C had become ill with COVID-19. The only known source for those affected persons in families B and C was patient A1 at the restaurant. Moreover, a study detected SARS-CoV-2 inside the heating and ventilation (“HVAC”) system connected to hospital rooms of sick patients. The study found SARS-CoV-2 in ceiling vent openings, vent exhaust filters, and ducts located as much as 56 meters (over 183 feet) from the rooms of the sick patients.¹²

43. Additionally, the CDC has stated that “there is evidence that under certain conditions, people with COVID-19 seem to have infected others who were more than 6 feet away” and infected people who entered the space shortly after the person with COVID-19 had left.¹³ A published systematic review of airborne transmission of SARS-CoV-2 corroborated the CDC’s concerns and recommended procedures to improve ventilation of indoor air environments to decrease bioaerosol concentration and physically reduce potential spread of SARS-CoV-2 in properties like the insured locations.¹⁴

44. The CDC has recommended “ventilation interventions” to help reduce exposure to

¹¹ See https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article.

¹² Karolina Nissen, et al., *Long-distance airborne dispersal of SARS-CoV-2 in COVID-19 wards*, 10 NATURE SCI. REPORTS 19589 (Nov. 11, 2020), <https://doi.org/10.1038/s41598-020-76442-2> (last visited May 25, 2021).

¹³ CDC, *How COVID-19 Spreads* (last updated Oct. 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited May 25, 2021).

¹⁴ Zahra Noorimotlagh, et al., *A systematic review of possible airborne transmission of the COVID-19 virus (SARS-CoV-2) in the indoor air environment*, 193 ENV’T RSCH. 110612, 1-6 (Feb. 2021), https://www.sciencedirect.com/science/article/pii/S0013935120315097?dgcid=rss_sd_all (last visited May 25, 2021).

the airborne SARS-CoV-2 in indoor spaces, including increasing airflow and air filtration (such as with high-efficiency particulate air (“HEPA”) fan/filtration systems).¹⁵ These and other remedial measures must be implemented, at high cost and extra expense, to reduce the amount of the SARS-CoV-2 present in a given space and to make property safe for its intended use. These remedial measures demonstrate direct physical loss or damage to interior spaces like the insured locations even where no virus is present.

45. The extent and nature of presymptomatic viral shedding suggests that property damage through environmental exposure and persistence in the air, surfaces, and floors is inevitable for high-traffic venues such as restaurants, hospitals, casinos, cruise line vessels, and event spaces, environments that are highly conducive to SARS-CoV-2 spread. This leads to additive, sustained property damage, as those who are infected then shed virus themselves, further damaging the property and rendering it unsafe and unfit for use.

46. A single introduction of SARS-CoV-2 can persist in indoor environments for long periods of time. SARS-CoV-2 RNA has been detected on packages even after international transport, as well as on numerous environmental samples in locations where infected people have visited or shopped, such as markets, airplanes, ships, or event venues.

47. The proposition advanced by the insurance industry that an indoor space containing the infectious SARS-CoV-2 virions can be made safe and fit for its functional and intended use even though the virions remain in the air and circulating throughout indoor environments either affixed to property or in an aerosol capacity because the virions can be removed by routine surface

¹⁵ CDC, *Ventilation in Buildings* (last updated Feb. 9, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html#:~:text=HEPA%20filters%20are%20even%20more,with%20SARS%2DCoV%2D2> (last visited May 25, 2021).

cleaning is false.

48. A number of studies have also demonstrated that SARS-CoV-2 is “much more resilient to cleaning than other respiratory viruses so tested.”¹⁶ The measures that must be taken to remove SARS-CoV-2 from property are significant and far beyond ordinary or routine cleaning.

49. Efficacy of decontaminating agents for viruses is based on a number of factors, including the initial amount of virus present, contact time with the disinfecting agent, dilution, temperature, and pH, among many others. Detergent surfactants are not recommended as single agents, but rather in conjunction with complex disinfectant solutions.¹⁷

50. Additionally, it can be challenging to accurately determine the efficacy of decontaminating agents. The toxicity of an agent may inhibit the growth of cells used to determine the presence of virus, making it difficult to determine if lower levels of infectious virus are actually still present on treated surfaces.¹⁸

51. In order to be effective, cleaning and disinfecting procedures require strict adherence to protocols not necessarily tested under “real life” or practical conditions, where treated surfaces or objects may not undergo even exposure or adequate contact time.¹⁹ Studies of coronaviruses have demonstrated viral RNA persistence on objects despite cleaning with 70% alcohol.²⁰

52. When considering disinfection, the safety of products and procedures must be

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Joon Young Song, et al., *Viral Shedding and Environmental Cleaning in Middle East Respiratory Syndrome Coronavirus Infection*, 47 INFECTION & CHEMOTHERAPY 4, 252-5 (2015), <https://www.icjournal.org/DOIx.php?id=10.3947/ic.2015.47.4.252> (last visited May 25, 2021).

considered as well, due to the risks of harmful chemical accumulation, breakdown of treated materials, flammability, and potential for allergen exposure.²¹

53. Moreover, the aerosolized SARS-CoV-2 particles and virions cannot be eliminated by routine cleaning. Cleaning surfaces in an indoor space will not remove the aerosolized SARS-CoV-2 particles and virions from the air that people can inhale and develop COVID-19 – no more than cleaning friable asbestos particles that have landed on a surface will remove the friable asbestos particles suspended in the air that people can inhale.

54. Given the ubiquity and pervasiveness of SARS-CoV-2, no amount of cleaning or ventilation intervention will prevent a person infected and contagious with the virus from entering an indoor space like the insured properties and exhaling millions of additional particles and virions into the air, further: (a) filling the air with the aerosolized SARS-CoV-2 virions that can be inhaled, sometimes with deadly consequences; and (b) depositing SARS-CoV-2 particles and virions on surfaces, physically altering and transforming those surfaces into disease-transmitting fomites.

55. Even as vaccines to protect against COVID-19 have recently become more available, distribution remains uneven. Effective control of the disease's spread since the pandemic began has necessarily relied on measures designed to reduce human-to-human and surface-to-human exposure. Similarly, the governmental orders closing or severely limiting use of non-essential business premises like TOG's business premises are one of the most common modes of preventing transmission of the disease because, among other things, the orders reduce the size and frequency of social gatherings and the physical use of properties.

COVID-19 and SARS-CoV-2 Cause Direct Physical Loss and Damage

56. Virologists, scientists, and researchers all have confirmed that SARS-CoV-2

²¹ *Id.*

remains viable and is active on physical surfaces after deposited on property as in the air. The persistent presence of the deadly, viable SARS-CoV-2 on surfaces and in the air damages buildings and properties rendering them damaged, lost, unsafe, unfit, and uninhabitable for normal occupancy or use.

57. Specifically, the scientific community has confirmed that SARS-CoV-2 and COVID-19 alter the conditions of properties and buildings such that the premises are physically damaged and no longer safe and habitable for normal use. In this regard, SARS-CoV-2 and COVID-19 cause direct physical loss or damage to buildings and properties (or both).

58. This direct physical loss or damage to property (or both) results because SARS-CoV-2 has a corporeal existence and is contained in respiratory droplets. Once expelled from infected individuals, these droplets land on, attach, and adhere to surfaces and objects and physically changes these once safe surfaces to “fomites.” Fomites are objects, previously safe to touch, that now serve as a vehicle and mechanism for transmissions of an infectious agent. Fomites are the result of SARS-CoV-2 physically changing air and property, making it unsafe. This physical alteration and change makes physical contact with those previously safe indoor spaces and inert surfaces (*e.g.*, walls, handrails, desks) unsafe and potentially deadly. This represents a physical change in the affected enclosed space, surface or object, causing severe property loss and damage. Affected properties are unusable, dangerous, and unsafe until the COVID-19-related conditions are fully rectified.

59. Medical and scientific research also has established that SARS-CoV-2 and COVID-19 spread through indoor airborne transmission. When individuals carrying SARS-CoV-2 breathe, talk, cough, or sneeze, they expel aerosolized droplet nuclei that remain in the air, accumulate in buildings, and, like dangerous fumes, make the premises unsafe and affirmatively dangerous.

According to experts, buildings and properties accumulate the airborne SARS-CoV-2 indoors, which plays a significant role in community transmission. As a result, SARS-CoV-2 and COVID-19 cause direct physical loss or damage to properties and buildings (or both) by changing the physical condition of air in buildings from safe and breathable to unsafe and dangerous.

60. Further, airborne viral particles are known to be able to spread into a facility's HVAC system, leading to transmission of SARS-CoV-2 from person to person. The Environmental Protection Agency ("EPA") has recommended that facilities make improvements to their ventilation and HVAC systems by, for example, increasing ventilation with air filtration and outdoor air. Accordingly, COVID-19 and SARS-CoV-2 cause direct physical loss or damage to property (or both) by, among other things, destroying, distorting, corrupting, attaching to, and physically altering property, including its surfaces, and by rendering property unusable, uninhabitable, unfit for intended functions, dangerous, and unsafe.

61. Fomites, droplets, droplet nuclei, and aerosols containing SARS-CoV-2 are not theoretical, informational, or incorporeal, but rather are dangerous physical objects that have a tangible existence. Their presence within an insured property causes direct physical loss or damage to property (or both) by necessitating remedial measures that include without limitation repairing or replacing air filtration systems, remodeling and reconfiguring physical spaces, removal of fomites by certified technicians, and other measures. The presence of COVID-19 and SARS-CoV-2 within an insured property also causes direct physical loss or damage to properties (or both) by transforming property from usable and safe into a property that is unsatisfactory for use, uninhabitable, unfit for its intended function, and extremely dangerous and potentially deadly for humans.

62. The presence of SARS-CoV-2 on property similarly creates the imminent threat of

further damage to that property or to nearby property. Individuals who come into contact, for example, with respiratory droplets at one location in the property by touching a doorknob, table, or handrail, will carry those droplets on their hands and deposit them elsewhere in the property, causing additional damage and loss. Property impacted by SARS-CoV-2 is just as dangerous as property impacted by fire or fumes or vapors (if not more), and all such damaged property is equally incapable of producing revenues. Like the impact of fire, smoke, or noxious fumes, the impact of potentially fatal COVID-19 constitutes direct physical loss or damage to property (or both).

63. The direct physical loss or damage to property (or both) described in this section has occurred at TOG's insured locations (including in Jackson County), and at its direct and indirect suppliers, leading to losses covered by the All Risk Policy. TOG had to take action to secure and preserve its properties and its business operations. To the extent that the All Risk Policy requires structural alteration to establish "physical damage," which TOG disputes, such alteration has occurred and rendered the insured properties incapable of performing their essential functions. TOG's losses are ongoing and are likely to increase substantially given the length and ultimate severity of the outbreak, repeated closures of the TOG Restaurants, and the government response. Moreover, to the extent that the All Risk Policy requires a permanent loss of property to establish "physical loss," which TOG disputes, such permanent loss has occurred.

Reactions at the National, State, and Local Levels

64. Across the United States, national, state and local governments tried to slow the spread of COVID-19 and protect people, property, and businesses. Unprecedented directives were issued, requiring certain businesses to close and requiring residents to remain in their homes unless performing "essential" activities.

65. On January 31, 2020, the United States Department of Health and Human Services declared that a public health emergency existed nationwide because of confirmed cases of COVID-19 in the United States.

66. Beginning in early March 2020, U.S. state and local governments issued orders suspending or severely curtailing the operations of all “non-essential” or “high risk” businesses in response to the virus and/or risks created by virus. This included restaurants such as those owned and operated by TOG and the operations of its direct and indirect suppliers.

67. On or about March 2020, U.S. states, counties, and cities where TOG’s insured properties, and the properties of its direct and indirect suppliers, are located declared states of emergency to help prepare for broader spread of COVID-19. The TOG Restaurants were only permitted to reopen with physically reduced capacities and physical changes to premises.

68. On or about March 2020, U.S. states, counties, and cities where TOG’s insured properties are located issued orders prohibiting all restaurants within those counties/cities from serving patrons on premises. The orders where applicable allowed restaurants to continue to operate only for purposes of offering products to customers *via* delivery service, customer take-out, pick-up, or for drive-thru service (subject to certain restrictions).

69. For example, on March 12, 2020, Quinton D. Lucas, the Mayor of the City of Kansas City, Missouri, issued a proclamation declaring a state of emergency, stating that the continued spread of COVID-19 constitutes a natural calamity and presents an imminent threat of widespread illness, which requires emergency action. The proclamation was ordered “to protect life and property” and permitted the city to order evacuations, close public places, impose curfews, limit public gathering and assemblies, and to order the closing of any and all businesses.

70. Further, on March 13, 2020, Missouri Governor Michael Parson declared a state of emergency due to COVID-19. And on April 3, 2020, Governor Parson and the Missouri Department of Health and Senior Services issued an order requiring individuals within State of Missouri to stay at home except for certain essential activities and prohibited the gathering of more than ten people due to COVID-19.

71. These orders, together with similarly construed orders issued by government officials, effectively curtailed TOG's stores' on-premises business operations that rely on customers' ability to dine on-premises in an interruption of business operations.

72. Because of the danger posed by COVID-19 and its spread as described above, TOG also determined that closure was necessary to slow the spread of COVID-19 as a result of infected persons on the property or from those who would enter the property.

73. Governmental authorities across the U.S. and abroad have issued orders referencing physical property loss or damage or imminent threatened physical property loss or damage from the virus. A motivating factor behind these orders was to protect persons and property from direct physical loss or damage to property (or both) caused by SARS-CoV-2 and COVID-19.

74. Prior to the issuance of any of the orders curtailing or suspending non-essential business operations, literally thousands of individuals would be present in TOG Restaurants on a daily basis.

75. The vast majority of those individuals were in-restaurant diners, who would spend a substantial period of time in the restaurant dining, conversing, and relaxing.

76. Given the number of infected individuals, it is a virtual certainty that infected individuals, both symptomatic and asymptomatic, were present in TOG's stores on a daily basis even prior to the issuance of the governmental orders and would have been present daily in TOG's

restaurants in an ever-increasing number in the absence of the issuance of those orders.

77. Exhalation by these infected individuals when eating, coughing, sneezing, talking, laughing, and even simply breathing created respiratory droplets and aerosolized particles containing the SARS-CoV-2 virus that were inhaled into the noses, mouths, and lungs of other individuals and deposited on surfaces within the TOG Restaurants where later contact by uninfected individuals undoubtedly resulted in transmission of SARS-CoV-2 to those individuals.

78. Each visit by an individual, whether symptomatic or asymptomatic, infected with SARS-CoV-2 resulted in either the actual or an imminent threat of deposition and transmission of the SARS-CoV-2 into the air and onto the surfaces within the TOG Restaurants.

79. For the reasons described above, COVID-19 and the governmental orders caused a total or partial prohibition of access to the TOG Restaurants as well as partial or total interruption of TOG's restaurant operations. The direct physical loss or damage to property (or both) caused by COVID-19 and/or the orders and the further direct physical loss or damage to property (or both) threatened by COVID-19 have combined to devastate TOG's business operations.

80. Further, for the reasons described above, COVID-19 and the governmental orders caused a total or partial prohibition of access to certain of the properties of TOG's direct and indirect suppliers, such that TOG experienced contingent business interruption loss because of the delay or failure to receive supplies, materials, food products, and other tangible things necessary to TOG's normal and expected business operations.

TOG Suffered and Continues to Suffer Covered Losses

81. The SARS-CoV-2 virus is a covered cause of loss, because it is a risk of physical loss or damage, and not otherwise excluded under the All Risk Policy.

82. The issuance of the above-referenced closure orders by government officials is a

covered cause of loss because it is a risk of direct physical loss or direct physical damage, and not otherwise excluded under the All Risk Policy.

83. Whether the SARS-CoV-2 virus and/or the above-referenced orders caused TOG's losses and expenses, and in what sequence in each covered location, presents a factual question that is inappropriate for resolution at the motion to dismiss stage.

84. The SARS-CoV-2 virus and/or the above-referenced orders issued by government officials have directly impacted the TOG Restaurants, which do not qualify as essential businesses. The damage and far-reaching restrictions and prohibitions on the activities that can be conducted at the TOG Restaurants, and restoration efforts necessary to rid the premises of COVID-19, have been catastrophic for TOG – interrupting their operations so pervasively as to effectively force them to close, thereby enduring a prolonged curtailment of earnings.

85. TOG's operations were suspended to allow TOG to repair the insured properties, including restoration efforts to rid the premises of and attempt to protect against further physical loss and/or damage SARS-CoV-2. Until the premises could be repaired and restored and resulting government orders lifted, TOG suffered a complete and permanent loss of use of its business premises and they were unfit for use for their intended purposes.

86. Ultimately, all TOG premises were closed on March 20, 2020, and remained closed through the end of April 2020, at which point TOG began to open on a gradual basis through end of June 2020. As of the end of June 2020, all of the TOG Restaurants had been reopened but were forced to operate at reduced hours and capacity. Since the reopening, some of the TOG Restaurants were again forced to close for periods of time.

87. As a result of the physical loss or damage and threatened or actual communicable disease, TOG acted to mitigate the effects on its business in numerous ways.

88. Prior to business closures in March 2020, the TOG Restaurants were frequented by thousands of individuals a day, including patrons, employees, vendors, and other individuals carrying SARS-CoV-2 and COVID-19. In addition to breathing SARS-CoV-2 and COVID-19 into the air, these individuals touched countless surfaces in TOG's restaurants, including reception, dining room, bar area, restrooms, kitchen, pool tables and game rooms, the furniture, doors, tables, surfaces on the floors, and other common areas on the premises.

89. These individuals that frequent the TOG Restaurants daily, ranging from patrons, to employees, to vendors, are carrying or otherwise exposed to SARS-CoV-2 and COVID-19 and would have been in contact with each other, as well as hosts and servers, dining room, bar area, restrooms, kitchen, transitional spaces, the furniture, doors, tables, surfaces on the floors, and other common areas on the premises.

90. Thus, TOG has been forced to pay decontamination costs, covered under the All Risk Policy, to repair the physical damage caused by COVID-19. It became clear that TOG's covered properties were (and continue to be) inoperable and unusable without the alterations necessary to protect the safety of its patrons, vendors, and employees. These decontamination costs also were necessary to comply with the emergency directives, laws, and/or ordinances promulgated by governmental authorities and the CDC, among others. None of these costs would have been incurred but for the impacts of the COVID-19 pandemic and the resulting closure orders.

91. In addition to decontamination costs, TOG has incurred significant losses and extra expense in nearly all aspects of its business. Again, none of these expenses would have been incurred but for the impacts of the COVID-19 pandemic and the resulting closure orders.

92. Among other things, TOG announced mitigation measures for in-restaurant customers once certain states began to allow reopening of businesses and in-person dining,

requiring proactive measures be taken which led to an uptick in extra expenses.

93. Further, COVID-19 and the governmental orders caused a total or partial prohibition of access to certain of the properties of TOG's direct and indirect suppliers, such that TOG experienced contingent business interruption loss because of the delay or failure to receive supplies, materials, food products, and other tangible things necessary to TOG's normal and expected business operations.

94. The above-referenced orders, issued as a direct result of the physical damage described above, have operated to prohibit access to the TOG Restaurants, the properties of TOG's direct and indirect suppliers, and the immediate surrounding businesses, properties, and areas.

95. The SARS-CoV-2 virus and/or the above-referenced closure orders have also caused TOG to suffer interruption of business operations resulting from TOG taking reasonable and necessary action for the temporary protection and preservation of its covered properties, to prevent immediately impending insured physical loss or damage to its insured locations.

96. The SARS-CoV-2 virus and/or the above-referenced closure orders have further caused TOG to suffer loss of earnings directly resulting from physical loss or damage to property at the premises of TOG's suppliers, customers, and/or contract service providers.

The Insurance Coverage Purchased by TOG

97. In exchange for a very substantial premium, Wausau agreed to indemnify TOG for property losses, business interruption losses ("Time Element" per the policy language), and other losses under its Premier Property Protector™ "all risk" insurance policy, Policy Number YAC-L9L-471218-019 for the period December 10, 2019 to December 10, 2020. *See Ex. A.* The All Risk Policy limit is \$115,381,258, which is subject to a deductible and certain sublimits.

98. When marketing its Premier Property Protector™ policy to the public, Wausau

boasted that this new policy form featured “flexibility, broad coverage, and more relevant capacity in one easy-to-use form.” Mike Fallon, the then president of National Insurance, for Wausau’s corporate parent’s business unit, stressed that “[t]he Premier Property Protector form blends broad coverage, an intuitive structure and easy to understand language....”²²

99. This is because the Premier Property ProtectorTM policy generally, and TOG’s policy in particular, is an “all-risk” policy. An “all-risk” policy provides the broadest coverage available. Under an “all-risk” policy, the policyholder’s burden is limited; the policyholder need only show that a loss occurred and that the loss was fortuitous. The burden then shifts to the insurance company to show that an express exception in the policy bars or limits coverage. Any risk not specifically and unambiguously excluded in the policy is covered.

100. The All Risk Policy broadly covers property against “all risks of direct physical loss or damage, except as hereinafter excluded or limited.” Ex. A, § I.C. Wausau did not define the phrase “physical loss or damage” in the All Risk Policy.

101. The presence of the disjunctive “or” in “physical loss or damage” means that coverage is triggered if there is a risk of *either* a direct physical “loss” *or* “damage” to property. It also means that a “loss” is distinct from “damage.”

102. Physical loss or damage to property happens when a covered cause of loss threatens to render or renders property unusable, unsuitable for its intended purpose, or unsafe for human occupancy and/or continued use.

103. COVID-19 and/or the government shut-down orders described above have caused “direct physical loss or damage” to TOG’s property under the All Risk Policy. Specifically, TOG

²² See *Liberty Mutual Enhances Commercial Insurance Property Form*, Business Insurance, <https://www.businessinsurance.com/article/20170809/NEWS06/912315067?template=printart>.

has suffered a loss of gross earnings that it otherwise would have received if indoor dining was not restricted and curtailed, and the volume of food purchases did not diminish significantly.

104. The All Risk Policy contains a section entitled “Time Element Coverages” which insures TOG’s gross earnings. Within that section, coverage is extended for “Extra Expense” which covers the reasonable and necessary extra costs to “temporarily continue as nearly normal as practicable” business operations. Ex. A, § III.

105. The All Risk Policy also contains additional “Time Element Coverages.” This includes items such as: “Attraction Property”; “Civil or Military Authority”; “Ingress/Egress”; “Contingent Time Element”; and “Leasehold Interest.” *Id.*

106. “Attraction Property” covers actual loss and Extra Expense due to loss or damage at an attraction property within one statute mile from a covered location. “Attraction Property” refers to a property operated by others and that TOG depends on to attract customers to its covered location. *Id.*, § III.E.1.

107. “Civil or Military Authority” coverage insures the “actual loss sustained and EXTRA EXPENSE during the *period of interruption* if an order of civil or military authority prohibits access to a covered location provided such order is caused by physical loss or damage of the type insured by this Policy at a covered location” or within one statute mile from a covered location. *Id.*, § III.E.2.

108. “Ingress/Egress” covers the “actual loss sustained and EXTRA EXPENSE due to the necessary interruption” of business operations “if ingress to or egress from a covered location is prevented, whether or not your premises or property is damaged, provided that such prevention is a direct result of physical loss or damage of the type insured to property of the type insured.” *Id.*, § III.E.8.

109. “Contingent Time Element” coverage insures the “actual loss sustained and EXTRA EXPENSE during the PERIOD OF LIABILITY directly resulting from physical loss or damage of the type insured by this Policy at *Direct Dependent Time Element Location(s)* and *Indirect Dependent Time Element Location(s)* located within the territory of this Policy.” “Direct Dependent Time Element Location(s)” includes any location(s) of a direct: customer, supplier, contract manufacturer or contract service provider to TOG. “Indirect Dependent Time Element Location(s)” includes any location(s) of any company that is a direct customer, supplier, contract manufacturer or contract service provider to any Direct Dependent Time Element Location(s). *Id.*, § III.E.4.

110. In plain English, and as relevant here, the Contingent Time Element coverage under the All Risk Policy provides coverage to TOG if its direct or indirect suppliers (*i.e.*, its suppliers or its suppliers’ suppliers) suffer physical loss or damage to property of the type covered under the All Risk Policy. This includes loss due to civil authority and ingress/egress.

111. “Leasehold Interest” covers loss where a lease agreement “requires continuation of rent as a result of a covered loss, and if the covered property is wholly or partially untenable or unusable, the actual rent payable while the covered property is untenable or until the lease is terminated....” *Id.*, § III.B.3.

112. The All Risk Policy also provides coverage for “Decontamination Costs” “directly resulting from a covered loss at a covered location” as a result of enforcement of a law or ordinance in force at the time of decontamination. *Id.*, § II.D.7. As a result of COVID-19 and/or the civil authority orders described above, the TOG Restaurants were required by government orders to implement heightened decontamination procedures in order to reopen and operate in any capacity.

113. Direct physical loss or damage due to the continuous spread and transmission of

COVID-19, government action or inaction, and the above-referenced civil authority orders are covered causes of loss not otherwise excluded under the All Risk Policy.

114. The All Risk Policy contains an exclusion for “contamination” but it is limited in scope and does not apply here. Specifically, the “contamination” exclusion provides:

We do not cover the following unless directly resulting from a covered loss:

- a. **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 elsewhere in this Policy.

115. The All Risk Policy defines “covered loss” as “loss to **covered property** caused by direct physical loss or damage insured by this Policy.” *Id.*, § VII.5.

116. “Contamination” is defined as “[a]ny condition of property that results from a **contaminant.**” *Id.*, § VII.4. “Contaminant” is “[a]ny foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold or mildew.” *Id.*, § VII.3.

117. On its face, the contamination exclusion applies only to **actual** “contamination” (not the threatened presence of contamination) and any “**cost**” due to actual contamination (not any “loss” or “damage” due to the threatened presence of or actual contamination).

118. The contamination exclusion also does not apply to concurrent causes of loss. Concurrent causation occurs when a loss is brought about through a combination of two or more potential causes. If one of the concurrent causes is covered, there is coverage under the All Risk Policy. If Wausau intended for the contamination exclusion to apply to concurrent causes of loss, then it should have said so like it did in other exclusions. *See, e.g., id.*, § II.C.2. (“We do not cover physical loss or damage directly or indirectly caused by or resulting from any of the following regardless of any other cause or event, whether or not insured under this Policy, contributing to the loss concurrently or in any other sequence”).

119. The All Risk Policy's contamination exclusion does not apply here for at least the following reasons.

120. The contamination exclusion precludes coverage only for any "cost" due to actual contamination, not "loss" or "damage" due to actual or the threatened presence of contamination. The All Risk Policy clearly distinguishes between "cost" and "loss" and "damage." If Wausau intended for this exclusion to preclude coverage for direct physical "loss" or "damage" due to contamination, then it should have said so like it did in other All Risk Policy exclusions it drafted. *See, e.g., id.*, § II.C.2 ("We do not cover physical loss or damage directly or indirectly caused by or resulting from any of the following regardless of any other cause or event, whether or not insured under this Policy, contributing to the loss concurrently or in any other sequence..."); *see also id.*, § II.C.1.d ("We do not cover ... [l]oss or damage or deterioration arising from any delay."); *id.*, § II.C.1.f ("We do not cover ... [l]oss or damage from enforcement of any law or ordinance ... [r]equiring the demolition of any property, including the cost in removing its debris.").

121. Further, the All Risk Policy expressly provides coverage both for "Decontamination Costs" and also removal of "contaminated covered property or the contaminant in or on covered property" resulting from a covered loss. *Id.*, § II.D.6, 7. These separate coverages underscore the fact that Wausau never intended to exclude coverage related to "contamination" where, as here, there is plainly a covered loss.

122. At a minimum, the All Risk Policy's contamination exclusion is ambiguous and should be construed against Wausau as the sole drafter of its All Risk Policy and in favor of the policyholder, TOG. *See Thor Equities, LLC v. Factory Mutual Ins. Co.*, No. 20-3380, 2021 U.S. Dist. LEXIS 62967, 2021 WL 1226983 (S.D.N.Y. Mar. 31, 2021).

123. Further, there are concurrent causes of TOG's loss, and the contamination

exclusion, by its express terms, does not apply to one of them. Thus, even if TOG's loss somehow is determined to be due to a virus, government action or inactions and the above-mentioned civil authority orders, among other potential causes, were a concurrent cause of loss that are covered under the All Risk Policy. If Wausau wanted the contamination exclusion to apply to concurrent causes of loss, then it knew how to exclude them, but it decided not to do so.

TOG's Claim and Wausau's Wrongful Denial of Coverage

124. On March 17, 2020, TOG provided Wausau with notice of its claim for coverage, informing Wausau that it experienced, and continues to experience, physical loss and/or damage to insured property and goods and suffered resulting business interruption losses as a result of the COVID-19 pandemic.

125. On March 23, 2020, Wausau informed TOG that it was denying coverage under the All Risk Policy. Wausau stated, among other things, that "[a]s there was no physical damage and contamination is an excluded peril, there is no coverage for your business interruption loss."

126. Contrary to Wausau's positions, TOG has sustained actual loss and has incurred extra expense directly resulting from direct physical loss or damage to property (or both) of the type insured under the All Risk Policy. No exclusions under the All Risk Policy apply to preclude coverage for TOG's claims.

127. TOG has substantially performed or otherwise satisfied all conditions precedent to bringing this action and obtaining coverage pursuant to the All Risk Policy and applicable law, or alternatively, TOG has been excused from performance by Wausau's acts, representations, conduct, or omissions.

FIRST CAUSE OF ACTION
(Declaratory Relief, pursuant to R.S. Mo. § 527.010)

128. TOG incorporates by reference the allegations contained in Paragraphs 1-127.

129. As set forth above, Wausau sold TOG the All Risk Policy protecting against all risks of direct physical loss or damage to property and time element coverages now being suffered by TOG as a result of COVID-19 and recent orders of civil authority that closed, and curtailed the operations of, the TOG Restaurants and the operations of its direct and indirect suppliers.

130. Wausau breached and continues to breach its promises, as set forth in the All Risk Policy, by, among other things, failing and/or refusing to honor its promises to pay for loss or damage to property and time element coverages now being suffered by TOG as a result of COVID-19 and recent orders of civil authority.

131. As a direct and proximate result of Wausau's breaches of contract and refusal to acknowledge its coverage obligations, TOG has suffered and will continue to suffer serious harm.

132. An actual and justiciable controversy exists between TOG and Wausau regarding the interpretation, application and meaning of the All Risk Policy.

133. Accordingly, TOG is entitled to declaratory judgment of its rights and of the obligations of Wausau under the All Risk Policy.

134. Declaratory relief from this Court will resolve all outstanding issues between TOG and Wausau under the All Risk Policy.

WHEREFORE, pursuant to R.S. Mo. § 527.010, TOG seeks judgment in its favor as to Count I as follows:

- a. TOG suffered loss, damage and/or costs covered under the All Risk Policy;
- b. The All Risk Policy's contamination exclusion does not bar or limit coverage for the loss, damage and/or costs suffered by TOG;
- c. COVID-19 and/or the entry of civil authority orders declaring that the suspected presence of COVID-19 causes physical loss or damage to

property sufficient to trigger coverage under the All Risk Policy;

- d. The entry of an Order declaring that Wausau must pay TOG the limits of liability for direct loss or damage to covered property, for the loss of income sustained by TOG due to COVID-19 and the necessary suspensions, and curtailments, of its operations, and the operations of its direct and indirect suppliers, for extra expenses, and for all additional coverages provided under the All Risk Policy; and
- e. The award of such additional relief as the Court deems just and appropriate.

SECOND CAUSE OF ACTION
(Breach of Contract)

135. TOG incorporates by reference the allegations contained in Paragraphs 1-135.

136. TOG has incurred, and will incur in the future, loss of income, Extra Expenses and other covered loss or damage due to COVID-19 and orders of civil authority that closed and curtailed TOG's operations and the operations of its direct and indirect suppliers.

137. In breach of the All Risk Policy, Wausau refused or otherwise failed to recognize any coverage afforded for TOG's loss, damage and/or costs, thereby causing damage to TOG.

WHEREFORE, TOG seeks judgment in its favor as to Count II as follows:

- a. The entry of an award requiring Wausau to pay TOG all monetary damages suffered by TOG caused by Wausau's breaches, including, without limitation, compensatory damages, consequential damages, prejudgment interest, post-judgment interest, and attorneys' fees and costs; and
- b. The award of such additional relief as the Court deems just and appropriate.

JURY DEMAND

TOG demands a jury trial for all issues so triable.

Dated: March 21, 2022

Respectfully submitted,

BOULWARE LAW LLC

By: /s/ Jeremy M. Suhr

Jeremy M. Suhr MO # 60075

1600 Genessee Street, Suite 416

Kansas City, MO 64102

Tele: (816) 492-2826

jeremy@boulware-law.com

David M. Cummings (*pro hac vice* forthcoming)

REED SMITH LLP

10 S. Wacker Dr., 40th Floor

Chicago, IL 60606

T: (312) 207-1000

F: (312) 207-6400

dcummings@reedsmith.com

ATTORNEYS FOR THE ONE GROUP HOSPITALITY INC.