

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

_____	)	
DOMCO, INC. d/b/a EL TIEMPO	)	
Plaintiff,	)	
	)	
v.	)	
	)	<b>CIVIL ACTION</b>
STARR SURPLUS LINES INSURANCE	)	
COMPANY	)	<b>DOCKET NO. _____</b>
Defendant.	)	
_____	)	<b>COMPLAINT AND JURY DEMAND</b>
	)	

**PLAINTIFF’S ORIGINAL COMPLAINT**

1. Plaintiff DomCo, Inc. d/b/a El Tiempo by and through its attorneys file this Complaint against the above-named defendant, Starr Surplus Lines Insurance Company (also referred to as “Defendant Insurer”) and alleges and states as follows:

**I. INTRODUCTION**

2. This action for breach of contract, declaratory judgment, and bad faith arises out of the Plaintiff’s claims for insurance coverage under an “all-risk” insurance policy (“the Policy”)<sup>1</sup> issued and sold to it by the Defendant insurer. (Starr Surplus Lines Insurance Co. Policy No. SL STPTY112007719.)

3. Despite agreeing to cover Plaintiff’s properties against all risks of direct physical loss or damage, except as specifically excluded in the Policy, and Plaintiff’s property damage and business interruption damages, Defendant Insurer wrongfully denied coverage.

<sup>1</sup> See The Policy attached at Exhibit A.

## II. THE PARTIES

4. Plaintiff Domco, Inc. d/b/a El Tiempo is a Texas Corporation with its principal place of business in Houston, Texas.

5. Defendant Starr Surplus Lines Insurance Company is domiciled in Illinois with its principal place of business in New York, New York.

## III. JURISDICTION AND VENUE

6. This Court has jurisdiction over this matter because the amount in controversy exceeds the jurisdiction limits of all lower courts which the jury would find to be fair.

7. Additionally, because Defendant has consented to the jurisdiction of the courts of the State of New York through a forum selection clause, the Court has personal jurisdiction over these claims. *See* Exhibit A at §12 e, pg. 9 of 16. (“The COMPANY agrees that any suit, action, or proceeding against it for recovery of any claim under this POLICY shall not be barred if commenced within the time prescribed in the statutes of the State of New York. Any suit, action, or proceeding against the COMPANY must be brought solely and exclusively in a New York state court or a federal district court sitting within the State of New York. The laws of the State of New York shall solely and exclusively be used and applied in any such suit, action, or proceeding, without regard to choice of law or conflict of law principles.”)

8. Further, venue is proper under NY CPLR §503 because Defendant is a resident of New York and under NY CPLR §509 because Plaintiff has selected this venue.

## IV. FACTUAL ALLEGATIONS

9. Plaintiff operates thirteen different businesses in Harris County and Fort Bend County, Texas.

10. Plaintiff operates all its businesses with one simple philosophy: treat guests like family, serve great food and always exceed expectations.

11. To protect Plaintiff's business in the event that Plaintiff suddenly had to suspend operations for reasons outside of Plaintiff's control, and in order to protect Plaintiff from property loss or damage or to prevent imminent property loss or damage, Plaintiff purchased insurance coverage from Defendant. *See* Exhibit A, Policy.

12. Defendant is an insurance company that sold the Policy providing coverage to Plaintiff against "all risks of direct physical loss, damage ... except as hereinafter excluded or limited". *See* Exhibit A, Policy, at 1 of 16.

13. The Policy also provides Time Element coverage to Plaintiff to cover "actual loss sustained due to necessary interruption of the Insured's normal business operations including but not limited to loss described in the Business Interruption Section." *See* Exhibit A, Policy at 4 of 4; *Id* at 16 of 16.

14. The Business Interruption Section provides for coverage of any "[l]oss directly resulting from necessary interruption of the Insured's normal business operations caused by direct physical loss or damage to real or personal property covered herein..." *See* Exhibit A, Policy at 1 of 3.

15. More specifically, the Policy provides Business Interruption coverage to Plaintiff for the "actual loss sustained by Plaintiff resulting directly from the necessary interruption of business..." *See* Exhibit A, Policy, Business Interruption Section at 1 of 3. Additionally, Defendant agreed to provide this Business Interruption coverage during the "Period of Indemnity" which was defined as twelve months following the date of loss and specifically provided that the

“Period of Indemnity shall not be limited by the date of termination of this Policy.” *See* Exhibit A, Business Interruption Section at 1 of 3.

16. Unlike many policies that provide Business Interruption coverage, Plaintiff’s Policy does not include, and is not subject to, any exclusion for losses caused by viruses or contagious or infectious disease.

17. The Policy also provides a specific endorsement providing coverage for Plaintiff’s “Extra Expense” (Plaintiff’s reasonable and necessary extra expenses incurred by to continue as nearly as practicable the normal operation of Plaintiff’s business business) following a direct physical loss or damage. *See* Exhibit A, Policy, Extra Expense Endorsement (No. 10) at 1 of 2.

18. The Extra Expense Endorsement also specifically includes necessary Extra Expenses incurred as a result of Interruption by a Civil or Military Authority “when, as a direct result of damage to or destruction of property within one (1) statute mile of the premises ...access to (the premises) is specifically prohibited by order of civil or military authority. *See* Exhibit A, Policy, Extra Expense Endorsement (No. 10) at 1 of 2.

19. In addition, the Policy includes numerous applicable property coverage Extensions and Business Interruption coverage provisions. *See* Exhibit A, Policy, Extra Expense Endorsement (No. 10) and Ingress Egress Endorsement (No 14).

20. The Policy provides up to \$39,000,000 in coverage for property damage and specifies \$500,000 in extra expense coverage. *See* Exhibit A, Property Coverage Form Declarations at 1 of 4.

21. Losses due to COVID-19 are a covered cause of loss under Plaintiff’s Policy.

**A. The COVID-19 Pandemic and the Covered Cause of Loss**

22. COVID-19 is a deadly communicable disease that has already infected over 75,000,000 people in the United States, resulting to date, in more than 892,000 deaths.<sup>2</sup>

23. The World Health Organization (“WHO”) declared the COVID-19 outbreak a pandemic, and former President Donald Trump declared a nationwide emergency due to the public health crisis caused by the COVID-19 outbreak in the United States.

24. According to the CDC, “COVID-19 is caused by a coronavirus called SARS-CoV-2. Coronaviruses are a large family of viruses that are common in people and [many] different species of animals, including camels, cattle, cats and bats. Rarely, animal coronaviruses can infect people and then spread between people.”<sup>3</sup>

25. COVID-19 can be transmitted in several ways, including human-to-human contact, airborne viral particles in ambient air and touching surfaces or objects. For example, when an uninfected person touches a surface containing the coronavirus, the uninfected person may transmit the coronavirus to another person, either by touching and contaminating a second surface, which is subsequently touched by that other person, or more directly by transmitting the coronavirus to another person. According to research published in the Journal of the American Medical Association, a person who sneezes can release a cloud of pathogen-bearing droplets that can span as far as 23 to 27 feet.<sup>4</sup>

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<sup>2</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last viewed March Feb 3, 2022).

<sup>3</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics> (last viewed on August 20, 2020).

<sup>4</sup> See <https://jamanetwork.com/journals/jama/fullarticle/2763852>.

26. According to WHO, the incubation period for COVID-19 – i.e., the time between exposure to the coronavirus and symptom onset – can be up to 14 days. Other studies suggest that the period may be up to 21 days. 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- and asymptomatic carriers are likely unaware that they are spreading the coronavirus 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. These studies’ results further confirmed that individuals can become infected with COVID-19 through indirect contact with surfaces or objects contacted by an infected person, whether or not they were symptomatic.<sup>5</sup>

27. Physical droplets containing the coronavirus land on and physically alter objects and surfaces by their presence. After landing on objects and surfaces, the coronavirus can remain present and dangerous for periods ranging from hours to many days.

28. According to WHO, people can become infected with the coronavirus by touching such objects and surfaces, then touching their eyes, nose, or mouth. This mode of transmission – indirect transmission via objects and surfaces – is known as “fomite transmission.” As the WHO has noted, fomite transmission is “a likely mode of transmission of SARS-CoV-2” because studies have consistently confirmed the existence of virus-laden droplets on objects and surfaces “in the

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<sup>5</sup> See <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (August 13, 2020); see also <https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations> (August 13, 2020).

vicinity of infected cases,” and because it is well known that other coronaviruses can be transmitted via fomite transmission.<sup>6</sup> For example, physical droplets containing the coronavirus can land on objects and surfaces and after landing on objects and surfaces, the coronavirus can remain present and dangerous for periods ranging from hours to many days.

29. In an article posted on the National Institute of Health’s website on March 24, 2020, the NIH stated that “[v]iruses can live for a time on surfaces outside the human body. According to the CDC, it may be possible to contract the virus responsible for the current outbreak, SARS-CoV-2, by touching a surface or object with the virus on it and then touching your face.”<sup>7</sup>

30. A study of a COVID-19 outbreak published in the CDC’s Emerging Infectious Diseases journal identified indirect transmission via objects such as elevator buttons and restroom taps as an important possible cause of a “rapid spread” of the coronavirus in a shopping mall in Wenzhou, China.<sup>8</sup>

31. Other studies have used invisible fluorescent tracers – decoy germs that glow under black light – to track how germs are spread from surfaces. In one series of experiments, 86 percent of workers were contaminated when spray or powder tracers were put on commonly touched objects in an office. When tracer powder was put on a bathroom faucet and exit doorknob, the glowing residue was found on employees’ hands, faces, phones and hair. From a shared cell phone,

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<sup>6</sup> See <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions>; <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (providing that “[I]t is possible that a person could get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or eyes”); see also <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Spread>; <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions>.

<sup>7</sup> <https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days>.

<sup>8</sup> See [https://wwwnc.cdc.gov/eid/article/26/6/20-0412\\_article](https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article).

the tracer spread to desktop surfaces, drinking cups, keyboards, pens and doorknobs. A contaminated copy machine button added a trail of fluorescent fingerprints transferred to documents and computer equipment. And just twenty minutes after arriving home from the office, the decoy germs carried by the employee were found on backpacks, keys and purses, on home doorknobs, light switches, countertops and kitchen appliances.

32. Research has indicated that the coronavirus can be detected on certain surfaces even weeks after infected persons are present at a given location. WHO has also confirmed that COVID-19 can exist on objects or surfaces and that the transmission of COVID-19 can occur by indirect contact with surfaces in the immediate environment or with objects that were touched by an infected person hours earlier.<sup>9</sup>

33. One study, for example, found that coronavirus remains active and dangerous on plastics for at least three days, while another reported that coronavirus remained stable and viable for seven days on a range of common surfaces, including plastic, stainless steel, glass and wood.<sup>10</sup> Another study detected viable coronavirus samples on glass, stainless steel and money for approximately one month if left at or around room temperature.

34. All of these materials were present at Plaintiff's businesses during the coverage period.

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<sup>9</sup> See <https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations> (last viewed on August 13 2020).

<sup>10</sup> See <https://www.nejm.org/doi/full/10.1056/nejmc2004973>; <https://www.medrxiv.org/content/10.1101/2020.05.07.20094805v1.full.pdf>; <https://virologyj.biomedcentral.com/articles/10.1186/s12985-020-01418-7>; <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last viewed August 13, 2020); see also <https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations> (last viewed August 13, 2020) (showing that a study in *The New England Journal of Medicine* established that COVID-19 can remain present in aerosols for up to three hours, up to four hours on copper, up to 24-hour on cardboard, and up to three days on plastic and stainless steel).



35. In a March 17, 2020, study published in the New England Journal of Medicine, researchers led by Dr. Vincent Munster of NIH's National Institute of Allergy and Infectious Diseases studied how long the virus survives in the air and on surfaces. The researchers reported that the COVID-19 virus remained infectious on plastic and stainless-steel surfaces for two to three days, and it remained infectious for up to 24 hours on cardboard surfaces.<sup>11</sup> All of these materials were also used at Plaintiff's covered properties during the coverage period.

36. Research has also indicated that COVID-19 can spread through the air and transmitted from person to person through heating and ventilation (HVAC) systems.<sup>12</sup> For example, one study found the presence of COVID-19 within the HVAC system servicing hospital ward rooms of COVID-19 patients. This study detected COVID-19 RNA in ceiling vent openings, vent exhaust filters, and central ducts that were located more than 50 meters from the patients' rooms.<sup>13</sup>

37. A study of hospitals in Wuhan, China, found COVID-19 in aerosols further than 6 feet, and up to 13 feet, from patients with higher concentrations detected in more crowded areas. Those authors found evidence of the virus on floors, trash bins, air vents and other places. Estimates using an average viral load for COVID-19 indicate that one minute of loud speaking could generate more than 1000 virion-containing aerosols.

38. The Environmental Protection Agency ("EPA") has recommended that business owners make improvements to their premises HVAC and ventilation systems based on several

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<sup>11</sup> See <https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days>.

<sup>12</sup> See [https://wwwnc.cdc.gov/eid/article/26/7/20-0764\\_article#r2](https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article#r2) (last viewed Dec. 16, 2020); <https://www.researchsquare.com/article/rs-34643/v1> (last viewed Dec. 16, 2020).

<sup>13</sup> See <https://www.researchsquare.com/article/rs-34643/v1>.

studies that show “epidemiological evidence suggestive of (coronavirus) transmission through aerosol.”<sup>14</sup> Based on these and other studies, the EPA has recommended that facilities make improvements to their ventilation and HVAC systems by, for example, increasing ventilation with outdoor air and air filtration.<sup>15</sup>

39. A study of an outbreak from a business in China concluded that the transmission in that case was likely prompted by air-conditioned ventilation.<sup>16</sup> In that case, from January 26 through February 10, 2020, an outbreak of COVID-19 infected ten persons from three families (families A–C) who had eaten at the same air-conditioned business in Guangzhou, China. The only known source of exposure for the affected persons in families B and C was patient A1 at the business. The families were seated more than a meter apart, and yet 10 people became ill who were at the business that day. The authors concluded that the virus likely spread through the business’s air-conditioning system.

40. Accordingly, COVID-19 causes physical loss and damage 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 function, dangerous and unsafe. While mitigation efforts were undertaken, COVID-19 caused physical loss and damage to Plaintiff’s covered property during the coverage period, as described further below.

41. First, respiratory droplets (i.e., droplets larger than 5-10  $\mu\text{m}$ ) expelled from infected individuals land on, attach, and adhere to surfaces and objects. In doing so, they structurally change

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<sup>14</sup> See <https://www.epa.gov/coronavirus/indoor-air-and-covid-19-key-references-andpublications> (last viewed Dec. 16, 2020); <https://www.epa.gov/coronavirus/indoor-air-and-coronavirus-covid-19> (last viewed Dec. 16, 2020) (suggesting facilities make improvements to their ventilation and HVAC systems by increasing ventilation with outdoor air and air filtration).

<sup>15</sup> See <https://www.epa.gov/coronavirus/indoor-air-and-coronavirus-covid-19>.

<sup>16</sup> Lu J, Gu J, Li K, Xu C, Su W, Lai Z, et al. COVID-19 outbreak associated with air conditioning in business, Guangzhou, China, 2020. *Emerg Infect Dis.* 2020 Jul. <https://doi.org/10.3201/eid2607.200764>.

the property and its surface by becoming a part of that surface. This structural alteration makes physical contact with those previously safe, inert surfaces (e.g., walls, handrails, furniture) unsafe.

42. Second, when individuals carrying the coronavirus breathe, talk, cough, or sneeze, they expel aerosolized droplet nuclei (i.e., those smaller than 5  $\mu\text{m}$ ) that remain in the air and, like dangerous fumes, make the premises unsafe and affirmatively dangerous. *This process alters the structural properties of air in buildings from safe and breathable to unsafe and dangerous.*

43. Fomites, aerosols, respiratory droplets, and droplet nuclei containing COVID-19 are not theoretical. In fact, they are physical substances that are active on physical surfaces and in the air and have a tangible and dangerous existence.<sup>17</sup>

44. When COVID-19 adheres onto a surface or material, it becomes part of that surface or material, changing them to fomites.<sup>18</sup> This is a physical alteration to the impacted surface or material and constitutes physical loss and damage which necessitates remedial measures in order to attempt eliminating COVID-19's presence. Further, the physical alteration makes physical contact with these once safe surfaces unsafe.

45. The presence of COVID-19, including the presence of infected persons within a facility, causes physical loss and damage. It necessitates remedial measures that include, without limitation, extensive cleaning and disinfecting, repairing or replacing air filtration systems, remodeling and reconfiguring physical spaces, and other measures to reduce or eliminate the presence of cases of COVID-19 and the coronavirus on-site.

46. The presence of COVID-19 within a facility causes direct physical loss and/or damage by transforming the facility that once was safe and usable for its intended purpose into a

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<sup>17</sup> See <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions>.

<sup>18</sup> *Id.*

facility that is not only unsafe and unusable, but also dangerous and potentially deadly for its patrons.

47. Although cleaning surfaces may reduce the presence of the coronavirus, it does not altogether eliminate it or its risk of transmission because surfaces with residual infectious virus or areas with lingering aerosolized infectious particles remain on and within the covered property. Further, once another infected person is present in the area, the surfaces and surrounding space also becomes contaminated or re-contaminated. As we now know, people infected with COVID-19, including asymptomatic persons, continuously spread the virus.

### *Case Specific Facts*

48. Plaintiff operates its businesses in Houston and Stafford, Texas. With the spread of COVID-19 likely beginning as early as November 2019 and the rate of infection across the country since, science and statistics have shown us that COVID-19 was physically present on the property. Beyond this, employees at the property tested positive for COVID-19 during the coverage period. The virus was there. The virus was harmful. Because COVID-19 adhered to the air and the physical premises it altered the property and caused direct physical damage. Plaintiff was forced to suspend or reduce its business due to COVID-19 and the resultant Closure Orders requiring all non-essential businesses to cease all activities. Plaintiff also took necessary steps to prevent further damage, minimize the suspension of business, and continue operations - mitigation efforts that were required by the insurance agreement.

49. Plaintiff's covered property has suffered direct physical loss and damage caused by the presence of COVID-19. Plaintiff hereby alleges as true and will present expert testimony regarding the following physical loss and damage relating to the presence of COVID-19:

a. Severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) is a beta

coronavirus that is genetically related to several other zoonotic coronaviruses, including SARS-CoV-1, the etiological agent of SARS. SARS-CoV-2 has glycoprotein “spikes” that are able to bind to human angiotensin converting enzyme 2 (ACE-2) receptors, which is present on human respiratory epithelial cells. After binding to ACE-2, the virus is able to enter the cells and make copies of itself, which are then released. These released infectious viral particles are then expelled in respiratory secretions as respiratory droplets into a multiphase, turbulent gas cloud during breathing, coughing, sneezing, talking and singing. There are large and small respiratory droplets within the cloud. Large respiratory droplets can infect other people either directly, through direct contact with respiratory mucosal surfaces, or indirectly, by contaminating surfaces which are then touched by another person who subsequently touches her or his mouth, nose, or eyes. The small droplets remain in the area as an aerosol, which can remain suspended in the air for hours, travel prolonged distances indoors along air currents induced by the HVAC system, and travel from room to room, infecting people directly through contact with, and inhalation of, the aerosol. Particles from the aerosol can also contaminate surfaces.

b. Because SARS CoV-2 spread is logarithmic, a key purpose of government closure orders for non-essential businesses to cease all activities was to prevent the spread of SARS-Co-V-2. But for the closure, there would have been more people infected with SARS-Co-V-2.

c. The virus is indirectly transmitted when a host touches a contaminated object or surface that is contaminated with the SAR-CoV-2 virus (i.e., fomite transmission). The virus can survive on hard and soft surfaces for a period of time ranging from a few hours to a few days.

d. Aerosol transmission is believed to be a common mode of transmission. If a person is infected with SARS-CoV-2, whether symptomatic or asymptomatic, infectious viral particles will be aerosolized into the air. Infection clusters suggest that aerosol, droplet and fomite transmission explains SARS-CoV-2 transmission amongst humans.

e. Nonetheless, the virus, while imperceptible to the human eye without enhancement, is undeniably present in the air and on objects and surfaces where infected humans congregate. The object, surface, and space are, essentially, rendered useless, in that they should not be utilized while the virus is present.

f. The virus cannot be observed by the human eye without enhancement. No one can see the virus in the air, on one's hands, or on a surface. This, of course, makes it difficult to eliminate the virus, or eradicate its transmission, from air or surfaces. The presence of the virus is only observed through the infection rate.

g. In a business setting, merely cleaning surfaces and/or equipment may reduce but does not altogether eliminate the risk of transmission amongst employees and the public. There may be surfaces and/or equipment with residual infectious virus and aerosolized infectious particles. In other words, disinfection may temporarily eliminate a virus that was present prior to disinfection; however, a space may remain contaminated if an aerosol is present, and immediately become contaminated thereafter if another infected person is present in the area.

h. The presence of the virus, whether circulating or stagnant, has physically altered the premises, in that the premises had become dangerous to fully occupy and use as intended prior to COVID-19. Remedial action, time and safe distancing were necessary to allow for a safe environment. All of these factors resulted in direct monetary loss to the

Plaintiff.

i. The virus, observable only through microscopy and reflected by the public transmission rates, does physically exist and will survive in the air and on hard and soft surfaces. The virus can remain viable and infectious in aerosols for hours and on surfaces up to days. The virus may be inhaled from aerosols or spread to hands from a contaminated surface and then to the nose or mouth, causing infection.

j. The virus' presence in a community, evidenced by infection rates, demonstrated that live virus had transferred in the air and to objects and surfaces. The virus was physically present in the air and on surfaces and objects, but imperceptible to the human eye. Nevertheless, the air, objects and surfaces are altered. The transmission of the virus can occur through breathing, aerosol generating procedures, or touching surfaces or objects contaminated with virus from an infected person.

k. Aerosol, droplet, and fomite transmission are the basis for masking, eye protection, the 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 various executive orders, including the Closure Orders. The virus is physically present in the communities, 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.

l. 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.

m. 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 throughout their presence at the insured premises (i.e., breathing and/or removing their masks). The only way to ensure the absence of virus on objects and surfaces is to prevent access to an environment, especially an indoor environment with full capacity.

50. COVID-19 rendered Plaintiff's businesses unfit for their intended business functions. For the months applicable under the Policy, Plaintiff's businesses were not functional for their business purposes because of the physical altered premises due to COVID-19. The direct physical damage and alteration caused by COVID-19 also forced Plaintiff to take costly action to prevent further damage or loss.

51. The presence of COVID-19 is direct physical loss or damage to property.

52. In response to the direct physical loss or damage to property due to COVID-19, civil authorities across the United States issued orders requiring the suspension or restriction of business at a wide range of establishments, including civil authorities with jurisdiction over business activities at Plaintiff's businesses (the "Closure Orders").

1. **Civil Authority Orders Because of COVID-19 and Related Physical Loss and/or Damage to Plaintiff's Property**

53. 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.



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

55. 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>19</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>20</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>21</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>22</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>23</sup> (COVID-19 is “physically causing property damage”); Panama City Fla. Resolution No. 20200318.1 (Mar. 18, 2020)<sup>24</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>19</sup> <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-100.pdf>

<sup>20</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>21</sup> <https://www.countyofnapa.org/DocumentCenter/View/16687/3-18-2020-Shelter-at-Home-Order>

<sup>22</sup> [https://www.cityofkeywest-fl.gov/egov/documents/1584822002\\_20507.pdf](https://www.cityofkeywest-fl.gov/egov/documents/1584822002_20507.pdf)

<sup>23</sup> <https://oaklandparkfl.gov/DocumentCenter/View/8408/Local-Public-Emergency-Action-Directive-19-March-2020-PDF>

<sup>24</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>25</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>26</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>27</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>28</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”).

56. 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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<sup>25</sup> <https://www.hillsboroughcounty.org/library/hillsborough/mediacenter/documents/administrator/epg/saferathomeorder.pdf>

<sup>26</sup> <https://www.pueblo.us/DocumentCenter/View/26395/Updated-Public-Health-Order---032620>

<sup>27</sup> [https://sfgov.org/sunshine/sites/default/files/sotf\\_061020\\_item3.pdf](https://sfgov.org/sunshine/sites/default/files/sotf_061020_item3.pdf)

<sup>28</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)

57. 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.

58. 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.

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

a) **State of Texas Closure Orders**

60. 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.

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

62. 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.

63. 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.

64. 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.

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

66. 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.

67. 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.

68. 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.

69. 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.

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

**b) City of Houston Closure Orders**

71. 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.

72. 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.

73. 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.

74. 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.

75. 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.

76. 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.

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

78. 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.

79. 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.

80. 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.

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

81. 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.

82. 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.

83. 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.

84. 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.

85. 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.

86. 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.

87. 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.

88. 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.

89. 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.

90. 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.

91. 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.

92. 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.

93. 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.

94. 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.

95. 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.

96. 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.

97. 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.

98. 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.

99. 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.

100. 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.

101. 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.

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

**C. Plaintiff's "All – Risks" Policy**

103. In return for the payment of a premium, Defendant issued the Policy to Plaintiff, which covers property located at each of Plaintiff's business locations "against all risks of direct physical loss or damage to covered property...occurring during the Term of this policy, except as hereinafter excluded or limited." See Exhibit A, Policy, at 1 of 16.

104. Plaintiff's businesses covered by the Policy are located at:

1. El Tiempo Richmond, 3130 Richmond Ave. Houston, TX 77098
2. El Tiempo Washington, 5602 Washington Ave. Houston, TX 77007
3. El Tiempo Taqueria, 5526 Washington Ave. Houston, TX 77007
4. Lorenzo's, 4412 Washington Ave. Houston, TX 77007
5. El Tiempo Vintage Park, 114 Vintage Park Blvd. Houston, TX 77070
6. El Tiempo Navigation, 2814 Navigation Blvd. Houston, TX 77003
7. El Tiempo Gessner, 2605 S. Gessner Rd. Houston, TX 77063
8. El Tiempo Westheimer, 322 Westheimer Houston, TX 77006

9. El Tiempo Cantina 290, 12440 Northwest Fwy. Houston, TX 77092
  10. El Tiempo Stafford, 12710 Southwest Fwy. Stafford, TX 77477
  11. Tony Mandolas Gulf Coast Kitchen, 1212 Waugh Dr. Houston, TX 77019
  12. El Tiempo Catering, 2910 Navigation Houston, TX 77003
  13. Griffin Partners, 602 Sawyer Houston, TX 77007
105. Defendant drafted the Policy in question.
106. The Policy is effective from June 30, 2019, through June 30, 2020.
107. Plaintiff performed all of its obligations under the Policy and in exchange for Defendant's agreement to take on Plaintiff's risk of loss. Plaintiff dutifully paid Defendant annual premiums.
108. The existence and actual presence of COVID-19 on the tables, chairs, walls, floors, door handles, railings, equipment, and other insured property at Plaintiff's businesses have triggered coverage under the Policy because COVID-19 caused actual damage to the insured property and has also caused Plaintiff to experience covered business interruption losses.

**1. COVID-19 Triggered Coverage Under the "All Risks" Policy**

109. The existence and actual presence of COVID-19 at Plaintiff's businesses triggered coverage under the Policy and also caused Plaintiff to experience covered business interruption.
110. In addition, the existence and presence of COVID-19 on property away from Plaintiff's businesses triggered coverage under the Policy.
111. COVID-19 has caused physical damage to property. The property was physically altered. COVID-19 also damaged many other properties, including those within and without a one-mile radius of each of Plaintiff's businesses.

112. The loss of functionality is no less physical than the impact of a property having lost its roof to a tornado or hurricane. Where once property could carry on its business function, the property with a blown away and crumbling roof cannot operate in that way. Where once the property could service customers, it can no longer do so. That is physical damage.

113. The presence of COVID-19 on property physically alters and damages the property. It makes it unsafe.

114. The Covid virus is a real tangible element that causes sickness. Because Plaintiff's businesses are frequented by many people, COVID- 19 has no doubt been present at Plaintiff's businesses and has impaired property surfaces causing physical loss and damage to covered property.

115. Plaintiff's businesses suffered direct physical loss and damage. Due to COVID-19, Plaintiff's businesses were physically altered to become unsafe, and thus did not function, for their intended purpose. Their businesses' business functions have been impaired. If they were to have remained open at full capacity and conduct business as usual, the disease and virus would have spread uncontrollably and more people would have been injured and died. This is not a non-physical or remote loss such as one occasioned by a breach of contract, loss of a market, or the imposition of a government penalty.

116. The presence of virus or disease constitutes physical damage to property, as the industry has recognized since at least 2006. When preparing so-called "virus" exclusions to be placed in some Policy, but not others, the insurance industry drafting arm, ISO, circulated a statement to state insurance regulators that included the following:

Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building

surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses. Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case.

117. The presence of virus resulted in direct physical loss and damage to property as described above.

118. Moreover, due to COVID-19, Plaintiff's businesses have suffered direct physical loss and damage under the plain meaning of those words. COVID-19 has impaired Plaintiff's property by making them physically altered and unusable in the way that they had been used before COVID-19.

119. Plaintiff's loss is "direct." Plaintiff is not, for example, asking Defendant to reimburse Plaintiff after someone obtained a judgment against Plaintiff for getting them sick. Rather, Plaintiff is asking Defendant to pay for its loss of business income occasioned by being unable to use its properties. Further, COVID-19 was not only a substantial factor in causing the loss, it also was the predominant or immediate factor in causing the loss or damage: COVID-19 present on the premises was close in proximity to the loss or damage, such that any ordinary person would think that the loss or damage was in the zone of danger of COVID-19. And as a matter of ordinary speech and usage an ordinary person would understand and say that COVID-19 caused the loss or damage. Plaintiff will present expert testimony to a jury to establish the proximity in

distance of the virus and the common understanding of the cause of the virus, which will establish to a jury that the loss or damage was direct – even under the strictest test on the meaning of “direct.”

120. Plaintiff’s loss is “physical.” The physical space of Plaintiff’s business properties was altered by the presence of COVID-19 and its infectious spread characteristics. COVID-19 structurally altered the surfaces of covered property and ambient air within covered properties. Plaintiff will present expert chemical testimony to show the structural alteration to the ambient air within and surfaces of covered property. Plaintiff was unable to use their spaces in the manner in which they had previously used those spaces, as Plaintiff will show through the facts and expert testimony on a safe occupancy of physical space. The confirmed presence of illness on the property as evidenced by many employees who tested positive for COVID-19 prevented the functioning and/or use of the physical space in no less of a way than, on a rainy day, a crumbling and open roof from the aftermath of a tornado would make the interior space of a business unusable.

121. Plaintiff’s loss is in fact a “loss.” Plaintiff lost the use and function of its physical spaces for business purposes. It is the alteration of the physical space in the buildings that caused them to be unusable. The direct physical loss flows from the alteration of the air and the surfaces of covered property.

122. The impairment of the business function is also damage to the businesses.

123. Plaintiff submitted claims pursuant to the Policy as a result of sustaining losses covered by the Policy. Defendant denied the claim. Plaintiff alleges that Defendant failed to properly investigate the claim and did so in bad faith based on a systematic company practice designed to minimize payments to its insureds.

124. More specifically, upon information and belief, Defendant has, on a wide-scale basis with many if not all of its insureds, wrongfully refused to provide coverage due to COVID-

19 and the resultant executive orders by civil authorities that have required the suspension of business without any meaningful investigation of the claims.

**2. Multiple Coverages are Triggered under the “All Risks” Policy**

125. In addition to triggering the Policy’ “all risks” coverage, Plaintiff’s claims triggered the Policy’s Business Interruption coverage, Civil and Military Authority coverage, Ingres/Egress coverage, Extra Expense coverage and Newly Acquired Locations coverage provided under the Policy including but not limited to the following:

**a) COVID-19 Triggered the Policy’s Business Interruption Coverage**

126. The Policy affords coverage for Plaintiff’s business interruption losses, subject to the Policy’ terms and conditions.

127. COVID-19 caused Plaintiff to suffer business interruption loss from the necessary interruption or reduction of business operations as a direct result of physical loss and damage of the type insured under the Policy.

**b) COVID-19 Triggered the Policy’ Extra Expense Coverage**

128. This loss triggers coverage under the Policy’s Business Interruption provisions including, without limitation, coverage for up to the Period of Recovery and/or the Maximum Period of Recovery of Business Interruption Gross Earnings loss, Business Interruption Loss of Profits, Extra Expense and Rental Value loss.

129. COVID-19 has caused Plaintiff to incur reasonable and necessary expenses to continue as nearly normal as practicable the conduct of Plaintiff’s business. Such expenses are beyond those that would have normally been incurred in conducting the business absent the presence of COVID-19.



130. The expense incurred by Plaintiff beyond those necessary in the normal operation of its business solely as a result of the physical loss and damage caused by COVID-19 trigger coverage under the Policy's Extra Expense coverage.

131. COVID-19 Triggered the Policy's Preservation of Property Coverage

132. The Policy afforded coverage for the expenses incurred by Plaintiff in taking actions for the temporary protection and preservation of property covered under the Policy in the event of actual or imminent direct physical loss, damage or destruction to such property.

133. This type of coverage has historically been known as "sue and labor" coverage or a "sue and labor" provision, and property Policy have long provided coverage for these types of expenses.

134. Plaintiff incurred expenses and losses as a direct result of COVID-19 and the Closure Orders issued directly as a result of COVID-19 and in an effort to prevent property damage and further imminent property damage.

135. In remediating the property loss and/or damage or destruction caused by COVID-19 and in complying with the Closure Orders and otherwise suspending or limiting operations, Plaintiff incurred expenses taking action to protect and preserve their property.

136. These expenses incurred by Plaintiff triggered the Policy's Preservation of Property coverage.

c) **COVID-19 Triggered the Policy's Interruption by Civil or Military Authority Coverage**

137. The physical damage, loss or destruction actually caused by COVID-19 at property located within one (1) statute miles of Plaintiff's businesses has directly resulted in the issuance of orders and directives, including but not limited to the above Closure Orders, preventing or impairing access to Plaintiff's businesses.

138. As a result, Plaintiff sustained Business Interruption losses and Civil or Military Authority coverage.

139. These business interruption losses are covered under the Policy's Interruption by Civil or Military Authority coverage.

**d) COVID-19 Triggered the Policy's Loss of Ingress or Egress Coverage**

140. COVID-19 and the physical damage it has caused within one (1) statute mile of Plaintiff's businesses, has interrupted and later reduced Plaintiff's normal business operations because ingress to or regress from Plaintiff's businesses has been prevented or impaired.

141. The Business Interruption losses sustained by Plaintiff as a result of the necessary suspension and/or reduction of Plaintiff's business as a result of the total or partial denial of access to Plaintiff's businesses triggers coverage under the Policy's Ingress/Egress coverage.

**3. No Exclusion Impacts Coverage**

142. No exclusion in the Policy applies to preclude or limit coverage for the actual presence of COVID-19 at or away from Plaintiff's businesses, the physical loss, damage or destruction to property at Plaintiff's businesses, and/or any of the Time Element business interruption losses that has and will continue to result from the physical loss or damage to property. To the extent that Defendant contends any exclusion applies, such exclusions are unenforceable.

**a) The Policy's Pollution and Contamination Exclusion Does Not Apply**

143. The Policy also contains an exclusion that purports to preclude coverage for Pollution and Contamination." See Exhibit A, Policy, at 6 of 16.

144. The Policy's "Pollution and Contamination" exclusion does not exclude coverage for loss caused by a "communicable disease."

145. The Policy's "pollution and contamination" exclusion does not exclude coverage for immediate costs to protect or preserve insured property due to impending physical loss or damage.

146. The Policy's "pollution and contamination" exclusion does not purport to exclude coverage for business interruption losses.

147. Further, since at least 2006, when the insurance industry began recognizing that the presence of virus or disease can constitute physical damage, the insurance industry drafting arm, ISO, began drafting express "virus" exclusions, which the insurance industry began incorporating into policies, either in their form or as an endorsement which provides in pertinent part, "[W]e will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." If Defendant had wanted to exclude losses due to "virus," Defendant was free to do so and could have included a standardized express virus exclusion first drafted at least fourteen (14) years ago.

148. To the extent that Defendant contends that the Policy's "pollution and contamination" clause bars coverage for damages caused by a communicable disease such as COVID-19 in this case, and that such clause extended to cost incurred to preserve or protect Plaintiff's insured property, Time Element business interruption loss, or some other aspect of Plaintiff's claim, the Policy is at best, ambiguous, and therefore, must be construed in favor of coverage.

b) **Plaintiff's renewed Policy with Defendant contains a Communicable Disease Exclusion Which Unambiguously Excludes Communicable Diseases Including COVID-19.**

149. In stark contrast to the Pollution and Contamination clause included in the Policy covering Plaintiff's loss, the renewal policy issued by Defendant included clear and unambiguous

language to disclose to Plaintiff that losses due to communicable diseases such as COVID-19 were excluded. See Exhibit B Starr Surplus Lines Insurance Company Policy SLSTPTY11341820 issued June 30, 2020 (“Renewal Policy”).

c) **The Exclusion is Clear as to Scope**

150. Contrary to the Policy in place at the time of Plaintiff’s loss, the Renewal Policy excludes coverage for business interruption losses as a result of communicable diseases. Likewise, the renewal policy differentiates itself by excluding coverage for the immediate costs to protect and preserve insured property. Specifically, the Renewal Policy’s exclusion unambiguously applies to “all coverages...optional coverages, and endorsements...including but not limited to, those that provide coverage for property or time element losses (including, but not limited to, ... business interruption, extra expense, ...and interruption by a civil or military authority.” See Exhibit B, Communicable Disease Exclusion (No 42).

d) **The Exclusion is Designed to Exclude Losses Like Plaintiff’s Claimed Loss.**

151. Unlike the Plaintiff’s Policy in place at the time of loss, COVID-19 is excluded under the Renewal Policy. The Communicable Disease Exclusion clearly defines the targeted exclusion and includes COVID-19. The Renewal Policy provides, in part:

“The Company does not insure any loss, cost damage or expense, directly or indirectly cause by, resulting from, arising out of, attributable to, contributed to, or occurring concurrently on in any sequence with a **communicable disease** or a **communicable disease agent**.

This exclusion applies to, but is not limited to, any loss, cost, damage, or expense as a result of:

- a. any contamination by any **communicable disease** or **communicable disease agent**;
- b. any denial, restriction, or impairment of access to property because of the existence, threat, or suspected presence of any **communicable**

**disease or communicable disease agent; or**

- c. any deterioration, loss of value, loss of marketability, or loss of use to tangible or intangible property insured hereunder directly or indirectly cause by or arising out of and **communicable disease or communicable disease agent.**”

152. Simply put, the Renewal Policy contains an exclusion that, if it was in place at the time of Plaintiff’s loss, would bar Plaintiff’s claims in this suit. The Policy at issue contains no such exclusion.

## V. CLAIMS FOR RELIEF

### A. COUNT I – Declaratory Judgment

153. Plaintiff repeats and realleges the allegations in Paragraphs 1-152 as if fully set forth herein.

154. Plaintiff seeks the Court’s declaration of the parties’ rights and duties under the Policy, pursuant to New York statute NY CPLR§3001 because a justiciable controversy exists between Plaintiff and Defendant regarding the availability of coverage under the Policy for Plaintiff’s claim(s).

Accordingly, Plaintiff seeks a declaration from the Court that:

- a. The various coverage provisions identified herein are triggered by the Plaintiff’s claims;
- b. The Interruption by Civil or Military Authority provision and the Special Time Element – Cancellation Coverage provision sublimit apply on a per occurrence basis and there have been multiple occurrences;
- c. No Policy exclusion applies to bar or limit coverage for Plaintiff’s claims; and
- d. The Policy covers Plaintiff’s claims.

**B. COUNT II – Breach of Contract – Property Loss and/or Damage**

155. Plaintiff repeats and realleges the allegations in Paragraphs 1-154, as if fully set forth herein.

156. The Policy is a valid and enforceable contract between Plaintiff and Defendant.

157. In the Policy, Defendant agreed to cover property against all risks of physical loss, damage or destruction not otherwise excluded.

158. COVID-19 caused direct physical loss and/or physical damage to Plaintiff's property.

159. No exclusions apply to bar coverage.

160. Plaintiff is entitled to coverage for the physical loss and/or damage up to the Policy's \$39,000,466 dollars in coverage.

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

162. Nonetheless, Defendant unjustifiably refuses to pay for Plaintiff's physical loss or damage in breach of the Policy.

163. Plaintiff has suffered damages as a result of Defendant's breach(es) of the Policy.

164. 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.

**C. COUNT III – Breach of Contract – Business Interruption Coverage**

165. Plaintiff repeats and realleges the allegations in Paragraphs 1-164, as if fully set forth herein.

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

167. 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.

168. 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.

169. No exclusions apply to bar coverage.

170. 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.

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

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

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

174. 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.

**D. COUNT IV – Breach of Contract – Extensions and Extensions of Business Interruption Coverage**

175. Plaintiff repeats and realleges the allegations in Paragraphs 1-174, as if fully set forth herein.

176. The Policy is a valid and enforceable contract between Plaintiff and Defendant.

177. In the Policy, Defendant agreed to afford additional coverage as provided in the Policy' coverage "Extensions" and "Extensions of Time Element Coverage."

178. COVID-19 caused direct physical loss to Plaintiff's property and the property of others. Plaintiff suffered losses under the Policy's coverage "Extensions" and "Extensions of Time Element Coverage."

179. No exclusions apply to bar coverage.

180. Plaintiff is entitled to coverage for losses related to COVID-19 up to each coverage "Extensions" and "Extensions of Time Element Coverage" limit of liability or any applicable sublimits.

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

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

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

184. 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.



**E. COUNT V – Breach of the Covenant of Good Faith and Fair Dealing**

185. Plaintiff repeats and realleges the allegations in Paragraphs 1-184 as if fully set forth herein.

186. Defendant has effectively denied Plaintiff's claim for coverage under the Policy relating to its losses from COVID-19.

187. Defendant's denial of Plaintiff's claim lacks any reasonable basis.

188. Defendant has failed to conduct a reasonable investigation of Plaintiff's claim under the Policy and, therefore, Defendant's basis for its denial is unreasonable.

189. Upon information and belief, Defendant has, on a wide-scale basis with many, if not all its insureds, refused to provide coverage due to COVID-19 and the resultant executive orders issued by civil authorities that have required the suspension and/or reduction of business operations. Defendant employed a systematic "one-size-fits-all" approach to adjusting and denying coverage for all COVID-19 claims, including Plaintiff's claim.

190. Defendant knew or was actually or implicitly aware of the lack of any reasonable basis to deny coverage.

191. Defendant acted with reckless disregard as to the unreasonableness of its denial.

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

193. Defendant's denial of coverage constitutes bad faith.

194. As a result of Defendant's bad faith, Plaintiff has suffered damages.

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

**DEMAND FOR JURY TRIAL**

Plaintiff hereby demands a trial by jury on all claims in this action of all issues so triable.

**REQUEST FOR RELIEF**

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

- A. A declaration from the Court that:
  - a. The various coverage provisions identified herein are triggered by Plaintiff's claim;
  - b. No Policy exclusion applies to bar or limit coverage for Plaintiff's claim; and
  - c. The Policy covers Plaintiff's claim.
- B. For general, special and compensatory damages according to proof;
- C. For punitive and exemplary damages according to proof;
- D. For special and consequential damages against Defendant in an amount to be proved at trial, in excess of \$500,000;
- E. Pre- and post-judgment interest, as provided by law;
- F. An award of attorney's fees and costs of suit incurred; and
- G. For such other and further relief as the Court deems just and proper.

Dated: February 24, 2022

**CHRISTIAN, SMITH & JEWELL, L.L.P.**

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