

STATE OF RHODE ISLAND  
PROVIDENCE COUNTY

SUPERIOR COURT

COMMERCE STATLER DEVELOPMENT, §  
LLC; 1914 COMMERCE LEASING, LLC; §  
STATLER 1900 COMMERCE, LLC; §  
SAAMSO, LLC; STATLER DALLAS F&B, §  
LLC; EPIC F&B, LLC: and MM F&B, LLC; §

*Plaintiffs,* §

v. §

AFFILIATED FM INSURANCE COMPANY, §

*Defendant.* §

C.A. NO. \_\_\_\_\_

**PLAINTIFFS' ORIGINAL COMPLAINT**

Plaintiffs Commerce Statler Development, LLC, 1914 Commerce Leasing, LLC; Statler 1900 Commerce, LLC, Saamso, LLC, Statler Dallas F&B, LLC, Epic F&B, LLC, and MM F&B, LLC (collectively "Plaintiffs") hereby file this Original Complaint against Defendant Affiliated FM Insurance Company ("AFM" or "Defendant") and allege as follows:

**I.**  
**INTRODUCTION**

1. This action for declaratory judgment, breach of contract and bad faith arises out of Plaintiffs' claim for insurance coverage under an "all risk" property insurance policy sold by AFM.

2. Plaintiffs own, operate and manage a series of related businesses in Dallas, Texas - including a hotel, six restaurants and bars, meeting spaces and ballrooms -- that share common insured locations.

3. Plaintiffs' ordinary business operations have been interrupted - through no fault of their own -- by the spread of the novel COVID-19 virus and by related orders of local, state and

national officials that were issued due to the actual presence of the virus and the risks of physical loss or damage posed by the virus. Plaintiffs have had to close certain of their business and have seen others substantially limited due to the presence of the COVID-19 virus and ordered COVID-19 restrictions. As a result, Plaintiffs suffered losses that fell within the coverage terms of their AFM Policy.

4. Despite having promised that the insurance policy it sold to Plaintiffs was "broad," "comprehensive," and "certain," and would provide coverage against "*all risks* of physical loss or damage," and Plaintiffs' resulting business interruption loss, AFM has conducted an improper investigation of Plaintiffs' claim and has wrongly failed to provide the promised coverage.

## **II.** **PARTIES**

5. Plaintiff Commerce Statler Development, LLC is a domestic limited liability company, formed under the laws of the State of Texas and located at 1800 Valley View Lane, Suite 300, Farmers Branch, Texas 75234. At all relevant times, Commerce Statler Development, LLC was the fee owner of the Locations (defined below) and the "master landlord" for the Locations.

6. Plaintiff 1914 Commerce Leasing, LLC is a domestic limited liability company, formed under the laws of the State of Texas and located at 5851 Legacy Circle, Suite 4000, Plano Texas 75024-5968. At all relevant times, 1914 Commerce Leasing, LLC was the master tenant for the Locations owned by Commerce Statler Development. 1914 Commerce Leasing LLC was the operator of the Hotel and the landlord and leasing agent for the other properties.

7. Plaintiff Statler Dallas F&B, LLC is a domestic limited liability company, formed under the laws of the State of Texas and located at 1055 Trend Drive, Suite 103, Carrollton, Texas

75006. At all relevant times, the Restaurants and Bars were leased to, and operated by Statler Dallas F&B, LLC.

8. Plaintiff Statler 1900 Commerce, LLC is a domestic limited liability company, formed under the laws of the State of Texas and located at 1800 Valley View Lane, Suite 300, Farmers Branch, Texas 75234-8954. At all relevant times, Statler 1900 Commerce, LLC was the lender entity from which Commerce Statler Development LLC borrowed funds for the Locations.

9. Plaintiff Saamso, LLC is a domestic limited liability company, formed under the laws of the State of Texas and located at 1800 Valley View Lane, Suite 300, Farmers Branch, Texas 75234-8954. At all relevant times, Saamso, LLC was the agent for 1914 Commerce Leasing, LLC and handled leasing and asset management for 1914 Commerce Leasing, LLC in exchange for a percentage of revenues.

10. Plaintiff Epic F&B, LLC is a domestic limited liability company, formed under the laws of the State of Texas and located at 25 Highland Park Village #145, Dallas, Texas 75205. At all relevant times, Epic F&B, LLC was the majority owner of Statler Dallas F&B, LLC.

11. Plaintiff MM F&B, LLC is a domestic limited liability company, formed under the laws of the State of Texas and located at 1800 Valley View Lane, Suite 300, Farmers Branch, Texas 75234. At all relevant times, MM F&B, LLC was an owner of Statler Dallas F&B, LLC.

12. Defendant Affiliated FM Insurance Company ("AFM") is incorporated under the laws of Rhode Island, with a principle place of business at 270 Central Avenue, Johnston, Rhode Island 02919. AFM is authorized to do business and issue insurance policies in the State of Texas. AFM may be served at 270 Central Avenue, Johnston, Rhode Island 02919.

### **III.**

### **JURISDICTION AND VENUE**

13. This Court has jurisdiction over this action because AFM is incorporated under the laws of Rhode Island, with a principle place of business at 270 Central Avenue, Johnston, Rhode Island 02919, and under Rhode Island General Laws § 8-2-14 because the amount in controversy exceeds the sum of ten thousand dollars (\$10,000).

14. Venue is proper in this Court, pursuant to Rhode Island General Laws § 9-4-4, because AFM is located in Providence County.

15. All conditions precedent to recovery by Plaintiffs have been performed or occurred.

16. To the extent any facts or claims asserted herein are inconsistent, they are respectfully asserted in the alternative.

#### **IV.** **FACTS**

##### **A. Plaintiffs' Insured Properties.**

17. The Statler Hotel is a historic, landmark property in downtown Dallas that opened in 1956. It was restored and relaunched in 2018 as a mixed-use project.

18. At all relevant times, Plaintiffs owned, operated and managed a group of related business -- consisting most prominently of a Hotel, six restaurants and bars, an apartment complex, offices spaces, retails spaces, meeting spaces, a ballroom and a parking service -- that shared a common set of locations at or near the Statler Hotel.

19. To protect their businesses against property damage or business interruptions, on or about October 31, 2019, Plaintiffs entered into a contract of insurance with AFM bearing Policy Number GS982 (the "Policy"). The Policy was in effect from October 31, 2019 through October 31, 2020. The Policy is attached hereto as *Exhibit A* and incorporated herein by reference.

20. The Policy covers property at three locations (the "Locations"): (1) 1914 Commerce Street, Dallas, TX 75201 ("Location One"); (2) 1954 Commerce Street, Dallas, TX 75201 ("Location Two"); and (3) 2013 Jackson Street, Dallas, TX 75201 ("Location Three").

21. The three Locations are occupied by the following properties and services (the "Properties") -- all of which are owned directly or indirectly by the Plaintiffs and all of which are sources of revenue for Plaintiffs:

**Location One - 1914 Commerce Street:** (a) Hotel: The Statler Dallas is a Hilton Curio Collection property with 159 rooms; (b) Restaurants and Bars: 30,000 sf of space fully leased to restaurant operators who manage six restaurants and bars on the property; (c) Ballroom space: 14,000 sf of space available for corporate, social and entertainment events; (d) Meeting space: 16,000 sf (30,000 if including ballrooms) of meeting space (e) Parking: 225 total spaces at street level and on two sub-levels under the hotel building including valet parking services; (f) Retail: 6,500 sf divided into four retails spaces; (g) Apartments: 219 luxury units housed on the upper floors of the hotel building;

**Location Two: 1954 Commerce Street:** (a) Office space: 96,292 sf of office space leased primarily to the Dallas Morning News (the "Office Space");

**Location Three: 2013 Jackson Street:** (a) Parking Garage: a six level parking garage with parking spaces primarily reserved for persons employed at the Office Space.

22. In exchange for AFM's agreement to take on Plaintiffs' risk of loss, Plaintiffs paid AFM over \$170,000 in annual premiums.

**B. The COVID-19 Pandemic.**

23. COVID-19 is a deadly communicable disease that has infected over eleven million people in the United States and caused nearly 250,000 deaths in the United States.<sup>1</sup> The World Health Organization has declared the COVID-19 outbreak a pandemic. Former President Donald Trump declared a nationwide emergency due to the public health crisis caused by the COVID-19 outbreak in the United States. Dallas County Judge Clay Jenkins issued a Declaration of Local Disaster for Public Health Emergency on March 12, 2020.

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<sup>1</sup> See <https://covid.cdc.gov/covid-data-tracker/#cases>

**COVID-19 was present at Location One and at surrounding areas.**

24. COVID-19 has been prevalent in Texas, and particularly in Dallas County. As of November 18, 2020, there were 1,048,383 confirmed positive cases and 19,883 deaths in Texas and 111,960 confirmed positive cases and 1162 deaths in Dallas County.<sup>2</sup> By February 2022, the total number of confirmed positive cases in Dallas County are 464,727 and the total deaths are 5,927.<sup>3</sup>

25. The existence and actual presence of COVID-19 at Location One has triggered coverage under the Policy.

26. Multiple employees at Location One, including employees working at the Hotel, Restaurants, and Bars at Location One, have tested positive for COVID-19. The first positive test of an employee was reported to Plaintiffs on or about May 11, 2020.

27. Plaintiffs have also been informed that other (non-employee) individuals tested positive for COVID-19 in proximity to times that those individuals were present at Location One.

28. In addition, the existence and presence of COVID-19 on properties in proximity to Location One has triggered coverage under the Policy. Based upon news reports and information that is publicly available and accessible via the internet,<sup>4</sup> COVID-19 cases have been reported at numerous locations that are within five statute miles of Location One including, but not limited to, the following: (1) Belmont Village Senior Living Turtle Creek, (2) Lakewest Rehabilitation & Skilled Care, (3) Monarch Pavilion Rehabilitation, (4) Remarkable Healthcare of Dallas, (5) Simpson Place Assisted Living, (6) Rehabilitation & Wellness Center of Dallas, (7) Renaissance at Kessler Park, (8) Tradition Lovers Lane, (9) Windsor Senior Living, and (10) Abri Health Care.

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<sup>2</sup> See <https://www.dallascounty.org/covid-19/>

<sup>3</sup> <https://www.dallascounty.org/covid-19/> (last checked on February 23, 2022)

<sup>4</sup> See <https://www.dallasnews.com/news/public-health/2020/06/09/here-are-the-dallas-nursing-homes-with-covid-19-infections-and-deaths/>

Several of these facilities have had significant and reported COVID-19 outbreaks, including deaths. For example: by October 15, 2020, Lakewest Rehabilitation & Skilled Care reported nearly forty persons with positive COVID-19 diagnoses - including 10 staff members and 39 residents.<sup>5</sup> By the end of February 2022, Lakewest Rehabilitation & Skilled Care has had over 225 COVID-19 cases among employees and residents. Monarch Pavilion Rehabilitation reports over 190 COVID-19 infections among employees and residents. Simpson Place Assisted Living had 40 reported cases. The Dallas Rehabilitation and Wellness Center reported 64 COVID-19 cases among its residents and staff members.

29. Colleges and Universities in proximity to Location One have reported positive COVID-19 cases. Southern Methodist University reported 24 positive cases in June 2020, 35 positive cases in July 202, and 260 positive cases in August 2020.<sup>6</sup> There have been over 2,700 COVID-19 cases reported among SMU students and staff.<sup>7</sup> The University of Texas Southwestern Medical Center, which is located less than five miles away from Location One, reports 5,741 positive cases for the period running from March 1, 2020 to February 10, 2022.<sup>8</sup>

30. Multiple COVID-19 testing centers and treatment and care facilities were located within five statute miles of Location One and drew persons infected with COVID-19 into proximity to Location One. These COVID-19 testing centers included: (1) Baylor University Medical Center Dallas, (2) Parkland Hospital, and (3) the American Airlines Center (testing center).

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<sup>5</sup> The data cited in this paragraph is available under the Nursing Facilities link at <https://hhs.texas.gov/services/health/coronavirus-covid-19/texas-covid-19-case-data> (last checked February 23, 2022).

<sup>6</sup> See SMU COVID-19 Dashboard available at <https://blog.smu.edu/coronavirus-covid-19/cases/> (last checked February 23, 2022).

<sup>7</sup> See SMU COVID-19 Dashboard available at <https://blog.smu.edu/coronavirus-covid-19/cases/> (last checked February 23, 2022).

<sup>8</sup> See UT Southwestern Medical Centers "Latest COVID-19 Numbers" available at <https://www.utsouthwestern.edu/covid-19/> (last checked February 23, 2022).

**COVID-19 has caused physical loss and damage to property -- including physical loss and damage at Location One.**

31. The COVID-19 virus is a tangible, physical object that has caused: (a) physical damage to both persons and property at Location One and throughout Dallas County, (b) physical loss of use and functionality of the Properties at Location One, and (c) a *risk* of physical loss or damage at Location One and throughout Dallas County.

32. The World Health Organization ("WHO") has 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 before.<sup>9</sup> The persistent physical presence of the COVID-19 virus has been affirmed by a study documented in The New England Journal of Medicine establishing that COVID-19 can remain present in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard, and up to three days on plastic and stainless steel.<sup>10</sup> The study's 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 the infected person was symptomatic.<sup>11</sup>

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<sup>9</sup> See <https://www.who.int/publications/i/item/cleaning-and-disinfection-of-environmental-surfaces-inthe-context-of-covid-19>

<sup>10</sup> van Doremalen, N., Bushmaker, T., Morris, D.H., Holbrook, M.G., Gamble, A., Williamson, B.N., et al., 2020. Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1. *N Engl J Med* 382, 1564–1567. (<https://doi.org/10.1056/NEJMc2004973>, accessed 6 May 2020)

<sup>11</sup> According to the World Health Organization ("WHO"): "People can catch COVID-19 from others who have the virus. The disease can spread from person to person through small droplets from the nose or mouth, which are spread when a person with COVID-19 coughs or simply exhales. These droplets land on objects and surfaces all around the person. Other people then catch COVID-19 by touching these objects or surfaces, then touching their eyes, nose or mouth. People also catch COVID-19 if they breathe in droplets from an infected person who coughs out or exhales droplets."<sup>11</sup> The time from exposure (infection) to the development of COVID-19 symptoms - the incubation period - can be up to fourteen days. During this period (the "pre-symptomatic" period), those infected can be contagious and transmit the disease before they show any symptoms or have any reason to believe they are sick.<sup>11</sup>



33. The Amended Order of Dallas County Judge Clay Jenkins dated April 3, 2020 expressly states that the COVID-19 virus "is physically causing property damage due to its proclivity to attach to surfaces for prolonged periods of time." Amended Order of County Judge Clay Jenkins: Safer at Home Order (April 3, 2020). The April 3, 2020 Dallas County Safer at Home Order is attached hereto as *Exhibit B* and incorporated herein by reference).

34. Experts in virology, epidemiology, biostatistics and public health have stated that changes in the environment due to SARS-CoV-2 and the resulting pandemic caused direct physical loss and damage to property. *E.g.* Report of Lemuel A. Moye, M.D., Ph.D. filed as Exhibit D to Plaintiff's Motion for Partial Summary Judgment in *Las Vegas Resort Holdings vs Affiliated FM Ins. Co.*, Case No. PC 2021-02790 (R.I. Sup. Ct.)(incorporated herein by reference). It is Dr. Moye's expert opinion that SARS -CoV-2 is a physical entity that physically alters the air and any surface contacted by the infected air or an infected human. That physical alteration is distinct, demonstrable and physical and renders the property uninhabitable and unable to carry out its intended function. This is what happened at Plaintiffs' Properties.

35. The Policy also recognizes that the presence of communicable disease causes physical damage to property because the Policy covers the costs of "cleanup, removal and disposal of such presence of communicable disease..." *See* Exhibit A, All Risk Coverage Form, at 7 of 44.

36. The presence of the COVID-19 virus at Location One, in proximity to Location One, and throughout Dallas County caused physical loss and damage to Properties within Location One which were deprived of their functionality and rendered unusable.

37. The presence of the COVID-19 virus at Location One, in proximity to Location One, and throughout Dallas County caused physical damage to persons who suffered illness, injury and harm due to infection with the COVID-19 virus.

38. Because of the presence of the virus and because of the restrictions imposed by civil authority orders issued due to the presence of the virus, Plaintiffs suffered a physical loss. Plaintiffs were required to cease certain businesses at Location One. More specifically, customers were directly prohibited from accessing the Restaurants, Bars and Retail businesses during certain periods. Additionally, Plaintiffs lost the use and function of their Properties when the virus and civil authority orders rendered the Hotel, Ballroom, Meeting Spaces, Restaurants and Bars unusable for their full intended purposes.

39. The Policy does not clearly and unambiguously require physical *deformation* or *structural alteration* of property for there to be physical loss or damage that comes within the coverage terms.

**Actions and Orders of Civil Authorities.**

40. COVID-19 is widespread in the state of Texas and, more specifically, in Dallas County. Based upon information that is publicly available and accessible via the internet, Dallas County Health and Human Services ("DCHHS") reported 1,306 confirmed COVID-19 cases in March. In April, there were 4,543 confirmed COVID-19 cases in Dallas County. In May, there were 6,109 confirmed cases. June saw 15,355 confirmed cases. In July, confirmed cases in Dallas County totaled 18,939. August confirmed cases totaled 8,924. Confirmed cases in September totaled 8,228. And in October 2020, there were 17,034 positive cases. As of November 17, 2020, DCHHS reported 111,174 total confirmed cases of COVID-19 in Dallas County, including 1,147 confirmed deaths. To date, there have been over half a million total COVID-19 cases among Dallas County residents.<sup>12</sup>

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<sup>12</sup> <https://www.dallascounty.org/covid-19/> (last checked February 22, 2022).

41. The widespread physical presence of the virus in Dallas County -- including at the Locations and in proximity to the Locations -- and the virus' propensity to cause actual physical damage and to present a risk of physical damage, caused civil authorities to prohibit access to Location One where the virus was presumed to exist (and did exist) and to pose a risk of transmission, illness and even death, if access to the public were permitted.

42. On March 12, 2020, Dallas County Judge Clay Jenkins issued a Declaration of Local Disaster for Public Health Emergency due to COVID-19. On March 13, 2020, the Governor of Texas issued a proclamation declaring that COVID-19 posed an imminent threat of disaster and declaring a state of disaster for all counties in the State of Texas. *See Exhibit C*, Collected Relevant Orders of Civil Authorities.

43. In the following months, the State of Texas and Dallas County (like counties and states across the nation) issued a series of orders (collectively the "Shutdown Orders"). The purpose of the Shutdown Orders was to "flatten the curve" of the virus and allow our healthcare systems to prepare for anticipated increases in the demand for medical care, ventilators, and personal protective equipment.<sup>13</sup> The Shutdown Orders included (but are not limited to) the following:

- Dallas County Order (March 12, 2020)
  - prohibited public or private gatherings of 500 people through March 20, 2020.
- Dallas County Amended Order (March 16, 2020)
  - shut down all dine-in restaurants and bars through March 20, 2020.
  - prohibited public or private gatherings of fifty people through March 20, 2020.
- State Executive Order No. GA-08 (March 19, 2020)
  - limited social gatherings to groups of ten.
  - shut down dine-in bars and restaurants through April 3, 2020.
- Dallas County Amended Order (March 21, 2020)

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<sup>13</sup> Exec. Order No. 13,909, 85 C.F.R. 16227 (2020), <https://www.whitehouse.gov/presidential-actions/executive-order-prioritizing-allocating-health-medical-resources-respond-spread-COVID-19/>.

- limited social gatherings to less than 10 persons.
- prohibited public or private recreational gatherings or community gatherings anywhere in Dallas County.
  
- Dallas County Amended Order (March 24, 2020)
  - enacted "Stay Home Stay Safe" shelter in place order through April 3, 2020<sup>14</sup>
  
- State Executive Order No. GA-11 (March 26, 2020) and No. GA-12 (March 29, 2020)
  - imposed 14-day quarantine for certain air travelers (GA-11) and certain road travelers (GA-12) coming to Texas.
  
- Dallas County Amended Order (March 29, 2020)
  - adds hotels and restaurants to the list of essential businesses.
  
- State Executive Order No. GA-14 (March 31, 2020)
  - shutdown of all "non-essential" services/businesses through April 30, 2020.
  - hotels, bars, and restaurants were not listed as essential services.
  
- Dallas County Amended Order: Safer at Home Order (April 3, 2020).
  - states that the COVID-19 virus "is physically causing property damage due to its proclivity to attach to surfaces for prolonged periods of time."
  
- State Executive Order No. GA-18 (April 27, 2020)
  - allowed for the reopening of restaurants in Dallas County at 25% capacity.
  
- Dallas County Supplemental Order (May 4, 2020)
  - allows for the reopening of dine-in restaurants (but not bars) at 25% capacity.
  
- State Executive Order No. GA-21 (May 5, 2020)
  - extends restaurant capacity to 25% capacity + unlimited outdoors seating, effective immediately.
  - reopens wedding services to 25% effective immediately.
  
- State Executive Order No. GA-23 (May 18, 2020)
  - increases restaurants to 50% capacity starting May 22, 2020.
  - allows bars to operate at 25% capacity starting May 22, 2020.
  
- State Executive Order No. GA-26 (June 3, 2020)
  - allows dine-in restaurants to operate at 75% capacity.
  - restricts bars to serving only seated patrons.
  
- State Executive Order No. GA-28 (June 26, 2020)
  - extends previous order allows dine-in restaurants to operate at 75% capacity through June 29 and then must go back to operating at 50% capacity.

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<sup>14</sup> Dallas County issued supplemental orders on April 3, April 23, May 20, June 5, June 16, and August 4, 2020 extending the period of the shelter-in place orders.

- restricted bars to only pickup and delivery; effective indefinitely
- State Executive Order No. GA-30 (September 17, 2020)
  - provides that every business establishment in Texas shall operate at no more than 50 percent of the total listed occupancy of the establishment.
  - provides exceptions for certain businesses including dine-in restaurants which are allowed to operate at 75% capacity so long as less than 51 percent of their gross receipts come from the sale of alcoholic beverages and customers eat or drink only while seated.
- State Executive Order No. GA-32 (October 7, 2020)
  - allows bars to operate at 50% capacity.
  - increases the occupancy levels for all business establishments other than bars in all areas with low COVID-19 hospitalizations to 75%; in areas with high hospitalizations, business establishments that otherwise would have a 75% occupancy limit may operate at up to 50% capacity.

See *Exhibit C*, Relevant Orders of Civil Authorities.

44. The Shutdown Orders, some of which remain in effect as of the date of this filing, caused Plaintiffs to suspend or limit their businesses at certain Properties and/or rendered certain Properties unusable for their intended purposes.

45. In addition, many cities and states issued orders that discouraged travel to Texas by imposing quarantine restrictions on travelers returning from Texas. For example, New York, Connecticut and New Jersey jointly issued a travel advisory imposing a requirement that travelers coming from Texas quarantine for 14 days. *E.g.* State of New York Executive Order: Quarantine Restrictions on Travelers Arriving in New York (June 24, 2020); Order of the Commissioner of Health of the City of Chicago, Order No. 2020-10 (Quarantine Restrictions on Persons Entering Chicago from High Incidence States); Government of the District of Columbia, Mayor's Order 2020-081: Requirement to Self-Quarantine and Non-Essential Travel During the Covid-19 Public Health Emergency (July 24, 2020).<sup>15</sup> Quarantine requirements or recommendations have also

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<sup>15</sup> <https://coronavirus.dc.gov/page/mayor's-order-2020-081-requirement-self-quarantine-after-non-essential-travel-during-covid-19>

been in effect in Alaska, Hawaii, Maine, Maryland, Massachusetts, New Hampshire, New Mexico, Ohio, and Pennsylvania. To avoid the quarantine requirement, travelers were advised by government officials to cancel or postpone travel to impacted states such as Texas. *E.g.* New Jersey Department of Health, Self-Quarantine for Travelers FAQ (updated Sept. 22, 2020)

46. Several Presidential proclamations have restricted international travelers who have been in certain countries -- including China, the United Kingdom, the Republic of Ireland, Austria, Belgium, Spain, France, German, Italy, Brazil and others -- from entering into the United States. *E.g.* Proclamation 9984, Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus (Jan 31, 2020).<sup>16</sup> These government travel restrictions have prevented tens of thousands of international travelers from entering the United States each day.

47. As businesses that rely upon customers, both locally and from across the country and around the world, Plaintiffs are directly affected by the Shutdown Orders and by similar orders issued by other counties, states, and countries.

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<sup>16</sup> The full text of the presidential proclamations is available on the White House website at:

- China: <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-persons-pose-risk-transmitting-2019-novel-coronavirus/>
- Iran: <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-coronavirus/>
- Schengen Area: <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-2019-novel-coronavirus/>
- United Kingdom and Ireland: <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-coronavirus-2/>
- Brazil: <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-novel-coronavirus/>
- Brazil Amendment: <https://www.whitehouse.gov/presidential-actions/president-amendment-proclamation-president-may-24-2020/>
- Immigrants: <https://travel.state.gov/content/travel/en/News/visas-news/Proclamation-Suspending-Entry-of-Immigrants-Who-Present-Risk-to-the-US-labor-market.html>

48. Plaintiffs' Properties have lost their functionality and have been impaired by the existence and risk of COVID-19 and by the related Shutdown Orders.

49. The Shutdown Orders, and the loss and property damage caused by both the actual presence of COVID-19 and the risk of COVID-19 transmission, has had a devastating impact on Plaintiffs' businesses.

**C. Coverage Under the AFM Policy.**

50. The Policy issued to Plaintiffs was AFM's proVison 4100 "all risks" policy. As an all risks Policy, the perils insured against are defined by the proVison 4100 Policy's exclusions and limitations -- not by positive grants of coverage for damage due to particular perils as is provided by a "named peril" policy. All risk policies cover all losses to the covered property unless the loss is excluded elsewhere within the policy.

51. AFM described its Policy in a letter to Plaintiffs as being "straightforward and certain", "easy to read and navigate", and as "providing [Plaintiffs] broad coverage" and "comprehensive coverage." *See* Exhibit A, Introductory Letter preceding Policy.

52. The Policy contains numerous different coverage parts, each with an applicable limit or sublimit of liability. The majority of the coverage parts are not mutually exclusive. Thus, a policyholder's loss may trigger several different coverage parts.

53. The Policy was drafted by AFM.

**The Policy's Basic Insuring Provision**

54. The Policy's basic insuring provision states as follows:

**INSURANCE PROVIDED:**

**This Policy covers property, as described in this Policy, against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded, while located as described in this Policy.**

See Exhibit A, All Risk Coverage Form, p. 1 of 44.

55. The Policy's basic insuring provision differs from many business insurance policies. While many policies define coverage in terms of "direct physical loss or damage," the Policy provides coverage against "all *risks* of physical loss or damage." In so doing, the Policy expands coverage beyond actual physical loss and damage to "all risks" of physical loss and damage. In addition, the Policy omits the requirement that the physical loss or damage be "direct."

56. The Policy expressly recognizes that property is physically damaged by the presence of communicable disease. Under a heading titled "Communicable Disease - Property Damage," the Policy expressly states that it covers, among other things "the reasonable and necessary costs incurred for the (a) Cleanup, removal and disposal of...communicable disease from insured property." See Exhibit A, All Risk Coverage Form, at 7 of 44. Accordingly, because the Policy specifically covers remediation of the damage caused by communicable disease, the presence of communicable disease is "physical damage of the type insured" under the Policy."

#### **Business Interruption Coverage**

57. The Policy affords coverage for Plaintiffs' business interruption losses. The Policy includes a Business Interruption provision which states:

**A. LOSS INSURED**

**This Policy insures Business Interruption loss, as provided in the Business Interruption Coverage, as a direct result of physical loss or damage of the type insured:**

**1. To property as described elsewhere in this Policy and not otherwise excluded by this Policy.**

See Exhibit A, All Risk Coverage Form, p. 19 of 44.



58. COVID-19 has caused Plaintiffs to suffer business interruption loss as a direct result of physical loss and damage of the type insured under the Policy. It has also caused Plaintiffs to incur additional expenses to continue even limited operations that are beyond those expenses that would have normally been incurred in conduct business absent the presence of COVID-19. These losses and expenses trigger coverage under the Policy's Business Interruption provisions including, but not limited to, coverage for Gross Earnings loss, Gross Profits loss, and Rental Income Loss and Extra Expense loss.

**Attraction Property Coverage Extension**

59. In addition to the general Business Insurance Coverage Provision, the Policy provides certain Additional Coverages or Coverage Extensions. These additional coverages and coverage extensions, for which Plaintiff paid an increased premium, do not reduce other coverages available under the Policy. They are additive. The sublimits applicable to any particular coverage provision do not limit the amount of coverage available under the Policy through other provisions that might also apply. Applicable extensions supplying additional coverage include the following:

60. The Policy's "Attraction Property" endorsement provides coverage for losses directly resulting from physical loss, damage, or destruction (of the type insured by the insured's property policy) to property not owned or operated by the insured that attracts business to the insured. To come within the coverage terms, the Attraction Property must be located within one mile of the insured's property. Specifically, the Policy states:

**1. Attraction Property**

**This Policy covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability directly resulting from physical loss or damage of the type insured to property of the type insured that attracts business to a described location and is within one (1) statute mile of the described location.**

See Exhibit A, All Risk Coverage Form, p. 24 of 44.

61. COVID-19 has caused, and is continuing to cause, physical loss and damage to properties within one mile of the Locations that attract business to Plaintiffs' Properties.

62. COVID-19 and the related Shutdown Orders closed businesses and also resulted in the cancellation (or postponement) of numerous events that were scheduled at venues that would have attracted customers to the Properties. Based upon information that is publicly available via the internet, entities located within one mile of the Locations with COVID-19-related closures, cancellations, and restrictions that impacted the Properties include, but are not limited to, the following: The Dallas Museum of Art, the AT&T Performing Arts Center, the Nasher Sculpture Center, the Majestic Theater, the John F. Kennedy Memorial Plaza, the 6th Floor Museum at Dealey Plaza, the Perot Museum of Nature and Science, Dallas Heritage Village, Dallas World Aquarium, Klyde Warren Park, Deep Ellum, the Crow Museum of Asian Art and the Morton H. Meyerson Symphony Center. Upon information and belief, each of these entities suffered physical loss or damage of the type insured due to the actual presence of the COVID-19 virus or due to the risk of physical loss or damage from the COVID-19 virus.

63. The American Airlines Center cancelled or postponed numerous events including: (1) all NBA Dallas Mavericks games, (2) All NHL Dallas Stars Games, (3) concerts by Elton John, Justin Bieber, the Eagles, The Who, Bon Jovi, Janet Jackson, Harry Styles, the Weekend, and

others, (4) events such as Disney on Ice and Jurassic World Live. The State Fair of Texas, which draws more than 2.5 million people to Dallas every year, has been cancelled; as have various events previously scheduled at the Cotton Bowl. The cancellation (or postponement) of these events has caused Plaintiffs to lose group contracts and advance bookings and has eliminated substantial business from persons who would have been attracted to the area by those events. Upon information and belief, the American Airlines Center suffered physical loss or damage of the type insured due to the actual presence of the COVID-19 virus or due to the risk of physical loss or damage from the COVID-19 virus.

64. Government buildings, business buildings and convention centers that were located within one mile of the Locations and which normally drew visitors to the Properties were required to close and/or limit their operations due to the actual presence or risk of COVID-19-related loss and property damage in ways which impacted Plaintiffs' businesses. For example, the Kay Bailey Hutchinson Convention Center typically holds an average of 100 events per year -- including trade shows, conventions and sporting championships. As of July 2020, the convention center had seen more than 40 events cancelled and had lost nearly half of its annual revenue. The cancellation of events at the Convention Center caused Plaintiffs to lose business from customers who would ordinarily have been attracted to the Locations due to their proximity to the Convention Center. Similarly, cancellations of meetings, trial or courtroom proceedings, and other events that would normally occur at Dallas City Hall, Comerica Bank Tower, Renaissance Tower, and Bank of America Plaza due to the actual presence or risk of COVID-19-related loss and property damage caused business interruption losses for Plaintiffs.

65. A significant driver of revenue for Plaintiffs' businesses also comes from large group events (including, but not limited to, corporate conventions, business meetings, community events,

and evening or weekend social events) that were scheduled in the Ballroom and Meeting Rooms. Civil authorities' travel restrictions and limits on gathering size resulted in the cancellation of these larger group events which, in turn, have caused the cancellation of hotel room bookings that were connected to the larger group events. As of September 30, 2020, Plaintiffs have had over 5,300 hotel room cancellations, and lost nearly \$1.3 million in revenue (past and future dates) due to the actual presence or risk of COVID-19 and the Shutdown Orders prohibiting large group events for which the Ballroom and Meeting Spaces had been reserved.

66. Plaintiffs have sustained, and will continue to sustain, business interruption loss as a direct result of physical loss and damage of the type insured under the Policy to properties within one mile of the Properties which attracted business to the Properties.

#### **Civil of Military Authority Coverage Extension**

67. The Policy's "Civil or Military Authority" extension provides coverage to an insured for the actual loss of business income it sustains during the length of time when access to its premises is prohibited by order of civil authority as a direct result of physical damage—as insured against in the policy—to property of the type insured. Specifically, the Policy provides:

#### **2. Civil or Military Authority**

**This Policy covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability if an order of civil or military authority prohibits access to a location provided such order is the direct result of physical damage of the type insured at a location or within five (5) statute miles of it.**

See Exhibit A, All Risk Coverage Form, at 24 of 44.

68. The Policy provides coverage where, as here, a Civil Authority has issued an order prohibiting customer access to the insured property as a direct result of physical damage. The

physical damage must be within five miles of the insured property and must be "of the type insured" (which under the Policy is "*all risks* of physical loss or damage"). The Civil Authority Provision also applies a 30-day time limitation to the damages recoverable.

69. As a direct and proximate result of the Shutdown Orders, access to Plaintiffs' insured Properties has been prohibited or limited. Plaintiffs were required by Civil Authority orders to close their doors to customers and cease certain businesses (particularly Restaurants, Bars and Retail) at Location One. Restrictions on travel and gathering sizes effectively prohibited access to other businesses (particularly Ballrooms, Meeting Spaces, Hotels and Valet Parking) by eliminating the functions for which the Properties would be used.

70. The Dallas County Shutdown Orders were issued as the direct result of physical damage to persons and property caused by the actual physical presence of the COVID-19 virus and communicable disease throughout Dallas County (including within 5 statute miles of Location One). The Dallas County Shutdown Orders were also issued as a direct result of the *risk* of further physical damage to persons and property posed by the COVID-19 virus.

71. Plaintiffs have sustained, and will continue to sustain, business interruption loss due to orders issued by civil authorities directly resulting from physical damage of the type insured under the Policy within five miles of the Properties.

**Communicable Disease-Property Damage Additional Coverage and  
Communicable Disease - Business Interruption Coverage Extension**

72. Under the Policy, AFM must cover Plaintiffs for the actual presence of "communicable disease" at the Locations, pursuant to two sections in the Policy: the "Communicable Disease - Property Damage" provision and the "Communicable Disease -

Business Interruption" provision.<sup>17</sup> The Policy includes the following provisions and definition relating to Communicable Disease:

**3. Communicable Disease - Business Interruption**

**If a described location owned, leased or rented by the Insured has the actual not suspected presence of communicable disease and access to such described location is limited, restricted or prohibited by:**

- a) An order of an authorized governmental agency regulating such presence of communicable disease; or**
- b) A decision of an Officer of the Insured as a result of such presence of communicable disease,**

*See Exhibit A, All Risk Coverage Form, at 25 of 44.*

**Communicable Disease - Property Damage**

**If a described location owned, leased or rented by the Insured has the actual not suspected presence of communicable disease and access to such described location is limited, restricted or prohibited by:**

- a) An order of an authorized governmental agency regulating or as a result of such presence of communicable disease, or**
- (b) A decision of an Officer of the Insured as a result of such presence of communicable disease,**

*See Exhibit A, All Risk Coverage Form, at 7 of 44.*

**Communicable disease means disease which is**

- 1. Transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges.**

*See Exhibit A, All Risk Coverage Form, at 42 of 44.*

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<sup>17</sup> The Communicable Disease - Property Damage provision is listed as an "Additional Coverage" in connection with the All Risk Coverage Provision. . *See Exhibit A, All Risk Coverage Form, at 7 of 44.* The Communicable Disease - Business Interruption provision is listed as a coverage extension under the Business Interruption coverage section. *See Exhibit A, All Risk Coverage Form, at 25 of 44.* Because of the overlap in subject matter between the two provisions, they are addressed collectively in this section of Plaintiffs' Complaint.

73. The actual presence of COVID-19 at Location One has caused physical damage and led authorized governmental agencies to issue orders prohibiting, restricting or limiting access and use of the Properties due to the presence of communicable disease. Due to the presence of COVID-19 in the community and at Location One, Officers of the Insured have ordered the closure or limited the use of the Properties in accordance with applicable Shutdown Orders.

74. The actual presence of COVID-19 at Location One has caused Plaintiffs' to suffer business losses due to authorized governmental agencies issuing orders prohibiting, restricting or limiting access and use of Location One due to the presence of communicable disease. Additionally, an Officer of the Insured, decided to prohibit access and limit use of Location One due to the presence of communicable disease.

75. The Communicable Disease Coverages are denoted as additional coverages or coverage extensions and do not reduce or limit other coverages available under the Policy. They are additive. Further, any sublimit applicable to the Communicable Disease coverages does not apply to limit the Policy's other coverages that may apply.

76. Plaintiffs have sustained, and will continue to sustain, property damage and business interruption losses as a direct result of (1) orders issued by civil authorities and (2) decisions made by an officer of the Insureds to limit, restrict or prohibit access to Location One due to the presence of communicable disease.

**Ingress/Egress Coverage Extension**

77. The Policy's "Ingress/Egress" extension provides coverage for business interruption losses incurred when ingress to or egress from a location is totally or partially prevented as a direct

result of physical loss or damage of the type insured whether or not at the described location. The Policy specifically states:

**8. Ingress/Egress**

**This Policy covers the Business Interruption Coverage loss incurred by the Insured due to the necessary interruption of the Insured's business when ingress to or egress from a described location(s) is physically prevented, either partially or totally, as a direct result of physical loss or damage of the type insured to property of the type insured whether or not at a described location.**

See Exhibit A, All Risk Coverage Form, p. 27 of 44.

78. Coverage is triggered under the Ingress/Egress provision because Plaintiffs sustained business interruption losses when state and local officials mandated that access to Properties at Location One be totally or partially denied due to the presence of COVID-19.

**Protection and Preservation of Property - Business Interruption Coverage Extension**

79. The Policy includes a provision for Extended Period of Liability which states as follows:

**13. Protection and Preservation of Property - Business Interruption**

**This Policy covers the Business Interruption Coverage loss incurred by the Insured for a period of time not to exceed 48 hours prior to and 48 hours after the Insured first taking reasonable action for the temporary protection and preservation of property insured by the Policy provided that such action is necessary to prevent immediately impending insured physical loss or damage to such insured property.**

See Exhibit A, All Risk Coverage Form, p. 30 of 44.

80. In addition to the steps taken in compliance with civil authority orders, Plaintiffs implemented reasonable restrictions regarding the physical use of and access to their Properties to prevent immediately impending physical loss or damage caused by the COVID-19 virus. These



restrictions included, but are not limited to, the following: (1) closing Properties for a period of time when COVID-19 exposure was known or suspected, (2) implementing time-consuming sanitization and safety procedures that required certain hotel rooms to remain off-the-market for a period of time after being rented to avoid property damage and danger to public health.

**Extended Period of Liability**

81. The Policy includes a provision for Extended Period of Liability which states as follows:

**7. Extended Period of Liability**

**The Gross Earnings and Rental Income coverage is extended to cover the reduction in sales resulting from:**

**a) The interruption of business as covered by Gross Earnings or Rental Income;**

**b) For such additional length of time as would be required with the exercise of due diligence and dispatch to restore the Insured's business to the condition that would have existed had no loss happened, and**

**c) Commencing with the date on which the liability of the Company for loss resulting from interruption of business would terminate if this Business Interruption Coverage Extension had not been included in this Policy.**

*See Exhibit A, All Risk Coverage Form, p. 26 of 44.*

82. This provision applies to extend the coverage available to Plaintiffs to cover the reduction in sales, gross earnings, and rental income resulting from business interruptions for such additional length of time (up to 365 days) as is required to restore Plaintiffs' businesses to the condition that would have existed if no loss had happened.

**No Exclusion in the Policy Impacts Coverage**

83. No exclusion in the Policy applies to preclude or limit coverage for the actual presence of COVID-19 at or away from Location One, the physical loss and damage to Properties

at Location One, and/or the business interruption losses that have, and will continue to, result from the physical loss and damage to property. To the extent that AFM contends any exclusion(s) do apply, such exclusions are unenforceable.

84. The Policy has three types of exclusions: Group I, Group II and Group III. Group I excludes coverage for business interruption losses caused by particular events (primarily nuclear reactions, war, terrorism, and theft). To accomplish this broad exclusion, the Policy's preface to the Group I exclusions states: "This Policy excludes ***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 concurrently, or in any other sequence to the loss or damage." *See* Exhibit A, All Risk Coverage Form, at 2 of 44. Group II and Group III exclusions, however, do not include prefatory language categorically excluding "loss" and do not include the anti-concurrent cause language that applies to the Group I exclusions.

85. The Contamination exclusion is a Group III exclusion.

86. The Policy includes the following provision and definition regarding Contamination:

**GROUP III. THIS POLICY EXCLUDES:**

**8. CONTAMINATION**

**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. If contamination due only to the actual not suspected presence of contaminant(s) directly results from other physical damage not excluded by this Policy, then only physical damage caused by such contamination may be insured. This exclusion does not apply to radioactive contamination which is excluded elsewhere in this Policy.**

*See* Exhibit A, All Risk Coverage Form, p. 4-5 of 44 (emphasis added).

**“Contamination means any condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold or mildew.”**

See Exhibit A, All Risk Coverage Form, p. 42 of 44 (emphasis added).

87. In 2006, the Insurance Services Office ("ISO"), an entity charged with drafting standard form policy language for use by the insurance industry, developed a standard form and broadly worded "virus exclusion" numbered CP 01 40 0706 and titled "loss due to Virus or Bacteria. AFM did not include that exclusion in the Policy.

88. The Contamination exclusion AFM chose to use in the Policy does not, itself, exclude coverage for business interruption losses.

89. The Contamination exclusion used by AFM does not exclude coverage for costs and expenses incurred to protect or preserve insured property from impending physical loss or damage.

90. The Contamination exclusion used by AFM also does not exclude losses and damage caused by Communicable Disease -- which are expressly covered by the Policy. AFM has stated that COVID-19 meets the definition of communicable disease under the Policy.

91. To the extent that AFM contends that any of the Policy's provisions do not provide coverage or otherwise bar or limit coverage for the losses and damage alleged herein, the Policy is, at best, ambiguous and must therefore be construed in favor of coverage. Additionally, upon information and belief, AFM is barred from relying upon the Contamination provision to exclude virus-related loss and damage because of regulatory and/or administrative estoppel or equitable estoppel. Alternatively, the exclusion (as interpreted by AFM) is unconscionable and/or contrary to public policy and cannot be enforced as written.

**D. AFM's Bad Faith Conduct**

92. AFM is a subsidiary of FM Global and is under its control. Based on information and belief, FM Global and AFM are, in fact, engaged in a calculated scheme to ensure that AFM's adjusters reached the same conclusion for all COVID-19 claims.

93. Claims personnel were instructed to follow FM Global's internal memo entitled "Talking Points on the Novel 2019 Coronavirus." without regard to any individual investigation of each claim. Pursuant to the Talking Points, AFM instructed its claims personnel to deny coverage under several pertinent coverage provisions regardless of what the claims handler's investigation revealed. *See Exhibit D*, "Talking Points."

94. Upon information and belief, AFM follows FM Global's Talking Points.

95. The Talking Points incorrectly and summarily state that the Policy's coverages for Civil or Military Authority, Contingent Time Element Extended, and Ingress/Egress do not apply because "[a] virus will typically not cause physical damage" and because "the presence of a communicable disease does not constitute physical damages and is not of the type insured against..." *See Exhibit D*, Talking Points.

96. AFM's bad faith position that the virus does not cause physical damage is contrary to the Policy's acknowledgement that the presence of communicable disease causes physical damage to property because it provides coverage for the resulting "cleanup, removal and disposal of...communicable disease."

97. The Talking Points document is an effort to maneuver and limit the investigation and impending decision on coverage to only the Communicable Disease coverages -- which have lower sublimits. Inclusion of only the Communicable Disease coverage in its Talking Points causes AFM's adjusters to request information tied only to Communicable Disease coverage.

98. Consistent with the approach set forth in the Talking Points, AFM conducted an inadequate and improper investigation of Plaintiffs' claim. AFM intentionally conducted a pretextual investigation. AFM made informational requests and required Plaintiffs to gather and provide information that was calculated solely to relate to and support AFM's predetermined decision that only the sub-limited Communicable Disease provisions could possibly afford coverage. AFM failed to gather information or consider relevant facts relating to Plaintiffs' *entire* claim under the Policy language.

99. The Talking Points instruct claims adjusters, including AFM adjusters, to reach conclusions without considering the specific facts relating to an insured's particular claim, and without considering the applicable law which controls the insurance policy's interpretation.

100. AFM's actions, including but not limited to the Talking Points, are in direct opposition to the accepted practices of good faith insurance claims handling.

101. AFM's explicit practice and procedure on COVID-19-related claims constitute an unfair or deceptive act or practice and bad faith.

102. AFM's actions in using the Talking Points demonstrates an intentional, conscious disregard of Plaintiffs' rights under the Policy.

103. AFM has intentionally failed to apply its own Policy language in good faith.

104. AFM intentionally placed, and continues to place, arbitrary requirements on the coverage provided by Plaintiffs' Policy. AFM's intentional imposition of arbitrary requirements upon Plaintiffs' ability to recover under the Policy is unreasonable.

105. AFM has effectively denied Plaintiffs' claim and in so doing has knowingly or recklessly failed to conduct a reasonable investigation of Plaintiffs' entire claim, and has issued a denial lacking a reasonable basis. Therefore, the basis for AFM's denial is unreasonable.

106. Plaintiffs have suffered and continue to suffer substantial damages due to AFM's wrongful denial and bad faith conduct.

**E. AFM's Denial of Coverage**

107. On July 14, 2020, Plaintiffs reported a loss under the Policy to AFM.

108. On July 17, 2020, AFM responded to the Notice of Loss and requested additional information. AFM took the position that Plaintiffs had not proven actual presence of the COVID-19 virus on the Properties and requested that Plaintiffs complete a questionnaire seeking specific additional information.

109. On August 24, 2020, Plaintiffs supplied responses to AFM's questionnaire and provided additional information and invoices in support of Plaintiffs' claim. AFM confirmed receipt of Plaintiffs' responses to the questionnaire on August 25, 2020.

110. AFM sent another questionnaire to Plaintiffs on October 27, 2020. Plaintiffs responded to AFM's second questionnaire.

111. Plaintiffs also provided a Sworn Statement in Proof of Loss to AFM on or around May 10, 2021.

112. AFM wrongly failed to provide coverage under the Policy and effectively denied Plaintiffs' claim.

**F. Plaintiffs' Losses**

113. The continuous presence of the coronavirus on or around Location One has created a dangerous condition, has caused physical loss or damage to Plaintiffs' Properties, and rendered Plaintiffs' Properties unsafe and unfit for their intended use.

114. As a direct result of (1) the COVID-19 virus' actual presence in the state of Texas and Dallas County (including at Location One), (2) the risk posed by the COVID-19 virus, and

(3) civil authorities' issuance of Shutdown Orders that prohibited, limited, or otherwise interfered with Plaintiffs' businesses at Location One, Plaintiffs have suffered physical losses and damage.

115. The COVID-19 virus and the related Shutdown Orders have caused direct physical loss of Plaintiffs' insured property in that the Properties have been rendered useless and/or uninhabitable by both the presence of the virus and the related Shutdown Orders. The Properties' functionality for their ordinary and intended uses has been prevented.

116. Plaintiffs had a reasonable expectation that loss of use of any portion of an insured Property (e.g. in-restaurant dining) would be covered even if Plaintiffs undertook other actions (e.g. offering take out services) to mitigate its losses and, therefore, the magnitude of its claim.

117. As a result of COVID-19 and the related Shutdown Orders, Location One has suffered immediate and direct physical loss and/or damage. Plaintiffs have been forced to suspend their operations resulting in substantial business interruption and losses of business revenue which are ongoing and continue to increase every day.

**V.**  
**CAUSES OF ACTION**

**COUNT ONE:**  
**DECLARATORY RELIEF**

118. Plaintiffs repeat and re-allege each and every allegation in this Petition and incorporate each allegation into this Count, as if fully set forth herein.

119. Pursuant to Rhode Island Superior Court Rule of Civil Procedure 57 and the Rhode Island Uniform Declaratory Judgment Act, R.I.G.L. 1956 § 9-30-2, a person interested under a written contract or other writing or whose rights, status or other legal relations are affected by a statute or ordinance may have determined any question of construction or validity arising under

the contract or ordinance and obtain a declaration of the rights, status and other legal relations thereunder.

120. An actual and justiciable controversy has arisen between Plaintiffs and AFM regarding the availability of coverage under the Policy for Plaintiffs' claims.

121. Accordingly, Plaintiffs seek a Declaratory Judgment to determine the following:

- (a) that the COVID-19 virus caused physical loss or damage to properties including the Insured Properties;
- (b) that coverage exists for losses incurred due to *the risk* of physical loss or damage due to the presence of COVID-19;
- (c) that the Policy's coverage provisions are triggered by the facts set forth herein;
- (d) that no Policy exclusion applies to bar or limit coverage for Plaintiffs' claims;
- (e) that the Policy provides coverage for Plaintiffs' claim.

**COUNT TWO:  
BREACH OF CONTRACT**

122. Plaintiffs repeat and re-allege each and every allegation in this Petition and incorporate each allegation into this Count, as if fully set forth herein.

123. The Policy is a valid, enforceable and binding contract between Plaintiffs and AFM that afforded Plaintiffs insurance under the terms and conditions of the Policy.

124. Plaintiffs complied with all applicable Policy provisions, including paying premiums and providing timely notice of their claim.

125. AFM failed to conduct a reasonable investigation to determine whether the losses and damage being claimed by Plaintiffs were covered under the Policy. AFM also failed to conduct a reasonable investigation to determine whether the losses and damage being claimed by Plaintiffs were subject to an exclusion under the Policy.



126. In the Policy, AFM agreed to cover Plaintiffs' Properties against all risks of physical loss and/or damage. In the Policy, AFM also agreed to cover Business Interruption loss and incurred Extra Expense, including as provided in the Business Interruption Coverage Extensions, as a direct result of physical loss or damage of the type insured under the Policy.

127. Coverage is due under multiple provisions of the Policy, including the following: (1) the basic insuring agreement, (2) the Business Interruption Coverage Provision, (3) the Attraction Property coverage extension, (4) the Civil or Military Authority coverage extension, (5) the Ingress/Egress coverage extension, (6) the Communicable Disease - Business Interruption coverage extension, (7) the Communicable Disease - Property Damage additional coverage, and the (8) Extended Period of Liability coverage extension.

128. No exclusions apply to bar coverage.

129. Nonetheless, AFM has unjustifiably failed to pay for Plaintiffs' covered losses, damage and expenses. AFM's refusal to pay is a breach of the Policy.

130. The failure of AFM to promptly accept Plaintiffs' claims under the Policy have caused (and will continue to cause) Plaintiffs to incur direct and consequential damages. As a result of AFM's breaches of contract, Plaintiffs have suffered, and continue to suffer, damages including but not limited to: (a) loss of business income; (b) loss of property; (c) loss of use of property; (d) damage to property; (e) extra expenses incurred, (f) economic hardship. Plaintiffs are entitled to damages in an amount to be determined at trial, along with pre- and post- judgment interest, reasonable and necessary attorney's fees; reasonable and necessary costs and any other relief that may be available and deemed appropriate by the Court.

**COUNT THREE:**  
**BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING**

131. Plaintiffs repeat and re-allege each and every allegation in this Petition and incorporate each allegation into this Count, as if fully set forth herein.

132. AFM has failed to pay Plaintiffs' claim for coverage under the Policy relating to its losses from COVID-19.

133. AFM's denial of Plaintiffs' claim lacks any reasonable basis.

134. AFM failed to conduct a reasonable investigation to determine whether the losses and damage being claimed by Plaintiffs were covered under the Policy. AFM also failed to conduct a reasonable investigation to determine whether the losses and damage being claimed by Plaintiffs were subject to an exclusion under the Policy. Without having performed a reasonable investigation, AFM's basis for denying Plaintiffs' claim is unreasonable.

135. Upon information and belief, AFM employed a systematic, one-size-fits-all approach to denying coverage for all COVID-19 claims, including Plaintiffs' claim.

136. AFM knew, or was actually or implicitly aware, of the lack of any reasonable basis to deny coverage.

137. AFM acted with reckless disregard as to the reasonableness of its refusal to pay claims, such as Plaintiffs, that were within the coverage terms of the Policy AFM sold

138. AFM breached its duty of good faith and fair dealing by failing to reasonably investigate Plaintiffs' claim and by failing to pay Plaintiffs' claim without a reasonable basis for doing so.

139. AFM's denial of coverage constitutes bad faith.

140. The property damage and business losses caused by COVID-19 are ongoing and causing undue burden and hardship on Plaintiffs. The failure of AFM to promptly accept Plaintiffs'

claims under the Policy have caused (and will continue to cause) Plaintiffs to incur direct and consequential damages.

141. As a result of AFM's bad faith, Plaintiffs have suffered, and continue to suffer, damages including but not limited to: (a) loss of business income; (b) loss of property; (c) loss of use of property; (d) damage to property; (e) extra expenses incurred, (f) economic hardship. Plaintiffs are entitled to damages in an amount to be determined at trial, along with pre- and post-judgment interest, reasonable and necessary attorney's fees; reasonable and necessary costs and any other relief that may be available and deemed appropriate by the Court.

**COUNT FOUR:**  
**VIOLATIONS OF THE TEXAS INSURANCE CODE**

142. Plaintiffs repeat and re-allege each and every allegation in this Petition and incorporate each allegation into this Count, as if fully set forth herein.

143. AFM'S systemic practice of mischaracterizing the facts provided by policyholders in connection with claims for coverage for losses from COVID-19 constitutes and unfair or deceptive act or practice in the business of insurance, pursuant to Tex. Ins. Code § 542.003(b)(1).

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

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

146. AFM failed to adopt and implement reasonable standards for the prompt investigation and processing of claims related to losses based on COVID-19, which constitutes a violation of Tex. Ins. Code § 542.003(3) and § 541.060(3).

147. AFM failed to timely and promptly pay as required under Texas Ins. Code § 542.055-542.059. AFM should be ordered to pay "in addition to the amount of the claim interest on the amount of the claim at the rate of 18 percent a year as damages, together with reasonable and necessary attorney's fees." Tex. Ins. Code § 542.050(a)

148. AFM's systemic practices and procedures have compelled Plaintiffs to retain the services of an attorney and to institute this litigation to recover amounts due under the Policy.

149. As a result of AFM's unfair or deceptive acts and practices, Plaintiffs have suffered, and continue to suffer, damage including but not limited to: (a) loss of business income; (b) loss of property; (c) loss of use of property; (d) damage to property; (e) extra expenses incurred; (f) economic hardship; (g) reasonable and necessary attorney's fees; and (h) reasonable and necessary costs.

**COUNT FIVE:**  
**INSURER'S BAD FAITH REFUSAL TO PAY A CLAIM**  
**PURSUANT TO R.I.G.L. 9-1-33**

150. Plaintiffs repeat and re-allege each and every allegation in this Petition and incorporate each allegation into this Count, as if fully set forth herein.

151. The acts and omissions of AFM as set forth herein, and also yet to be discovered in this matter, constitute bad faith under R.I.G.L. § 9-1-33.

152. Plaintiffs sustained damage due to the physical presence of COVID-19, the existence and ongoing threat of COVID-19, and the civil authority orders prohibiting large gatherings

resulting from COVID-19, but AFM has failed to comply with its obligation and has failed to compensate Plaintiffs for their claim.

153. Plaintiffs are entitled to compensatory damages and punitive damages as a result of AFM's bad faith.

154. Plaintiffs have been required to retain the services of attorneys to commence this action and are further entitled to attorney's fees and costs.

**COUNT SIX**  
**VIOLATIONS OF THE TEXAS DECEPTIVE TRADE PRACTICES ACT**

155. Plaintiffs repeat and re-allege each and every allegation in this Petition and incorporate each allegation into this Count, as if fully set forth herein.

156. A claim for violations of the Texas Deception Trade Practices Act ("Texas DTPA") is asserted by Plaintiffs 1914 Commerce Leasing, LLC; Statler 1900 Commerce, LLC; Saamso, LLC; Statler Dallas F&B, LLC; Epic F&B, LLC; and MM F&B, LLC.

157. The Texas DTPA applies to all types of consumer transactions involving goods or services. Insurance is a "service" subject to the Texas DTPA. Plaintiffs are consumers who sought and acquired by purchase insurance services.

158. Texas Insurance Code § 541.151(2) references and prohibits conduct defined in the Texas Deceptive Trade Practices Act, Tex. Bus. & Com. Code § 17.46(b).

159. AFM has violated Tex. Ins. Code § 541.151(2) and Tex. Bus. & Com. Code § 17.46(b) through the following conduct:

- representing that goods or services have...benefits...which they do not have;
- representing that an agreement confers or involves rights, remedies or obligations which it does not have or involve or which are prohibited by law;
- representing that goods or services are of a particular standard, quality or grade...if they are of another;

- failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction which the consumer would not have entered had the information been disclosed.

160. AFM misrepresented that the Policy provided "broad" and "comprehensive" coverage. AFT encouraged Plaintiffs to believe that the Policy would afford coverage for all risks, such as pandemics, not specifically excluded by the terms of the Policy. AFM made these misrepresentations and omissions with the intent to induce Plaintiffs to purchase the Policy from AFM.

161. AFM's systemic practice of mischaracterizing the facts provided by policyholders in connection with claims for coverage for losses from COVID-19 constitutes an unfair or deceptive act or practice in the business of insurance. Additionally, AFM's systemic practice of attempting to influence or direct policyholders' claims for coverage for losses from COVID-19 to the sub-limited Communicable Disease Coverages constitutes an unfair or deceptive act or practice in the business of insurance.

162. AFM's use of the AFM Talking Points with predetermined conclusions regarding coverage for claims based on losses from COVID-19 without consideration of the particular facts or applicable law and AFM's use of the Talking Points to coach its claim adjusters to steer policyholders to the sub-limited Communicable Disease Coverages constitutes an unfair or deceptive act or practice in the business of insurance.

163. AFM's failures to adopt and implement reasonable standards for the prompt investigation and processing of claims related to losses based on COVID-19 and AFM's systemic practice and policy of denying coverage for claims by policyholder for losses from COVID-19 without conducting an adequate investigation of the facts and applicable law constitutes an unfair

or deceptive act or practice in the business of insurance pursuant to Tex. Ins. Code § 542.003(b)(1), (3) and § 541.060(3).

164. AFM misrepresented to Plaintiffs that the Policy was an "all risk" policy which provided "broad" and "comprehensive" coverage that was "straightforward" and "certain."

165. Plaintiffs relied on AFM's misrepresentations and omissions when entering the contract with AFM. Had Plaintiffs been made aware that the Policy would not afford adequate coverage for property damage and business losses in the event of a pandemic, Plaintiffs would not have purchased the Policy or would have sought and obtained additional insurance coverage for pandemic events.

166. AFM's practices, procedures, misrepresentations and omissions have compelled Plaintiffs to institute this litigation to recover amounts due under the Policy.

167. As a result of AFM's unfair or deceptive acts and practices, Plaintiffs have suffered, and continue to suffer, damage including but not limited to: (a) loss of business income; (b) loss of property; (c) loss of use of property; (d) damage to property; (e) extra expenses incurred; (f) economic hardship; (g) reasonable and necessary attorney's fees; and (h) reasonable and necessary costs.

## **VI.** **REQUESTED RELIEF**

**WHEREFORE**, Plaintiffs respectfully requests that the Court enter judgment in their favor and against AFM as follows:

1. For a declaration from the Court that:
  - a. that the COVID-19 virus caused physical loss or damage to properties including the Insured Properties;
  - b. that coverage exists for losses incurred due to *the risk* of physical loss or damage due to the presence of COVID-19;

- c. that the Policy's coverage provisions are triggered by the facts set forth herein;
  - d. no Policy exclusion applies to bar or limit coverage for Plaintiffs' claims; and
  - e. the Policy affords coverage for Plaintiffs' claim.
2. For all damages, including actual, compensatory, special, consequential and punitive damages against AFM in an amount to be proven at trial, in excess of \$10,000;
  3. For statutory damages, including pre- and post-judgment interest, as permitted by law;
  4. For an award of attorneys' fees and costs of suit incurred;
  5. For any other and further relief, either in at law or in equity, to which Plaintiffs may show themselves to be justly entitled.

**VII.**  
**JURY DEMAND**

Plaintiffs hereby demand a trial by jury on all claims so triable.

Dated: February 25, 2022

Respectfully Submitted,

MCINTYRE TATE LLP

/s/ Stephen M. Prignano

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