

**STATE OF RHODE ISLAND
 PROVIDENCE COUNTY**

SUPERIOR COURT

JOSEPHSON, LLC D/B/A THE MOINIAN
 GROUP

Plaintiff,

v.

AFFILIATED FM INSURANCE COMPANY,

Defendant.

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C.A. No. PC-2021-

JURY TRIAL DEMANDED

COMPLAINT

Plaintiff Josephson, LLC d/b/a The Moinian Group (“Moinian” or “Plaintiff”), by and through its undersigned attorneys, as and for its Complaint against Affiliated FM Insurance Company (“AFM” or “Defendant”), alleges as follows:

INTRODUCTION

1. This action for breach of contract and declaratory judgment arises out of Moinian’s pursuit of insurance coverage for its property and business interruption losses resulting from the ongoing COVID-19 pandemic.

2. Moinian is one of the largest privately held real estate investment companies in the country, with a portfolio in excess of 20 million square feet. Moinian is among the few national real estate entities to develop, own, and operate properties across every real estate asset category, including residential, commercial, and hospitality properties in New York, New York; Los Angeles, California; and Dallas, Texas.

3. Moinian’s portfolio of residential buildings in New York, New York includes luxury residences and apartments in Hell’s Kitchen, Midtown Manhattan (just a few blocks from

Columbus Circle and Central Park), Battery Park, and the Financial District, as well as several locations across Brooklyn.

4. Moinian's commercial portfolio includes state-of-the-art high-end office space on Columbus Circle (near Carnegie Hall and the 57th Street shopping corridor), Fifth Avenue, 57th Street, and Park Avenue (next to the Empire State Building and Madison Square Park), and in Battery Park and the Financial District. Moinian also own the International Jewelry Center, an iconic commercial building in Los Angeles's famous Jewelry District, and Renaissance Tower (affectionately known as RenTower), the second tallest building in Dallas.

5. Moinian's commercial tenants include Nordstrom, Chase, CVS Pharmacy, Best Buy, MassMutual, Todd Snyder, The Atlantic, FedEx, Bank of America, and Brinks, among many others. Moinian, along with a partner, is also currently developing a nearly 2 million square foot glass-and-steel Class A office tower in Hudson Yards.

6. Moinian's hospitality portfolio includes hundreds of rooms in The W Downtown (located near the World Trade Center), the Hilton Garden Inn (located adjacent to Broadway), and Hotel Mela (located in the heart of Times Square and including The Long Room, an Irish gastropub, which was forced to close during the pandemic).

7. Like so many other businesses, Moinian was not spared by the pandemic. Fortunately, though, Moinian purchased an "all risks" commercial property insurance policy from AFM, Policy No. KN104 (the "Policy," attached hereto as Exhibit A).

8. Except as otherwise excluded, the Policy broadly covers property "against ALL RISKS OF PHYSICAL LOSS OR DAMAGE." Ex. A at p. 1. The Policy covers Moinian's losses

from physical loss or damage to property occurring during the policy period from September 12, 2019 to September 12, 2020.

9. In exchange for a substantial premium payment, AFM agreed to provide Moinian with up to \$750 million in per-occurrence coverage for Moinian's losses resulting from physical loss or damage at certain real and other property located throughout the United States.

10. The Policy covers both "physical loss" and "physical . . . damage" to Moinian's property.

11. As used in the Policy, "loss" is distinct from "damage" and has an independent meaning.

12. The Policy does not define the terms "physical," "loss," or "damage" or the phrase "physical loss or damage."

13. Further, the Policy does not require there to be structural damage or alteration to property to meet the Policy's "physical loss or damage" requirements. Indeed, the term "structural" does not appear in the Policy.

14. In addition to basic property damage coverage, the Policy includes numerous extensions of coverage relevant to Moinian's losses, including:

- Coverage for costs incurred to decontaminate insured property in compliance with laws regulating contaminants such as viruses at insured property;
- Coverage for costs incurred to address the presence of a communicable disease like COVID-19 at insured property in the particular situation where access has been limited, restricted, or prohibited by an order of an authorized governmental agency or a decision of an officer of Moinian because of that presence;
- Business Interruption coverage for financial loss resulting from physical loss or damage to Moinian's insured properties;

- Business Interruption coverage for Moinian's financial loss of rental income from existing and prospective tenants;
- Business Interruption coverage for extra expense Moinian incurred to temporarily continue the conduct of its business as close to normally as possible;
- Business Interruption coverage for financial loss resulting from loss or damage to property that attracts business to Moinian's property;
- Business Interruption coverage for financial loss resulting from the prohibition of access to certain Moinian properties by order of civil authority;
- Business Interruption coverage for financial loss at locations with the presence of a communicable disease like COVID-19 in the particular situation where access has been limited, restricted, or prohibited by an order of an authorized governmental agency or a decision of an officer of Moinian because of that presence; and
- Business Interruption coverage for financial loss when ingress to, or egress from, a property is partially or totally physically prevented based on physical loss or damage.

15. Moinian's business has been decimated by the vast scope of physical loss or damage inflicted on its property, various attraction properties, and other properties within one mile of Moinian's properties and throughout the world by COVID-19.

16. Moinian has had the confirmed presence of the coronavirus/COVID-19 at multiple insured locations and has taken action to secure and preserve those properties.

17. Among its financial losses arising exclusively from physical loss or damage caused by the coronavirus/COVID-19, Moinian has lost millions in bookings at hotel properties, non-payment of rent at residential and commercial properties, and failure to secure reasonably expected new rental income at residential and commercial properties. Moinian's losses are increasing as the pandemic continues.

18. Based on information presently available, Moinian's losses total at least \$90 million and could increase substantially.

19. However, when Moinian made a claim for coverage under the Policy for its COVID-19-related losses, AFM responded with a cursory letter reciting only the Policy's two sublimited coverages for property damage and business interruption costs arising from communicable diseases under certain factual circumstances (the "CD Coverages") and seeking additional information with regard to the same.

20. AFM made it clear from the beginning that it would consider coverage only under the Policy's narrow CD Coverages, even though the vast majority of Moinian's communicable disease-related losses are instead covered by other provisions in the Policy. The CD Coverages' small sublimits (equal to less than 1% of the Policy's overall limit) only address particular factual circumstances, namely where communicable disease is actually present at an insured location *owned, leased, or rented by Moinian* and access to such location is limited, restricted, or prohibited by an order of an *authorized governmental agency regulating the presence of that disease* or by a *decision of a Moinian officer* because of the actual presence of disease.

21. As further explained herein, in addition to losses that meet the narrow factual predicates for the Policy's CD Coverages, Moinian has suffered vast additional financial losses due to physical loss or damage to property from the coronavirus and/or COVID-19. For example, Moinian suffered various forms of financial loss caused by the actual presence of COVID-19 at insured properties that caused physical loss or damage to the properties. Moinian also suffered financial losses that are covered under the Policy as a result of civil authority orders, advisements,

and other directives issued in connection with the COVID-19 pandemic, but AFM has failed to acknowledge coverage for such losses.

22. Despite AFM's implication to the contrary, AFM must evaluate and provide coverage under all potentially applicable property and business interruption coverages, not just the sublimited CD Coverages.

23. Because Moinian has clear reason to believe AFM will deny coverage for, at a minimum, all losses AFM determines do not fall within the CD Coverages, Moinian is forced to commence this action for anticipatory breach of contract and a judicial declaration of AFM's duties and obligations to Moinian under the Policy.

THE PARTIES

24. Plaintiff Josephson, LLC d/b/a The Moinian Group is a limited liability company organized under the laws of New York with its principal place of business in the State of New York.

25. Upon information and belief, Defendant Affiliated FM Insurance Company is a corporation organized under the laws of the State of Rhode Island, with its principal place of business in Johnston, Rhode Island, and is authorized to issue insurance policies in Rhode Island.

JURISDICTION AND VENUE

26. This Court has jurisdiction pursuant to the provisions of Rhode Island Superior Court Rules of Civil Procedure 57 and Rhode Island General Laws ("R.I.G.L.") § 9-30-2.

27. This matter is subject to the jurisdiction of this Court, as AFM is organized under the laws of Rhode Island and does business in the State of Rhode Island, and the value of Moinian's claims exceeds the jurisdictional amount under R.I.G.L. § 8-2-14.

28. Venue in this Court is proper pursuant to R.I.G.L. § 9-4-4 because AFM is located in Providence County, in the State of Rhode Island.

FACTUAL ALLEGATIONS

I. The COVID-19 Outbreak Causes Widespread Physical Loss or Damage to Property

29. In or around late 2019, news outlets reported an outbreak of illness known as COVID-19 caused by a novel coronavirus formally known as SARS-CoV-2 in or around Wuhan, Hubei Province, China. In an event that has not occurred in more than a century, a pandemic ensued, with COVID-19 quickly spreading to Europe and then to the United States.¹

30. From the first confirmed case of COVID-19 in the United States in January 2020 through today, the impact of the coronavirus/COVID-19 on life and property has been staggering. As of the date of this filing, more than 3.4 million people have died worldwide, including more than 591,000 in the United States.²

31. As of February 26, 2020, the Centers for Disease Control and Prevention (“CDC”) warned that community transmission of the disease existed in the United States. That is, COVID-19 was spreading with no ability to trace the origins of new infections.³

¹ Donald G. McNeil Jr., *Wuhan Coronavirus Looks Increasingly Like a Pandemic, Experts Say*, N.Y. TIMES (Feb. 2, 2020), available at <https://www.nytimes.com/2020/02/02/health/coronavirus-pandemic-china.html> (last visited May 26, 2021).

² COVID-19 Dashboard by the Center for Systems Science and Engineering at Johns Hopkins University, available at <https://www.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6> (last visited May 26, 2021).

³ *CDC Confirms Possible Instance of Community Spread of COVID-19 in U.S.*, CDC Newsroom,

32. On March 11, 2020, the World Health Organization (the “WHO”) declared the novel coronavirus and the resulting infectious disease COVID-19 a global pandemic.

33. On March 22, 2020, New York Governor Andrew Cuomo issued the “New York State on PAUSE” executive order, ordering the closure of all non-essential businesses and prohibiting non-essential gatherings. This order was extended several times since its initial issuance.

34. Similar executive orders were issued and renewed by other state and municipal governments where Moinian has insured locations. Most notably, given Moinian’s substantial properties in New York City, Mayor Bill de Blasio signed a stay-at-home order that he said was needed because of the unique characteristics of the novel coronavirus/COVID-19 and, of particular relevance here, the fact that “the virus physically is causing property loss and damage[.]”⁴ In subsequent orders, Mayor de Blasio found that “the actions taken to prevent [the] spread [of COVID-19] have led to property loss and damage.”⁵

35. As another example, California Governor Gavin Newsom and Los Angeles Mayor Eric Garcetti both signed orders closing non-essential businesses and severely limiting the ability of people to travel to and around Los Angeles County, where Moinian has an insured location.⁶

(Feb. 26, 2020), *available at* <https://www.cdc.gov/media/releases/2020/s0226-Covid-19-spread.html> (last visited May 26, 2021).

⁴ Emergency Executive Order No. 101, *available at* <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-101.pdf> (last visited May 26, 2021).

⁵ *See, e.g.*, Emergency Executive Order No. 103, *available at* <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-103.pdf> (last visited May 26, 2021).

⁶ *See* Executive Order N-33-20, *available at* <https://www.gov.ca.gov/wp->

36. Even now, over one year since the WHO declared COVID-19 a pandemic, the world remains in its grip.

37. The various modes of transmission of COVID-19 have made containment particularly challenging. The WHO recognizes that the coronavirus can be transmitted through person-to-person contact, contact with surfaces impacted by the virus, also known as “fomites,” and droplets and aerosolized particles that remain suspended in the air, often in highly populated areas.⁷

38. According to the WHO, the coronavirus spreads primarily between persons who are in close contact with each other, usually about three feet.⁸

39. Asymptomatic transmission is a significant challenge posed by the hazardous and often deadly coronavirus. Persons infected but without symptoms can still transmit the virus in two different states of infection: a presymptomatic state (in individuals who are infectious before developing symptoms); and an asymptomatic state (in individuals who never experience symptoms). Therefore, presymptomatic and asymptomatic people infected with COVID-19 can unwittingly spread the virus by merely breathing, speaking, or touching objects and surfaces, their

[content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf](#) (last visited May 26, 2021); Public Order Under City of Los Angeles Emergency Authority (Mar. 15, 2020), *available at* <https://www.lamayor.org/sites/g/files/wph1781/files/article/files/Mayor%20Garcetti%20Emergency%20Order%20-%20March%2015%202020.pdf> (last visited May 26, 2021).

⁷ *Transmission of SARS-CoV-2: implications for infection prevention precautions*, WHO Scientific Brief (July 9, 2020), *available at* <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions> (last visited May 26, 2021).

⁸ *Coronavirus disease (COVID-19): How is it transmitted?*, WHO (July 9, 2020), *available at* <https://www.who.int/news-room/q-a-detail/coronavirus-disease-covid-19-how-is-it-transmitted> (last visited May 26, 2021).

infected status undetectable to themselves and those around them. A study published by CDC researchers confirmed the magnitude of this problem, estimating that transmission of the coronavirus from asymptomatic individuals accounts for *more than half of all transmissions*.⁹

40. Further, COVID-19 has an incubation period that can last up to fourteen days.¹⁰ Incubation is the time between when a person becomes infected and the infected person's expression of symptoms.

41. During the incubation period, or in the presymptomatic state, infected individuals can carry the greatest viral load, which is the quantity of a virus in a person's system.¹¹ Thus, presymptomatic persons can have the greatest ability to transmit COVID-19 and pose the greatest risk to human health and property loss or damage.

42. Additionally, scientific studies have found that the coronavirus physically rests and remains on surfaces for up to twenty-eight days on a variety of materials, including glass, steel, vinyl, plastic, and paper—surfaces that are found throughout Moinian's properties.¹² Human

⁹ Michael A. Johansson, et al., *SARS-CoV-2 Transmission From People Without COVID-19 Symptoms*, JAMA NETWORK (Jan. 7, 2021), available at <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2774707> (last visited May 26, 2021).

¹⁰ WHO, *Coronavirus disease 2019 (COVID-19) Situation Report – 73* (Apr. 2, 2020), available at https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_2 (last visited May 26, 2021).

¹¹ Xi He, et al., *Temporal dynamics in viral shedding and transmissibility of COVID-19*, 26 NATURE MED. 672, 674 (Apr. 15, 2020), available at <https://www.nature.com/articles/s41591-020-0869-5> (last visited May 26, 2021).

¹² See, e.g., Shane Riddell, et al., *The effect of temperature on persistence of SARS-CoV-2 on common surfaces*, VIROLOGY J. (Oct. 7, 2020), available at <https://virologyj.biomedcentral.com/articles/10.1186/s12985-020-01418-7> (last visited May 26, 2021); see also Neeltje van Doremalen, et al., *Aerosol and Surface Stability of SARS-Cov-2 as*

contact with these surfaces can transmit the disease-causing virus, rendering the property dangerous and potentially fatal. When the virus is shed by an infected person onto objects and surfaces such as tables, doorknobs, counters, elevator buttons, handrails, and bathroom fixtures, other people can become infected by touching these surfaces, then touching their eyes, noses, or mouths.¹³

43. Accordingly, fomites transform the surface of property into a potentially deadly transmission device. A study published in the *Journal of Epidemiology and Infection* showed that after lockdown in the United Kingdom, fomite transmission of the coronavirus/COVID-19 may have contributed to as much as 25% of the deaths in that region.¹⁴

Compared with SARS-CoV-1, N. ENGL. J. MED. (March 18, 2020), available at <https://www.nejm.org/doi/full/10.1056/nejmc2004973> (last visited May 26, 2021); Leah F. Moriarty, et al., *Public Health Responses to COVID-19 Outbreaks on Cruise Ships – Worldwide, February-March 2020*, CDC MORBIDITY AND MORTALITY WEEKLY REPORT (Mar. 27, 2020), available at <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.htm> (last visited May 26, 2021); Zhen-Dong Guo, *Aerosol and Surface Distribution of Severe Acute Respiratory Syndrome Coronavirus 2 in Hospital Wards, Wuhan, China, 2020*, CDC Emerging Infectious Disease Journal Vol. 26, No. 7-July 2020 (Apr. 10, 2020), available at https://wwwnc.cdc.gov/eid/article/26/7/20-0885_article (last visited May 26, 2021).

¹³ See, e.g., *Coronavirus disease (COVID-19): How is it transmitted?*, WHO (July 9, 2020), *supra* note 8; see also CDC, Jing Cai, Wenjie Sun, Jianping Huang, Michelle Gamber, Jing Wu, Guiqing He, *Indirect Virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China, 2020*, 26 EMERGING INFECTIONS DISEASES 6 (June 2020), available at https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article (last visited May 26, 2021); WHO, *Transmission of SARS-CoV-2: implications for infection prevention precautions* (Jul. 9, 2020), *supra* note 7; see also *See How Easily COVID-19 Might Spread Through A Restaurant In This Black Light Experiment* (May 16, 2020), available at <https://www.news10.com/news/coronavirus/see-how-easily-covid-19-might-spread-through-a-restaurant-in-this-black-light-experiment/> (last visited May 26, 2021).

¹⁴ A. Meiksin, *Dynamics of COVID-19 transmission including indirect transmission mechanisms: a mathematical analysis*, 148 EPIDEMIOLOGY & INFECTION e257, 1-7 (Oct. 2020), available at <https://www.cambridge.org/core/journals/epidemiology-and-infection/article/dynamics-ofcovid19-transmission-including-indirect-transmission-mechanisms-a-mathematicalanalysis/A134C5182FD44BEC9E2BA6581EF805D3> (last visited May 26, 2021).

44. Additionally, an American Society for Microbiology article discussed fomite transmission involving both porous and non-porous surfaces as a mode of virus transmission.¹⁵ According to the researchers, “[o]nce a fomite is contaminated, the transfer of infectious virus may readily occur between inanimate and animate objects, or vice versa, and between two separate fomites (if brought together).”¹⁶ Essentially, various surfaces that are frequently touched can become highly transmissive fomites for the tangible, physical coronavirus.¹⁷

45. A CDC research letter also concluded that the coronavirus can remain viable on plastic, aluminum, and glass surfaces—surfaces that are found throughout Moinian’s properties—for at least 96 hours in indoor living spaces.¹⁸

46. Based on its ability to affix itself to surfaces inside buildings, the coronavirus has caused and continues to cause physical loss or damage to property, which in turn renders the property in question dangerous, uninhabitable, and unfit for its intended purpose.

47. Additionally, droplets and aerosols—fine water droplets produced by coughing but also by normal breathing and talking—can transmit the coronavirus/COVID-19 and are another

¹⁵ Stephanie A. Bone and Charles P. Gerba, *Significance of Fomites in the Spread of Respiratory and Enteric Viral Disease*, 73 APPLIED AND ENVIRONMENTAL MICROBIOLOGY 6, 1687-96 (Mar. 2007), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1828811/> (last visited May 26, 2021).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ CDC, Boris Pastorino, Franck Touret, Magali Gilles, Xavier de Lamballerie, and Rémi N. Charrel, *Prolonged Infectivity of SARS-CoV-2 in Fomites*, 26 EMERGING INFECTIOUS DISEASES 9 (Sept. 2020), available at https://wwwnc.cdc.gov/eid/article/26/9/20-1788_article (last visited May 26, 2021).

source of physical loss or damage caused by it.¹⁹ Droplets carry the coronavirus and transmit infection when others inhale the infected droplets or come into contact with the infected droplets through their mucous membranes.²⁰ Also, infected aerosols “remain infectious when suspended in air over long distances and time.”²¹ Respiratory particles produced by the average person can travel almost 20 feet by sneezing.²² These tiny particles are especially dangerous indoors, because they can remain “airborne *indefinitely* under most indoor conditions unless there is removal due to air currents or dilution ventilation.”²³

48. Scientific articles state that respiratory transmission via aerosols is the primary mode of transmission of the coronavirus/COVID-19.²⁴ One scientific review stated that the “infectious virus can be found in aerosols and in exhaled breath samples, and it is likely that under

¹⁹ See, e.g., CDC, *How COVID-19 Spreads* (last updated May 10, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited May 26, 2021).

²⁰ CDC, *Scientific Brief: SARS-CoV-2 and Potential Airborne Transmission* (last updated May 7, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html> (last visited May 26, 2021).

²¹ *Transmission of SARS-CoV-2: implications for infection prevention precautions*, WHO Scientific Brief (Jul. 9, 2020), *supra* note 7.

²² Kevin P. Fennelly, *Particle sizes of infectious aerosols: implications for infection control*, LANCET RESPIRATORY MED. 8:914-24 (July 24, 2020), available at [https://www.thelancet.com/journals/lanres/article/PIIS2213-2600\(20\)30323-4/fulltext](https://www.thelancet.com/journals/lanres/article/PIIS2213-2600(20)30323-4/fulltext) (last visited May 26, 2021).

²³ *Id.*

²⁴ See, e.g., G. Kampf, Y. Brüggemann, H. Kaba, J. Steinmann, S. Pfaender, S. Scheithauer and E. Steinmann, *Potential sources, modes of transmission and effectiveness of prevention measures against SARS-CoV-2*, Journal of Hospital Infection (Dec. 2020), available at <https://www.sciencedirect.com/science/article/abs/pii/S0195670120304370> (last visited May 26, 2021).

certain circumstances, including during aerosol-generating procedures, while singing, or in indoor environments with poor ventilation, the virus may be transmitted at a distance through aerosols.”²⁵

49. Accordingly, based on its ability to remain suspended in the air for extended periods of time, especially in indoor spaces with heavy foot traffic, the coronavirus has caused and continues to cause physical loss or damage to property. This physical loss or damage renders the property in question dangerous and unfit for its intended purpose.

50. Moreover, unlike many other viruses that, once outside the body, do not remain infectious for long periods of time, studies show that the coronavirus is resilient and can remain on surfaces for days and even weeks. Throughout that time, the coronavirus remains infectious and thus continues to compromise the physical integrity of the property to which it attaches, causing physical loss or damage to such property. The surfaces the coronavirus survives on, including steel, wood, glass, plastic, and cloth, are used throughout Moinian’s properties. The virus, therefore, renders such structures unusable for an extended period of time.

51. Because COVID-19 is a pandemic and is statistically certain to be carried by a number of individuals who visit Moinian’s properties, the coronavirus is continually reintroduced to the surfaces and air in Moinian’s properties.²⁶

52. Unfortunately, routine cleaning and improved ventilation do not remove or eliminate the coronavirus from fomites, droplets, or aerosols, and therefore do not remedy the

²⁵ E. A. Meyerowitz, A. Richterman, R. T. Gandhi and P. E. Sax, *Transmission of SARS-CoV-2: a review of viral, host, and environmental factors*, *Annals of Internal Medicine* (Jan. 2021), available at <https://www.acpjournals.org/doi/full/10.7326/M20-5008> (last visited May 26, 2021).

²⁶ See, e.g., *COVID-19 Event Risk Assessment Planning Tool*, Georgia Institute of Technology, available at <https://covid19risk.biosci.gatech.edu/> (last visited May 26, 2021).

ongoing hazard of COVID-19 inside physical spaces. A recent CDC article stated that “there is little scientific support for routine use of disinfectants in community settings, whether indoor or outdoor, to prevent SARS-CoV-2 transmission from fomites.”²⁷ Another study concluded that the coronavirus is “much more resilient to . . . cleaning than most other respiratory viruses so tested.”²⁸

53. Additionally, the use of complex disinfectant solutions and regimens poses its own risks that may be harmful to human health and safety, especially in the contained indoor spaces where the coronavirus is at its most hazardous and potentially fatal. “The use of decontamination and disinfection should be balanced with considerations of [human] safety.”²⁹ Another CDC article stated that “ventilation interventions can reduce the risk of exposure to the virus and reduce the spread of the disease, but they will not eliminate the risk completely.”³⁰

54. Thus, the measures required to remove the coronavirus from property are significant and far beyond mere cleaning and disinfecting of surfaces and indoor air. Indeed, Moinian has taken significant and costly measures to clean and sanitize its properties, beyond just routine cleaning, in an attempt to transform the properties from their unsafe, hazardous, and

²⁷ *Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, Science Briefs (Apr. 5, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html> (last visited May 26, 2021).

²⁸ Nevio Cimolai, *Environmental and decontamination issues for human coronaviruses and their potential surrogates*, 92 J. OF MED. VIROLOGY 11, 2498-510 (June 2020), available at <https://doi.org/10.1002/jmv.26170> (last visited May 26, 2021).

²⁹ *Id.*

³⁰ *Ventilation in Buildings*, COVID-19 (Mar. 23, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html#:~:text=HEPA%20filters%20are%20even%20more> (last visited May 26, 2021).

potentially fatal condition. Unfortunately, though, these measures cannot eliminate the coronavirus from fomites or infected droplets or aerosols any more than cleaning and ventilating friable asbestos particles from surfaces and the air can prevent persons from inhaling the same and developing asbestos-related diseases.

55. Because routine cleaning and improved ventilation cannot consistently remove or eliminate the coronavirus, they likewise cannot remove or eliminate the risk of individuals contracting COVID-19 from infected fomites, droplets, and aerosols.

56. Given the ubiquity and pervasiveness of the coronavirus, no amount of cleaning or ventilation intervention will prevent a person infected with COVID-19 from entering an indoor space and exhaling millions of infected particles onto surfaces and in the air, physically altering, transforming, and damaging surfaces and the air, turning surfaces into disease-transmitting fomites and making the property uninhabitable, unsafe, and unfit for its intended purposes.

57. The coronavirus also continues to evolve, further stymying efforts to control the pandemic. Multiple variants of the coronavirus are circulating globally, including variants originating in the United Kingdom, South Africa, and Brazil.³¹ Ongoing research suggests these variants may spread more easily and quickly, making the coronavirus/COVID-19 evermore dangerous and damaging to persons and property.

58. Despite the sustained global effort to contain COVID-19, it is beyond dispute that the disease can be anywhere and everywhere. Although the coronavirus is not visible, it is

³¹*About Variants of the Virus that Causes COVID-19*, CDC (updated Feb. 12, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html> (last visited May 26, 2021).

nonetheless a physical substance that attaches to and infiltrates property, causing harm to such property. It is especially hazardous when it is located indoors where it cannot be eliminated from surfaces or the air via additional cleaning or improved ventilation.

II. The Federal Government's Response to the Coronavirus and COVID-19 Contributed to Moinian's Financial Losses Arising from Physical Loss or Damage to Property

59. On January 3, 2020, the U.S. federal government received its first formal notification of the COVID-19 outbreak in China. The United States reported its first COVID-19 case on January 20, 2020, and on January 30, 2020 the WHO declared the COVID-19 pandemic a "Public Health Emergency of International Concern." Yet in the first few months of 2020, the U.S. government failed to recognize the severity of the pandemic or contain the virus.

60. By the beginning of February 2020, 11,000,000 people in China's Wuhan province were under quarantine, and the extent of human-to-human transmission was clear. Aside from limiting travel from Wuhan, however, the federal government took little action. Even though funding and medical equipment were being depleted by the day, the U.S. federal government did not authorize new funds or require the production of testing kits, ventilators, or personal protective equipment for healthcare workers.

61. In February 2020, the virus spread throughout the United States largely undetected. Though the CDC began shipping testing kits to laboratories on February 5, 2020, the kits were later determined to be flawed, rendering any results unreliable. By February 26, 2020, the CDC were still testing fewer than 100 patients daily, notwithstanding that the CDC were telling state and local officials that their testing capacity was more than adequate to meet current testing demands.

62. Finally, on March 13, 2020, the U.S. federal government declared a national emergency. Three days later, the CDC and members of the national Coronavirus Task Force issued public guidance, styled as “15 Days to Slow the Spread,” that advocated for the first time far-reaching social-distancing measures, such as working from home; avoiding shopping trips and gatherings of more than 10 people; and staying away from bars, restaurants, and food courts.

63. The failure of the federal government to prevent the continued migration of the coronavirus and COVID-19 from states that were hit early to the rest of the country forced states to take the lead in combating the virus’s spread. The federal government’s inaction allowed the virus to proliferate in areas where Moinian has properties and thereby contributed to the physical loss or damage suffered by Moinian’s properties due to the coronavirus.

64. According to a Columbia University study, if the government had imposed social-distancing measures just one week earlier—on March 8, 2020 instead of March 15, 2020—the United States would have avoided 703,975 confirmed cases (62%) and 35,927 reported deaths (55%) as of May 3, 2020.³² And if social distancing and lockdowns had begun just two weeks earlier—on March 1—the country would have seen a reduction of 960,937 (84%) cases and 53,990 (83%) deaths.

65. The U.S. federal government’s response to the COVID-19 pandemic is a cause of the physical loss or damage to Moinian’s property and other properties within one mile of Moinian’s properties.

³² Jeffrey Shaman et al., *Differential Effects of Intervention Timing on COVID-19 Spread in the United States*, MedRxiv (May 29, 2020), available at <https://www.medrxiv.org/content/10.1101/2020.05.15.20103655v2.full.pdf> (last visited May 26, 2021).

III. AFM Knew of the Risks of a Global Pandemic

66. The insurance industry generally and AFM specifically have known for many years, if not decades, about the risks of a global pandemic.

67. There have been many publicly available reports and articles about the risks of a global pandemic in the last several years. For example, in 2013, Towers Watson published the results of a survey of insurance executives from around the world entitled “Extreme Risks 2013” in which more than 30,000 votes were cast. The number one extreme risk identified by survey participants was a pandemic, that is, a “new highly infectious and fatal disease spreads through human, animal or plant populations worldwide.”³³ In 2015, scientists at AIR Worldwide published an article called “Quantifying Pandemic Risk,” containing the byline: “The recent West Africa Ebola outbreak serves as a reminder that it is important for actuaries to account for and quantify pandemic risk.”³⁴ Again, in an article from 2018, “What the 1918 Flu Pandemic Can Teach Today’s Insurers,” scientists modeled the effects of a modern-day 1918 pandemic and estimated that “a modern day Spanish flu would cause between 21 and 33 million deaths worldwide.”³⁵ These articles and others demonstrate that AFM knew of the risks of a global pandemic.

³³ See *Insurers rate global pandemic as the major extreme risk*, Actuarial Post (undated), available at <https://www.actuarialpost.co.uk/article/insurers-rate-global-pandemic-as-the-major-extreme-risk-5705.htm> (last visited May 26, 2021).

³⁴ J. Douglas Fullam, ASA, Nita Madhav, MSPH, CCM, *Quantifying Pandemic Risk*, The Actuary Magazine 12:1 (February/March 2015), available at [https://www.soa.org/globalassets/assets/library/newsletters/the-actuary-magazine/2015/february/act-2015-vol12-iss1-fullam.pdf?mc_cid=f0cee24803&mc_eid=\[41023ebc2c\]](https://www.soa.org/globalassets/assets/library/newsletters/the-actuary-magazine/2015/february/act-2015-vol12-iss1-fullam.pdf?mc_cid=f0cee24803&mc_eid=[41023ebc2c]) (last visited May 26, 2021).

³⁵ Narges Dorratoltaj, Ph.D., Doug Fullam, ASA, *What the 1918 Flu Pandemic Can Teach Today’s Insurers*, AIR Currents (Mar. 29, 2018), available at <https://www.air-worldwide.com/publications/air-currents/2018/What-the-1918-Flu-Pandemic-Can-Teach-Today-s-Insurers/> (last visited May 26, 2021).

68. Furthermore, in 2006, shortly after the 2003 outbreak of Severe Acute Respiratory Syndrome, also known as SARS, which was an airborne viral respiratory disease that spread through small droplets of saliva,³⁶ just like COVID-19, the Insurance Services Office (“ISO”) drafted new endorsements that it filed with state insurance regulators in all ISO jurisdictions and recommended to the independent bureaus in other jurisdictions to address the exclusion of loss due to virus or bacteria.³⁷ The ISO circular specifically states that viruses such as the rotavirus, SARS, and the influenza (such as the avian flu) may “enable the spread of disease by their presence on interior building surfaces [resulting in] potential claims [for] business interruption (time element) losses.”³⁸ AFM chose not to include the virus exclusion ISO drafted, which exclusion many insurance carriers have used in their “all risks” property policies.

69. In addition to knowing of the risks of a global pandemic and refusing to include a virus exclusion in the Policy, AFM has been aware of the fact that its affiliate company, Factory Mutual Insurance Company (“FM”), argued in a case against another insurance company that the presence of mold—a microscopic but tangible and physical object—in a building and the costs to remediate and return the building to its pre-loss condition constitute “physical loss or damage.”³⁹ FM asserted that any arguments otherwise “are contrary to the facts of this loss and the case law

³⁶ See, e.g., *Severe Acute Respiratory Syndrome (SARS)*, World Health Organization (undated), available at https://www.who.int/health-topics/severe-acute-respiratory-syndrome#tab=tab_1 (last visited May 26, 2021).

³⁷ *New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria*, ISO Circular (July 6, 2006), available at <https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf> (last visited May 26, 2021).

³⁸ *Id.*

³⁹ *Factory Mutual Ins. Co. v. Federal Ins. Co.*, No.: 1:17-cv-00760-GJF-LF (D. N.M. Nov. 19, 2019), Dkt. 127.

which broadly interprets the term ‘physical loss or damage’ in property insurance policies.”⁴⁰ FM even stated that it was undisputed that the presence of the microscopic particles “destroyed” the property’s “environment” and rendered it “unfit for its intended use.”⁴¹

IV. AFM Believes and Asserts that the Presence and Spread of Communicable Diseases Like COVID-19 Constitute Direct Physical Damage

70. Public records demonstrate that AFM has consistently recognized that the presence and spread of a communicable disease like COVID-19 is a form of direct physical damage to property.

71. In 2010, AFM’s proVision policy included a coverage extension entitled “Interruption by Communicable Disease.” *See* Ex. B at 1-2. The Interruption by Communicable Disease extension stated: “For the purpose of this extension, **the presence of and the spread of communicable diseases will be considered direct physical damage**” *Id.* at 2 (emphasis added).

72. In 2015, AFM removed the Interruption by Communicable Disease extension from the proVision form and revised and added it to Healthcare Endorsement: PRO HC 4100. *See* Ex. B at 1-3 and Ex. C at 1-2. The Communicable Disease Cleanup, Removal and Disposal coverage in the Healthcare Endorsement stated (as did the Interruption by Communicable Disease extension in 2010): “For the purpose of this coverage, **the presence and spread of communicable disease will be considered direct physical damage**” Ex. B at 2 and Ex. C at 1 (emphasis added).

⁴⁰ *Id.*

⁴¹ *Id.* (citing cases).

73. In 2016, AFM again revised and moved its communicable disease coverage—this time to both the property and business interruption sections of the proVision form (as it appears in the Policy). In “New York Explanatory Memorandum Filing AFM-2016-3,” AFM explained that:

This coverage was previously approved as Communicable Disease Cleanup, Removal and Disposal in Form PRO HC 4100 (04/15), Filing AFM-2015-1. The coverage was previously available to insureds with healthcare occupancies only and now is core coverage. Grammatical and editorial changes have been made for clarification. The coverage also now allows for an officer of the Insured to trigger the coverage and notice has been added that a waiting period applies. This is an overall expansion in coverage.

Ex. D at 2 and 4-5. Notably, however, AFM deleted the following sentence from the new “Communicable Disease” coverage: “For the purpose of this coverage, the presence and spread of communicable disease will be considered direct physical damage” *See* Ex. E at 7 and 29. Also, notably, AFM did not state that the presence and spread of communicable disease like COVID-19 is not direct physical damage. *See id.*

74. Accordingly, AFM has consistently recognized and represented that the presence and spread of a communicable disease such as COVID-19 constitutes direct physical damage to property.

V. The AFM Policy Offers Broad Coverage for Property and Business Interruption Losses Arising from Loss or Damage to Moinian’s Property or Other Applicable Property

75. Moinian purchased the AFM Policy to protect its business against precisely the types of loss that it has incurred because of the coronavirus and the resulting COVID-19 pandemic.

A. The Policy’s Property Loss or Damage Coverages

76. Except as otherwise excluded, the Policy broadly covers property “against ALL RISKS OF PHYSICAL LOSS OR DAMAGE.” Ex. A at p. 1.

77. As drafted by AFM, the Policy does not define what constitutes “physical loss or damage” vis-à-vis property.

78. Property covered under the Policy includes Real Property and Personal Property. *Id.* at p. 1 § A.1-2.

79. The Policy’s property damage section includes numerous “ADDITIONAL COVERAGES.” *Id.* at pp. 5-18.

80. The “Communicable Disease – Property Damage” additional coverage provides that:

If a **described location**⁴² 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 result [sic] 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**,

This Policy covers the reasonable and necessary costs incurred by the Insured at such **described location** for the:

- a) Cleanup, removal and disposal of such presence of **communicable disease** from insured property; and
- b) Actual costs of fees payable to public relations services or actual costs of using the Insured’s employees for reputation management resulting from such presence of **communicable disease** on insured property.

Id. at p. 7 § D.5.

⁴² Bolded terms have defined meanings within the Policy.

81. **Communicable disease** is defined as any “disease which is . . . [t]ransmissible from human to human by direct or indirect contact with an affected individual or the individual’s discharges” *Id.* at p. 42.

82. The Communicable Disease – Property Damage coverage does not limit available coverage for losses caused by Communicable Disease that do not satisfy the narrow factual requirements of the coverage extension.

83. The “Decontamination Costs” additional coverage provides that:

If insured property is contaminated as a direct result of insured physical damage and there is in force at the time of the loss any law or ordinance regulating **contamination** due to the actual not suspected presence of **contaminant(s)**, then this Policy covers, as a direct result of enforcement of such law or ordinance, the increased cost of decontamination and/or removal of such contaminated insured property in a manner to satisfy such law or ordinance. This coverage applies only to that part of insured property so contaminated due to such presence of **contaminant(s)** as a direct result of insured physical damage.

Id. at p. 8 § D.8.

B. The Policy’s Business Interruption Coverages

84. In addition to covering property loss or damage, the Policy “insures Business Interruption loss, as provided in the Business Interruption Coverages, as a direct result of physical loss or damage of the type insured . . . [t]o property as described elsewhere in this Policy and not otherwise excluded by this Policy” Ex. A at p. 19 § A.1.

85. The basic Business Interruption coverage covers Moinian’s financial losses measured by either Gross Earnings or Gross Profits (at Moinian’s election), as set forth more fully in the Policy. *See id.* at pp. 20-22 §§ B.1-2, 5.

86. The Business Interruption coverage also covers Rental Income loss, which includes:

- a) The fair rental value of any portion of the property occupied by the Insured;
- b) Income reasonably expected from the rentals of unoccupied or unrented portions of such property; [and]
- c) The rental income from the rented portions of such property, according to bona fide leases, contracts or agreements, in force at the time of loss[.]

Id. at p. 21 § B.3.

87. The Business Interruption coverage also covers certain Extra Expense, including, among other things, “extra expense incurred by the Insured . . . to [t]emporarily continue as close to normal [sic] the conduct of the Insured’s business” *Id.* at p. 22 § B.4.

88. The Period of Liability for the Gross Earnings, Rental Income, or Extra Expense coverage is:

- 1. The period starting from the time of physical loss or damage of the type insured; and
- 2. Ending when, with due diligence and dispatch,
 - a) The lost or damaged property could be repaired or replaced and made ready for production or business operations or services under the same or equivalent physical operating conditions that existed prior to the loss or damage; or
 - b) The lost or damaged property under the course of construction or renovation could be repaired or replaced to the same or equivalent degree of completion that existed prior to the loss or damage. This period of time will be applied to the level of business that would have been reasonably achieved after construction and startup would have been completed had no physical damage happened.

Id. at p. 23 § C. The Period of Liability for Gross Profits is the “period starting from the time of physical loss or damage of the type insured and ending no later than the period of time shown in

the Declarations section during which the results of the business shall be directly affected by such damage.” *Id.*

89. The Business Interruption section of the Policy also includes several “BUSINESS INTERRUPTION COVERAGE EXTENSIONS,” as set forth more fully in the Policy and including Attraction Property coverage, Civil or Military Authority coverage, Communicable Disease – Business Interruption coverage, and Ingress/Egress coverage. *Id.* at pp. 24-30.

90. Under the Attraction Property Business Interruption Coverage Extension, the “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**.” *Id.* at p. 24 § E.1.

91. Under the Civil or Military Authority Business Interruption Coverage Extension, the “Policy covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability if an order of civil . . . 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.” *Id.* at p. 24 § E.2.

92. Under the Communicable Disease – Business Interruption Business Interruption Coverage Extension:

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**,

This Policy covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability at such **described location** with such presence of **communicable disease**.

Id. at p. 24 § E.3.

93. The Communicable Disease – Business Interruption coverage does not limit available coverage for losses caused by Communicable Disease that do not satisfy the narrow factual requirements of the coverage extension.

94. Under the Ingress/Egress Business Interruption Coverage Extension:

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**.

Id. at p. 27 § E.8.

95. The Policy also includes an Extended Period of Liability Business Interruption Coverage Extension, which extends the Gross Earnings and Rental Income coverage 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.

Id. at p. 26 § E.7.

96. The Extended Period of Liability coverage provides up to an additional 365 days of coverage under any applicable business interruption coverage(s). *Id.* at Declarations p. 3.

C. The Policy’s “Contamination” Exclusion

97. The Policy contains numerous exclusions, each of which can only potentially apply “unless otherwise stated” elsewhere in the Policy. Ex. A at p. 2 § C.

98. One such exclusion is for “**contamination**” and reads as follows:

This Policy excludes . . . **[c]ontamination**, 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.

Id. at p. 5 § C.III.8.

99. “**Contamination**” is defined as “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.” *Id.* at p. 42.

100. Despite the items listed as **contaminants** in the definition of **contamination**, the Policy’s “Communicable Disease – Property Damage” and “Communicable Disease – Business Interruption” coverages make clear that AFM contemplates the potential for the Policy to cover loss from **communicable diseases** that may relate to a “bacteri[um], virus, [or] disease causing or illness causing agent.”

101. Additionally, the contamination exclusion excludes only “cost” due to contamination, but not ensuing financial loss. To the extent the contamination exclusion applies

to a particular instance of physical loss or damage, it applies only to “cost” due to contamination with respect to that loss or damage, but not to any ensuing financial losses.

102. Unlike other exclusions in the Policy that expressly apply “regardless of any other cause or event, whether or not insured under this Policy, contributing concurrently or in any other sequence to the loss,” *see, e.g., id.* at p. 2 § C.I., AFM chose not to so broaden its contamination exclusion.

IV. Moinian Suffers Massive Financial Losses Based on Physical Loss or Damage Caused by COVID-19 and Related Government Orders, Triggering the Policy’s Property Damage and Business Interruption Coverages

103. Most of Moinian’s residential, commercial, and hospitality properties are located in New York, New York while others are located in Los Angeles, California and Dallas, Texas.

104. All of the above areas have been deeply affected by the coronavirus and resulting COVID-19 pandemic.

105. Though microscopic, the coronavirus/COVID-19 is a tangible, physical thing with material existence.

106. As explained above, physical droplets containing the coronavirus can land on property such as surfaces and objects, creating fomites that remain physically present for hours or days and cause physical loss or damage to property.

107. Fomites in Moinian’s properties did in fact cause physical loss or damage to such properties.

108. Also as explained above, aerosols, fine water droplets produced by normal breathing and talking, containing the coronavirus can remain physically suspended in the air for extended periods of time and cause loss or damage to property.

109. Aerosols in Moinian's insured properties did in fact cause physical loss or damage to such properties.

110. Aerosols are especially likely to remain suspended in the air inside buildings where there is less airflow than in the open outside air, including in Moinian's insured properties.

111. The presence of the coronavirus/COVID-19 in, on, and around Moinian's insured property in multiple physical, tangible forms caused physical loss or damage to that property and as a result rendered it unusable and/or unfit for its intended purpose; that in turn prevented Moinian's tenants, prospective tenants, guests, and retail customers from using the property.

112. The sustained and unavoidable physical loss or damage to Moinian's properties or other properties caused by the coronavirus and/or COVID-19 caused Moinian to suffer numerous types of financial losses, including:

- a. costs incurred to address the presence of the coronavirus/COVID-19 at insured property, including but not limited to the purchase of additional supplies such as hand sanitizer, hand sanitizer dispensers, floor-stand supports, antibacterial soap, gloves, masks, cleaning supplies, plexiglass dividers, thermometers, paper products, goggles, desk dividers, floor signs, and retractable belt stanchions;
- b. costs incurred to decontaminate insured property, including but not limited to the purchase of both additional supplies and additional cleaning services;
- c. loss of Gross Earnings and/or Gross Profits due to physical loss or damage at Moinian's commercial and hospitality properties;

- d. loss of Rental Income due to physical loss or damage at Moinian's residential and commercial properties due to unpaid rent by existing tenants and loss of reasonably expected rental income from prospective tenants;
- e. Extra Expense incurred to temporarily continue the business as close to normal as practicable and to temporarily use the property (including but not limited to the purchase of additional supplies and cleaning services);
- f. losses of the sorts described above resulting from physical loss or damage to properties within one mile of Moinian properties that attract business to Moinian properties (*e.g.*, Broadway theaters, retail and dining, 57th Street shopping, Times Square, the World Trade Center, L.A.'s jewelry district, and many others);
- g. losses of the sorts described above resulting from the prohibition of access to certain Moinian properties by orders of civil authority resulting from physical loss or damage to other properties within five miles of Moinian properties;
- h. losses resulting from the actual presence of COVID-19 that caused access to Moinian's property to be limited or restricted based on orders of civil authority, orders of an authorized governmental agency, or decisions by Moinian officers; and
- i. losses resulting from ingress to, or egress from, Moinian property being partially or totally physically prevented based on physical loss or damage to Moinian's property or other property.

113. As explained above, the U.S. government initially failed to contain the spread of the coronavirus/COVID-19, causing the coronavirus/COVID-19 to spread and cause physical loss

or damage throughout areas where Moinian's properties are located—loss or damage the coronavirus/COVID-19 might not have caused but for the governmental inaction.

114. Accordingly, Moinian has incurred costs and suffered financial losses as a direct result of physical loss or damage of the type insured to property described in the Policy because of the coronavirus and/or COVID-19.

115. As a direct result of Moinian's physical loss or damage to insured property, Moinian sustained and continues to sustain additional operational expenses, losses of gross earnings, gross profit, and rental income, extra expense, increases in the costs of doing business, claim preparation costs, and/or other covered losses.

116. Moinian has taken reasonable steps to mitigate its losses wherever possible.

V. Moinian Submits Its Claim to AFM and AFM Effectively Denies Coverage

117. Via letter dated June 10, 2020, Moinian timely notified AFM of its ongoing COVID-19-related losses.

118. Moinian's June 10, 2020 letter stated that "Moinian has suffered, and will continue to suffer, loss, expense, and/or damage covered under this Policy, including, but not limited to, business income and/or business interruption losses, extra expense, and/or damages at its covered properties in the wake of the ongoing pandemic." Moinian's June 10, 2020 letter also stated that "[g]iven the nature of the ongoing pandemic, the scope, timing and extent of covered loss, expense and/or damage that will result from these circumstances is not yet known, but could be significant. Moinian requests that [AFM] provide coverage for its loss, expense and/or damage."

119. On or about June 22, 2020, AFM responded to Moinian's claim with a list of information requests expressly geared toward the Policy's sublimited CD Coverages, in which

AFM summarily assumed that all Moinian's possible losses would necessarily fall under those sublimited coverages.

120. AFM sent multiple follow-up letters, all of which reiterated the same exclusive focus on information relevant to the sublimited CD Coverages.

121. Upon information and belief, AFM's standard practice when handling COVID-19-related claims is to issue requests for information targeted to the factual predicates of the CD Coverages and insist that only the sublimited CD Coverages apply to the policyholder's losses, regardless of the actual facts of the policyholder's losses.

122. On May 27, 2021, Moinian sent AFM a letter in its continuing endeavor to provide AFM with the information it purportedly needs to adjust the claim under the CD Coverages, subject to a clear reservation of Moinian's right to pursue all of the other Policy coverages to which it is entitled.

123. Based on AFM's standard practice and the nature of the information requests Moinian received, even if AFM were to consider covering any element of Moinian's claim, it would wrongly do so only under the CD Coverages. Accordingly, Moinian commences this action seeking damages for AFM's breach of contract and a judicial declaration of AFM's current and future obligations to Moinian under the Policy.

FIRST CAUSE OF ACTION
(Breach of Contract and/or Anticipatory Breach of Contract)

124. Moinian repeats and realleges the allegations set forth in the foregoing paragraphs as if fully set forth herein.

125. The AFM Policy constitutes a valid and enforceable contract between Moinian, as the “Named Insured,” and AFM, as the “Insurer” providing insurance coverage under the Policy.

126. In the Policy, AFM agreed to insure covered property against all risks of physical loss or damage not otherwise excluded, including the coverages in the Property and Business Interruption portions of the Policy.

127. As described above, Moinian has sustained, and is continuing to sustain, losses covered under the Policy.

128. Moinian paid all premiums due for the Policy, provided prompt notice of its ongoing costs and losses, and performed all other obligations required of it under the Policy with respect to its claim for COVID-19-related losses.

129. AFM’s suggestion that Moinian’s recovery for COVID-19-related losses would be capped by the sublimited CD Coverages was a positive and unequivocal expression that AFM would not perform its obligations to provide coverage outside of the CD Coverages.

130. AFM has not paid any amounts to Moinian in connection with its claim. Instead, it has wrongly denied, or will in the future wrongly deny, coverage for Moinian’s claim under all applicable coverages other than, potentially, the sublimited CD Coverages.

131. No exclusions apply to bar coverage under the Policy sections described herein.

132. As a direct and proximate result of AFM’s breach of contract and/or anticipatory breach of contract, Moinian has suffered and will continue to suffer damages in an amount to be determined at trial, plus consequential damages, attorneys’ fees and costs, and pre- and post-judgment interest to the extent permitted by law.

SECOND CAUSE OF ACTION
(Declaratory Judgment)

133. Moinian repeats and realleges the allegations set forth in the foregoing paragraphs as if fully set forth herein.

134. Under the terms of the Policy, AFM must pay for any covered costs or losses covered under the Policy, subject only to applicable deductibles or limits of liability.

135. As detailed above, Moinian's costs and losses are covered in full under the Policy and are not excluded from coverage.

136. AFM disputes its legal obligation to pay Moinian's claim.

137. An actual and justiciable controversy presently exists between Moinian and AFM concerning the proper construction of the Policy, and the rights and obligations of the parties thereto, with respect to Moinian's claim for losses arising out of the coronavirus and/or COVID-19 pandemic.

138. Moinian seeks a declaratory judgment in favor of Moinian and against AFM declaring that Moinian is entitled to full coverage under the Policy.

139. The issuance of declaratory relief by this Court will terminate the existing controversy among the parties.

PRAYER FOR RELIEF

WHEREFORE, Moinian prays for relief as follows:

a. On the First Cause of Action, Moinian requests that the Court enter judgment against AFM, awarding Moinian damages in an amount to be determined at trial, plus consequential damages, attorneys' fees and costs, and pre- and post-judgment interest to the extent permitted by law;

b. On the Second Cause of Action, Moinian requests that the Court enter a declaratory judgment in favor of Moinian against AFM that Moinian's costs and losses are covered under the Policy and declaring that AFM is required to pay Moinian for its covered losses under the Policy, subject only to applicable deductibles or limits of liability;

c. For all Causes of Action, all pre-judgment and post-judgment interest as allowed by law and all attorneys' fees and costs incurred as a consequence of having to prosecute this lawsuit; and

d. Such other and further relief as the Court deems just and proper.

JURY DEMAND

Moinian hereby demands a trial by jury on all issues so triable.

Dated: Providence, Rhode Island
June 2, 2021

JOSEPHSON, LLC D/B/A THE MOINIAN
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