

CAUSE NO. _____

**BAYLOR COLLEGE OF
MEDICINE,**

Plaintiff,

vs.

**HOUSTON CASUALTY
COMPANY,**

Defendant.

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

____th JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

Plaintiff Baylor College of Medicine ("BCM") files this Original Petition against Houston Casualty Company ("HCC" or "Defendant"), which has denied BCM's first-party claim for lost business income caused by the COVID-19 Pandemic in violation of the clear terms of the applicable policy.

PARTIES

1. Plaintiff BCM is domestic non-profit corporation located in Harris County, Texas.

2. Defendant HCC is a Texas-domiciled property and casualty insurance company with its headquarters and principal place of business in Houston, Harris County, Texas. HCC may be served with process by serving its registered agent, National Registered Agents Inc., 1999 Bryan St., Ste. 900, Dallas, Texas, 75201-

3140, with a copy to Mendes and Mount, 750 Seventh Ave., New York, NY 10019-6829, pursuant to the insurance policy at issue in this litigation.

JURISDICTION AND VENUE

3. The Court has subject matter jurisdiction over the claims in this lawsuit because the amount in controversy exceeds the minimum jurisdictional limits of this Court.

4. The Court may exercise personal jurisdiction over HCC because HCC is a citizen of and resides in Texas.

5. Venue is appropriate in this district because Harris County is where the Defendant resides and where all or a substantial part of the events or omissions giving rise to the claims occurred.

DISCOVERY CONTROL PLAN

6. Discovery for this action will be conducted under Level 3 of Texas Rule of Civil Procedure 190.

RULE 47 STATEMENT

7. BCM seeks monetary relief in excess of \$50,000,000.

STATEMENT OF FACTS

8. BCM is a health sciences university that works to improve health, education, and community service through science, scholarship, and innovation. BCM is widely recognized as a global leader in biomedical education, innovative

research, and cure discovery.

9. BCM generates income through the provision of medical services, research, and education. Its revenue comes from individuals, health insurance payors, federal and state government funding, public research grants, private foundations, and hospitals.

10. BCM's campus, made up of administrative buildings, lecture halls, scientific laboratories, and clinical space is located in Houston's Medical Center. It has additional properties in the River Oaks, Upper Kirby, and Greenway Plaza areas.

The Policy

11. On or about October 31, 2019, BCM and HCC entered into an insurance contract. See Commercial Property Policy No. B0180PG1922227 ("Policy," attached as **Exhibit 1**). BCM agreed to pay premiums to HCC in exchange for HCC's promise to indemnify BCM for "all risks of direct physical loss of or damage" to real and personal property BCM owns, operates, or controls. Policy § 7.

12. The Policy covers loss or damage from, among other things, business interruption, interruption by civil authority, limitations of ingress and egress, and extra expense.

13. Specifically, HCC agreed to pay:

Loss resulting from necessary interruption of business conducted by the Insured and caused by direct physical loss, damage, or destruction by any of the perils covered herein during the term of this Policy to real or personal property as described in Section 6a and including property while in transit.

Policy § 6(b)(1);

Extra Expense necessarily and reasonably incurred resulting from direct physical loss or damage to property as described in Section 6a, and to property intended for use by the Insured by any of the perils covered herein during the term of this Policy.

Id. § 6(c)(1);

[E]xpenses as are necessarily incurred for the purpose of reducing any loss under this policy, however such expenses may not exceed the amount by which the loss under this policy is thereby reduced.

Id. § 6(e)(3);

[A]ctual loss as covered in 6.b, c. and d. resulting due to direct physical loss, damage or destruction during the term of the Policy, by the perils insured against, of: . . . property of a type not excluded by this Policy of a Named supplier of goods or services to the Insured, or the Named receiver of goods or services from the Insured, whether such supplier or receiver is owned by the Insured or is owned by others, but in no event for more than two (2) years from the date of loss.

Id. § 6(e)(4)(b);

[L]oss sustained during the period of time, when as a direct result of damage by an insured peril (within a Five (5) mile radius of the Insured's premises), access to real and personal property of the Insured is prohibited by order of civil and/or military authority, but in no event for more than thirty (30) days.

Id. § 6(e)(5);

[L]oss sustained during the period of time, when as a direct result of damage by an insured peril (within a Five (5) mile radius of the Insured's premises), ingress to or egress from the Insured's "premises" is thereby prevented, but in no event for more than thirty (30) days.

Id. § 6(e)(6);

[D]irect physical loss of or damage of the type insured by this policy to research projects including the value of time spent on research projects, and the expenses incurred in order to continue or resume projects or minimize the loss . . .

Id. § 6(i); and

In case of actual or imminent direct physical loss or damage of the type insured against by this Policy, the expenses incurred by the Insured in taking reasonable and necessary actions for the temporary protection and preservation of property insured hereunder shall be added to the total physical loss or damage otherwise recoverable under the Policy . . .

Id. § 32.

14. All risks are covered unless expressly excluded. Policy § 7 ("This Policy insures against all risks of direct physical loss of or damage to property described herein . . . except as hereinafter excluded."). The Policy does not exclude from coverage direct physical loss or damage to covered property caused by virus.

15. The Policy does not define "direct physical loss, damage, or destruction"; however, the use of the disjunctive "or" in the phrase means that coverage is triggered if loss *or* damage *or* destruction occurs. These concepts are

separate and distinct under the language of the Policy.

16. Under the Policy, direct physical loss, damage or destruction to property may be reasonably interpreted to occur under a variety of circumstances, including but not limited to when a covered cause of loss threatens or renders property unusable or unsuitable for its intended purpose or unsafe for normal human occupancy or use.

17. BCM paid all Policy premiums to HCC, which accepted all such premiums, and the Policy has been and remains in full force and effect for the period from October 31, 2019 to October 31, 2020.

The Peril

18. After the inception of the Policy, a new coronavirus that causes a respiratory disease known as COVID-19 emerged in Houston. By the beginning of March 2020, thousands of Americans were infected. On March 11, the World Health Organization (“WHO”) declared the COVID-19 outbreak a pandemic; and on March 13, Texas Governor Greg Abbott declared a state of disaster in Texas. In accord with these declarations, on March 19, John W. Hellerstedt, M.D., Commissioner of the Department of State Health Services declared a public health disaster in Texas because COVID-19 “has created an immediate threat, poses a high risk of death to a large number of people, and creates a substantial risk of public exposure because

of the disease's method of transmission and evidence that there is community spread in Texas.”

19. The COVID-19 pandemic is exacerbated by the fact that it may infect a person in a variety of ways. The deadly virus spreads when an infected person emits viral particles into the air when they sneeze, cough, talk or breathe and another person ingests them.¹ A study published in the *New England Journal of Medicine*, shows the virus can float or drift in the air for up to three hours.² The risk of infection from exposure to airborne viral particles is greatest in indoor spaces.³

20. The virus has also been shown to physically infect and stay on surfaces and everyday objects such as counters, tabletops, windows, doorknobs, bathroom fixtures, phones, etc. for days on end.⁴ A study published in the *Journal of Hospital Infection* found that the virus can remain infectious on inanimate surfaces at room temperature for up to nine days.⁵

21. On March 19, 2020, Governor Abbott of the State of Texas issued an executive order that “every person in Texas shall avoid gathering in groups of more

¹ <https://www.health.harvard.edu/diseases-and-conditions/covid-19-basics> (all websites cited herein were last accessed August 7, 2020).

² See <https://www.nejm.org/doi/full/10.1056/NEJMc2004973>

³ See <https://www.medrxiv.org/content/10.1101/2020.02.28.20029272v2>

⁴ <https://www.nejm.org/doi/full/10.1056/NEJMc2004973>

⁵ [https://www.journalofhospitalinfection.com/article/S0195-6701\(20\)30046-3/fulltext](https://www.journalofhospitalinfection.com/article/S0195-6701(20)30046-3/fulltext)

than 10 people,” and advising that people should avoid eating in restaurants as well as visiting gyms.

22. On March 24, 2020, recognizing that “the COVID-19 virus causes property loss or damage due to its ability to attach to surfaces for prolonged periods of time,” Harris County Judge Lena Hidalgo issued an order directing all individuals living in the county to stay at home except to provide or receive certain essential services or engage in certain essential activities. The order further required all non-essential businesses located within the County to cease all activities at facilities located within Harris County. The order remained in effect until April 30; and on May 1, a new, but substantially similar version of the order was extended to June 10, 2020. Certain of BCM’s operations were not designated essential businesses and were required to fully close; remaining operations were dramatically reduced because patients’ and providers’ access to BCM’s real and personal property was prohibited.

23. Because Covid-19 has persisted and continued to spread in the community, Governor Abbott of the State of Texas has issued numerous orders designed to combat the spread and threat of the virus:

- On March 31, Gov. Abbott issued an executive order implementing essential services and activities protocols for the entire state of Texas, stating “[e]very person in Texas shall, except where necessary to provide or obtain essential services, minimize social gatherings and

minimize in-person contact with people who are not of the same household.” The order also ordered schools to remain closed to in-person classroom attendance through May 4, 2020.

- On June 23, Gov. Abbott issued an updated executive order to expand the ability of mayors and county judges to impose restrictions on certain outdoor gatherings of over 100 people.
- On June 26, Gov. Abbott issued an executive order re-imposing restrictions on bars and restaurants, which had been relaxed. The order restricted bars to delivery and takeout service only. It also mandated restaurants cut back on dine-in service, operating at only 50% capacity. Previously, restaurants had been able to fill dining rooms at 75% of normal occupancy. The Governor’s office stated publicly that these measures were “essential to our mission to swiftly contain this virus and enhance public health.”
- On July 2, 2020, Gov. Abbott issued an executive order, requiring all Texans to wear a face covering over the nose and mouth in public spaces in counties with 20 or more positive COVID-19 cases, with few exceptions.
- On July 2, Gov. Abbott issued an updated executive order to expand the ability of mayors and county judges to impose restrictions on certain outdoor gatherings of over 10 people.
- On July 9, Gov. Abbott issued a proclamation re-suspending elective surgeries and procedures in hospitals in all counties located within 11 Trauma Service Areas (TSAs) in Texas, including Harris County.

24. Under Section 418.173 of the Texas Government Code, failure to comply with any executive order issued during the COVID-19 pandemic is an offense punishable by a fine not to exceed \$1,000, confinement in jail for a term not to exceed 180 days, or both fine and confinement.

25. Likewise, on June 26, 2020 Harris County Judge Lina Hidalgo raised the Current Level of Risk for Harris County from Level 2 to Level 1. Level 1 signifies a severe and uncontrolled level of COVID-19 in Harris County. At this level, residents are advised to take action to minimize contacts with others wherever possible and avoid leaving home except for the most essential needs like going to the grocery store for food and medicine.

26. On July 24, recognizing the “higher risk for spread of COVID-19 in schools, and the challenge of keeping students, teachers, administrators, and school personnel safe from COVID-19,” Judge Hidalgo further ordered all public and non-religious private schools in Harris County not to open for face-to-face instruction until after September 7, 2020. While the order cannot require private schools to delay in-person instruction, it “strongly urge[s]” them to do the same. The order cautions that the reopening of schools in Harris County may be further delayed, depending on the severity of the outbreak at the time.

27. The closure of all non-essential businesses and restrictions on gatherings of people and in-person instruction evidences an awareness by state and local governments that COVID-19 causes loss of or damage to property—especially for businesses that are open to large numbers of the public, like BCM, as the contact and interaction incident to such businesses causes an increased likelihood—almost

certainty—that COVID-19 is physically present on the property.

28. As of the date of this filing, there are over 100,000 confirmed cases in Harris County and over 1,200 COVID-19 related deaths.

***Direct Physical Loss, Damage, or Destruction to
BCM Real and Personal Property***

29. The COVID-19 pandemic and the physical presence of the virus on BCM's real and personal properties have caused direct physical loss, damage, and destruction to those properties. BCM has and will continue to sustain direct physical loss, damage, and destruction covered by the Policy, including but not limited to, business interruption, extra expense, interruption by civil authority, limitations on ingress and egress, and expenses to reduce loss.

30. Several individuals with confirmed cases of coronavirus—and untold numbers of unconfirmed cases—have been physically present in covered properties on BCM's campus starting in mid and late March and continuing thereafter.

31. As a result of the physical presence of the virus on BCM's insured property and rapid community spread, as well as state and local orders issued as a result of damage wrought by COVID-19, BCM was forced to completely close one of its clinics; to dramatically reduce the number of patient appointments at its other clinical facilities; and to stop all elective procedures. Due to patients' lack of access to BCM's brick-and-mortar locations due to the physical damage caused by the

virus, BCM implemented a telehealth program, featuring appointments via video visits at considerable cost.

32. BCM's educational programing was also severely compromised. Its Simulation and Anatomy Labs had to significantly reduce their operations and transition them to a virtual platform. Relatedly, BCM's willed-body program was forced to reduce its intake and urgently embalm all cadavers.

33. BCM's laboratory research services were forced to reduce their activities to only those necessary to maintain laboratory equipment and resources. As a result of the virus' physical impact on BCM research facilities and equipment, the rodent census had to be reduced to 60% of the normal level; and clinical research has suffered significant losses as human research subjects can no longer participate in BCM studies that require their physical presence.

34. The physical damage caused by the virus is continuing and ongoing, and its impact on Fall 2020 operations is as yet unknown. The continued presence of the virus may require BCM to keep its clinics, classrooms, labs, and other facilities closed or at reduced capacity, and to continue providing virtual instruction to students and tele-healthcare to patients. That would result in additional expense associated with expanding BCM's virtual offerings, lost clinical revenues, and lost tuition.

HCC Wrongfully Denies BCM's Claim

35. BCM timely submitted a claim for business interruption losses on April 10, 2020. On August 7, 2020, HCC denied the claim, contending “there was no direct physical loss or damage to” covered property, and that none of the governmental orders restricting access to the property “have been issued due to physical property damage.” Insurers’ Letter, dated 8/7/2020 (attached as **Exhibit 2**).

36. In its denial, HCC also cited policy provisions purporting to exclude “pollutants or contaminants” and “microorganisms” from the Policy as justification for denying coverage. *Id.* HCC appears to interpret the reference to a “substance whose presence poses an actual or potential threat to human health” in those provisions to exclude COVID-19 as a covered cause of loss:

[T]he Policies do not insure any loss, damage, cost or expense which arises from any kind of pollution or contamination, or the threat of pollution or contamination. . . . The exclusion applies to pollution or contamination by any substance designated or defined as toxic, dangerous, hazardous or deleterious to persons by any law, ordinance or regulation, and also applies to the presence or existence of anything that endangers or threatens to endanger the health, safety or welfare of persons. Therefore, any loss that arises from the COVID-19 virus, a substance that endangers or threatens to endanger human health, is excluded from coverage under the Policy.

Exhibit 2 at 9-10.

[T]he Policies do not insure any loss, damage, claim, cost, expense or

other sum that directly or indirectly arises out of or relates to a microorganism of any type, including any substance whose presence poses an actual or potential threat to human health. . . . Therefore, any loss that arises from the COVID-19 virus, a substance whose presence poses an actual or potential threat to human health, it is excluded from coverage under the Policy.

Id. at 10.

37. The Policy issued by HCC was part of a Lloyd's of London syndicate. Although HCC has taken the position that BCM's losses arising out of COVID-19 are not covered by the Policy, Lloyd's of London has publicly admitted to investors and regulatory bodies that COVID-19 losses require coverage. In fact, Lloyd's of London has announced that it estimates it will pay claims in the range of \$3 to 4.3 billion as a result of the COVID-19 pandemic as of June 30, and cautioned that these initial projected losses could rise in the future if the pandemic persists.⁶ These public admissions belie HCC's denial of BCM's claim.

COVID-19 is a Covered Cause of Loss

38. Under an "all-risk" policy, like the one at issue here, if a peril is not specifically excluded, it is a covered cause of loss. *SMI Realty Mgmt. Corp. v. Underwriters at Lloyd's London*, 179 S.W.3d 619, 627 n.3 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). As a result of COVID-19, BCM has suffered and will

⁶ <https://www.insurancejournal.com/news/international/2020/05/14/568472.htm>

continue to suffer business interruption loss and extra expense sustained by the necessary interruption of its business caused by direct physical loss, damage, or destruction to real and personal property caused by a covered peril. *See* Policy § 6(b)(1).

39. HCC specifically excluded many perils from BCM's coverage, but not viruses. Under Section 8, entitled "Perils Excluded," the Policy states that it does not insure a long list of specifically named perils. *Id.* § 8. The list includes seven named perils, including fraudulent or dishonest acts, nuclear reaction or radiation; and war, hostile or warlike action, to name a few. *Id.* § 8(a)-(g). Pandemics, viruses, or diseases are not listed among them.

The Pollution and Contamination Exclusion Does Not Apply

40. HCC's reliance on the "pollutants or contaminants" exclusion and accompanying definitions to deny coverage is not supported by the plain language of the Policy. The term "any kind of seepage or any kind of pollution and/or contamination" is defined to include the following:

- 1) seepage of, or pollution and/or contamination by, anything including but not limited to, any material designated as a "hazardous substance" by the United States Environmental Protection Agency or as a "hazardous material" by the United States Department of Transportation, or defined as a "toxic substance" by the Canadian Environmental Protection Act for the purposes of part II of that Act, or any substance designated or defined as toxic, dangerous, hazardous or deleterious to persons or the environment under any other law, ordinance or regulation; and

- 2) the presence, existence, or release of anything which endangers or threatens to endanger the health, safety or welfare of persons or the environment.

Policy, Endorsement No. 1 § III.

41. Virus is not designated as a “hazardous substance” by the United States Environmental Protection Agency, a “hazardous material” by the United States Department of Transportation, or defined as a “toxic substance” by the Canadian Environmental Protection Act. Virus is also not defined as “toxic, dangerous, hazardous or deleterious to persons or the environment” under any other law, ordinance, or regulation. Indeed, virus is not at all like the chemical substances and materials on those lists, which include, for example, arsenic, beryllium nitrate, lithium batteries, fireworks, nitrous oxide, etc.⁷ Virus is, instead, an inert protein that attaches to human cells.⁸

42. While there can be no question that viruses in general, and COVID-19 specifically, endanger human health, the immediately following “catchall” provision that refers to “anything which endangers or threatens to endanger the health safety or welfare of persons or the environment” must be read with reference to and limited by the immediately preceding paragraph that lists specific substances covered by the

⁷ 40 CFR § 302.4 (EPA); <https://www.transportation.gov/check-box/check-box-it-hazmat> (DOT); <https://www.canada.ca/en/environment-climate-change/services/management-toxic-substances/list-canadian-environmental-protection-act.html> (Canadian EPA).

⁸ <https://www.genome.gov/genetics-glossary/Virus>

exclusion. This is confirmed by the use of the conjunctive “and.” Because virus is not like any of those substances specifically listed in the preceding paragraph, it is not brought within the exclusion by the catchall provision. Any broader reading of the catchall provision would lead to an absurd result. If the catchall provision is read to include any dangerous item regardless of its similarity to those specifically referenced in the immediately preceding provision, the exclusion would extend to include any number of perils that are clearly covered by the Policy—fire, windstorm, flood, etc., all of which constitute “things” that “endanger[] or threaten[] to endanger the health, safety or welfare of persons or the environment.”

43. HCC and its fellow insurers have recognized that virus is separate and distinct from the substances designated by the governments of the United States and Canada as hazardous or toxic. In their denial letter, they reference another, similar BCM commercial property policy that specifically defines “Contaminants and Pollutants” as any substance which, after its release, can cause or threaten damage to human health “including, but not limited to bacteria, virus, or hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976 and Toxic Substances and Control Act or as designated by the U.S. Environmental Protection Agency.” Ex. 2 at 11. The fact that HCC’s fellow insurers felt the need to list “virus” separately from

substances designated “hazardous” by many of the same governmental agencies referenced in the HCC policy demonstrates their understanding of virus as something distinct from those substances. Moreover, as explained further below, by creating an exclusion specific to virus that is not included in the HCC Policy, the insurance industry has acknowledged that the typical pollution and contamination exclusion—like the one at issue here—does not apply to damage and losses caused by virus. Thus, while a virus can cause damage to human health or property, it is not itself a “Pollutant or Contaminant” as defined by the Policy.

The Microorganism Exclusion Does Not Apply

44. HCC contends that language purporting to exclude the presence of certain microorganisms from the scope of coverage also excludes virus. This argument is similarly without merit. The microorganisms exclusion states that the Policy:

does not insure any loss, damage, claim, cost, expense or other sum directly or indirectly arising out of or relating to:

mold, mildew, fungus, spores or other microorganism of any type, nature or description, including but not limited to any substance whose presence poses an actual or potential threat to human health.

Policy, Endorsement No. 6 § B. HCC does not contend that virus is a microorganism, nor could it. It is generally accepted in the scientific community that virus is not a living thing because it is not made of cells—the basic building

blocks of life.⁹ Thus, HCC relies exclusively on the “substance whose presence poses an actual threat to human health” language to contend the microorganism exclusion applies. As with the pollutants and contaminants exclusion, the catchall must be read with reference to the list of specific items that immediately precedes it. Because virus—while certainly a threat to human health—is not a living thing like mold, mildew, fungus, or spores, it is not captured by the catchall. Any broader reading of the phrase “any substance whose presence poses an actual or potential threat to human health” would render the Policy meaningless.

45. While the wording of the pollutant and contaminant and microorganism exclusions yields only one reasonable interpretation, in the alternative, if there is more than one reasonable construction of those exclusions, then they are ambiguous and must be construed in BCM’s favor:

It is a settled rule that policies of insurance will be interpreted and construed liberally in favor of the insured and strictly against the insurer, and especially so when dealing with exceptions and words of limitation. When the language of a policy is susceptible of more than one reasonable construction, the courts will apply the construction which favors the insured and permits recovery.

Ramsay v. Maryland Am. Gen. Ins. Co., 533 S.W.2d 344, 349 (Tex. 1976)
(internal citations omitted).

⁹ <https://www.scientificamerican.com/article/are-viruses-alive-2004/>

***COVID-19 Causes Direct Physical Loss,
Damage, or Destruction to Real and Personal Property***

46. As explained above, COVID-19 becomes aerosolized in enclosed, indoor spaces and settles on surfaces, physically attaching to walls, windows, countertops, door knobs, phones, computers, kitchen and bathroom fixtures, as well as medical instruments, tools, and equipment, rendering that property physically lost, damaged, and destroyed.

47. The insurance industry has long acknowledged that virus causes direct physical harm, damage, and destruction to property. In 2006, the Insurance Services Office (“ISO”) and the American Association of Insurance Services (“AAIS”), represented hundreds of insurers in a national effort to seek approval from state regulators for the adoption of virus exclusions to insurance policies that provided coverage for business interruption caused by property damage. Specifically, ISO circulated “New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria” in response to the SARS virus.¹⁰ The ISO Circular explains that “[d]isease causing agents may . . . enable the spread of disease by their presence on internal building surfaces or the surfaces of personal property,” and thus may not have been excluded by the then-current exclusion for pollutants or contaminants—which uses

¹⁰ <https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf>

language virtually identical to that contained in the HCC Policy at issue here.¹¹ The ISO created a form containing the following language to specifically exclude viruses from the scope of coverage: “We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” Upon information and belief, HCC knew of and had access to the ISO’s virus exclusion endorsement and has included such exclusion in its policies with other insureds.

48. By promulgating the virus exclusion in 2006, ISO recognized that virus can cause physical damage or loss to property; hence, the need for an exclusion. The existence of the standard exclusion is an admission by the industry that policies without them do, in fact, cover virus-related damage and losses. The Policy does not contain the standard virus exclusion, thus virus is a covered cause of loss.

49. The loss of functionality of covered property as a result of the physical presence of the virus also triggers coverage. Nowhere does the Policy define “direct physical loss, damage, or destruction to property” to exclude loss of use of property. Had HCC wanted to exclude loss of use or reduction in functionality from the scope of coverage, it has clearly demonstrated an ability to do so. In its Endorsement No. 4, it specifically excluded the “loss of use, reduction in functionality, cost, [or]

¹¹ See *id.*

expense of whatsoever nature” to electronic data. Policy, Endorsement No. 4. There is no such limitation as it pertains to coverage for the loss of real or personal property.

50. For all of these reasons, COVID-19 is a covered peril under HCC’s all-risk policy that causes direct physical loss, damage or destruction to property. HCC’s denial of BCM’s claim was wrongful; it finds no support in the insurance coverage BCM bargained and paid for.

COVID-19 Triggered the Policy’s Business Interruption Coverage

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

52. As described above, COVID-19 has caused BCM to suffer business interruption losses as a direct result of direct physical loss, damage and destruction to property of the type insured by the Policy.

53. These losses trigger coverage under the Policy’s Business Interruption provisions, including, without limitation, net profit before income taxes which has been prevented from being earned and all charges and expenses that have had to continue during the interruption of the business.

Additional Coverages: Civil Authority, Extra Expense, Ingress/Egress, Research and Development, Contingent/Interdependent Business Interruption and Preservation and Protection of Property

54. The Policy includes additional coverages to insure against losses caused by a variety of circumstances, which are applicable here. See Policy § 6.

55. First, the Policy establishes that HCC will “cover the loss sustained during the period of time, when as a direct result of damage by an insured peril (within a Five (5) mile radius of the insured’s premises), access to real and personal property of the Insured is prohibited by order of civil and/or military authority, but in no event for more than thirty (30) days.” *Id.* § 6(e)(5). Notably, coverage under this provision does not require “direct physical loss or damage to property”; only that the order restricting access to the property is “a direct result of damage by an insured peril.” BCM is entitled to such coverage because there are numerous orders promulgated by civil authorities as a result of damage caused by COVID-19 that restrict or prohibit access to BCM’s insured property and the surrounding areas, and the effect of such orders prohibited, in whole or part, access to BCM’s covered properties.

56. Second, the Policy states HCC will cover “Extra Expense necessarily and reasonably incurred resulting from direct physical loss or damage to property as described in Section 6a, and to property intended for use by the Insured by any of

the perils covered herein during the term of this Policy.” *Id.* § 6(c)(1). Extra Expense is defined as “the excess of the total cost during the period of recovery of the lost or damaged property chargeable to the operation of the Insured’s business over and above the total cost that would normally have been incurred to conduct the business during the same period had no loss or damage occurred.” *Id.* § 6(c)(2). As described above, BCM incurred considerable expense implementing a telehealth program to reach patients who could no longer access BCM’s brick-and-mortar clinics due to COVID-19. BCM incurred further expense transferring its training laboratories and other educational offerings to a virtual format. These expenses exceeded those normally required to run its business during the same period. Accordingly, BCM is entitled to extra expense coverage under the Policy. The same expenses are recoverable under the “Expenses to Reduce Loss” provision, which covers those “expenses as are necessarily incurred for the purpose of reducing any loss under this policy . . .” *Id.* § 6(e)(3).

57. Third, the Policy provides that HCC will cover “loss sustained during the period of time, when as a direct result of damage by an insured peril (within a Five (5) mile radius of the Insured’s premises), ingress to or egress from the Insured’s ‘premises’ is thereby prevented, but in no event for more than thirty (30) days.” *Id.* § 6(e)(6). Because BCM’s covered property and property within five

miles of BCM's covered property suffered damage due to COVID-19, thereby limiting, in whole or part, ingress to and egress from BCM's covered property, BCM is entitled to recover its business interruption loss and extra expenses associated with such limitations.

58. Fourth, the Policy provides that HCC will cover "direct physical loss of or damage of the type insured by this policy to research projects including the value of time spent on research projects, and the expenses incurred in order to continue or resume projects or minimize the loss." *Id.* § 6(i). As a result of the damage wrought on BCM's properties by COVID-19, BCM was forced to cancel or curtail clinical trials and other research projects. Accordingly, BCM is entitled to recover the value of time spent on those projects and the expenses it incurred in order to minimize those losses.

59. Fifth, the Policy insures actual business interruption losses due to direct physical loss, damage or destruction to property of the type insured of "a Named supplier of goods or services to the Insured, or the Named receiver of goods or services from the Insured, whether such supplier or receiver is owned by the Insured or is owned by others . . ." *Id.* § 6(e)(4)(b). The loss of business income sustained by BCM as a result of such supply chain interruptions triggers coverage under the Policy's "Contingent/Interdependent Business Interruption" provision.

60. Sixth, the Policy covers “expenses incurred by the Insured in taking reasonable and necessary actions for the temporary protection and preservation of property insured hereunder” “[i]n case of actual or imminent direct physical loss or damage of the type insured against.” *Id.* § 32. BCM has incurred expenses to preserve and protect its real and personal property from actual and imminent damage caused by COVID-19. Thus, BCM is entitled to recover those expenses pursuant to the Preservation and Protection of Property provision of the Policy.

**VI.
CAUSES OF ACTION**

**COUNT ONE
BREACH OF CONTRACT**

61. BCM incorporates the above-referenced paragraphs as if stated fully herein.

62. The Policy, which includes the terms described above and set forth in the attached Exhibit 1, constitutes a valid, binding contract between HCC and BCM.

63. BCM fully performed its contractual obligations by paying all premiums due under the Policy.

64. HCC materially breached the Policy by denying coverage for business interruption loss, extra expense, contingent/interdependent business interruption, research and development, and other losses sustained by BCM as a result of direct

physical loss, damage, or destruction to covered property caused by a covered peril. HCC also breached the Policy by denying additional coverages to BCM as a result of damage to property, including interruption by civil or military authority and expenses to protect and preserve property against actual and imminent damage caused by COVID-19.

65. HCC's material breach of the Policy has caused and will continue to cause BCM millions of dollars in damages in the form of lost business income and extra expense.

COUNT TWO
DECLARATORY JUDGMENT

66. BCM incorporates the above-referenced paragraphs as if stated fully herein.

67. A justiciable controversy exists between BCM and HCC regarding the availability of coverage under the Policy. Pursuant to Chapter 37 of the Texas Civil Practice & Remedies Code, BCM seeks the Court's declaration of the parties' rights and duties under the Policy as follows:

- a) The Policy is a valid and binding contract obligating HCC to indemnify BCM for covered losses;
- b) BCM has substantially performed or otherwise satisfied all conditions precedent to bringing this action and obtaining coverage under the Policy, or, alternatively, BCM has been excused from performance by HCC's acts, representations,

conduct, or omissions;

- c) HCC has failed to indemnify BCM for covered losses under the Policy;
- d) COVID-19 is a covered cause of loss under the Policy;
- e) BCM did and continues to sustain direct physical loss, damage, or destruction to covered property at a covered location that was and is caused by COVID-19;
- f) No exclusion to coverage, including the pollution and contamination and microorganism exclusions, applies under the Policy;
- g) BCM is entitled to recover its actual business interruption losses sustained due to the necessary interruption of its business operations, services, or production during the pandemic caused by COVID-19;
- h) BCM is owed the extra expense it necessarily and reasonably incurred as a result of direct physical loss or damage to property caused by COVID-19; and
- i) BCM is entitled to additional coverage under the Policy pursuant to the interruption by civil or military authority; extra expense; ingress/egress, research and development, contingent/interdependent business interruption, and preservation and protection of property provisions of the Policy.

COUNT THREE
VIOLATIONS OF TEXAS INSURANCE CODE

68. BCM incorporates the above-referenced paragraphs as if stated fully herein.

69. HCC's failure and refusal to pay BCM's claim for coverage constitutes

a violation of TEX. INS. CODE §§ 541.001 *et seq.* and 542.001 *et seq.* (the “Code”).

70. Specifically, HCC violated the Code by, among other things: (i) misrepresenting to BCM the policy provisions at issue, (ii) failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of BCM’s claim for which its liability was reasonably clear; and (iii) failing to promptly provide BCM a reasonable explanation of the basis in the policy for its denial of BCM’s claim.

71. HCC’s actions and inactions were a cause of damages to BCM, including, without limitation, attorneys’ fees incurred by BCM.

72. On information and belief, HCC’s unlawful acts and practices were committed knowingly as defined in 541.002 and demonstrate actual conscious indifference for the rights and welfare of BCM. In refusing to timely indemnify BCM for its losses, HCC knew BCM would incur and continue to incur substantial expenses despite having insurance coverage under the Policy. Accordingly, BCM seeks recovery in an amount equal to three times its actual damages.

73. HCC’s failure to promptly pay BCM’s claim violates the Texas Insurance Code. HCC is liable to BCM, in addition to the amount of the claim for interest on the amount of the claim at 18 percent a year as damages, in addition to prejudgment interest.

COUNT FOUR
BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING

74. BCM incorporates the above-referenced paragraphs as if stated fully herein.

75. HCC owed a duty to deal fairly and in good faith with BCM in the processing of its claim.

76. On information and belief, HCC knew or should have known that it was reasonably clear that BCM's claim was covered.

77. HCC's failure and refusal to pay BCM's claim for coverage in light of its actual or constructive knowledge that it had no reasonable basis to deny the claim constitutes a breach of the duty of good faith and fair dealing.

78. HCC's actions and inactions were a cause of damages to BCM.

CONDITIONS PRECEDENT

79. All conditions precedent to recovery for all relief requested have been satisfied or waived.

ATTORNEYS' FEES

80. BCM is entitled to recovery its attorneys' fees and court costs pursuant to Texas Civil Practice and Remedies Code §§ 38.001 (1), (2) and (8); and Texas Insurance Code §§ 541.152 and 542.060.

DEMAND FOR JURY

81. BCM demands a trial by jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff BCM demands:

1. Judgment against HCC for all losses covered by the Policy;
2. Declaratory relief as set out above;
3. An award of up to treble damages for violations of the Texas Insurance Code;
4. An award of prejudgment interest;
5. An award of interest as damages on the amount of the claim in the amount of 18% per year;
6. All costs and attorneys' fees and expenses incurred prosecuting these claims; and
7. Such other and further relief as the Court deems just and equitable.

Dated September 1, 2020.

Respectfully submitted,

**FOGLER, BRAR,
O'NEIL & GRAY LLP**

/s/ Murray Fogler

Murray Fogler

State Bar No. 07207300

mfogler@foglerbrar.com

Jas Brar
State Bar No. 24059483
jbrar@foglerbrar.com
Robin O'Neil
State Bar No. 24079075
roneil@foglerbrar.com
Carly Milner
State Bar No. 24065761
cmilner@foglerbrar.com
2 Houston Center
909 Fannin, Suite 1640
Houston, Texas 77010
Telephone: (713) 481-1010
Facsimile: (713) 574-3224

**ATTORNEYS FOR PLAINTIFF
BAYLOR COLLEGE OF MEDICINE**