

**STATE OF RHODE ISLAND**  
**PROVIDENCE COUNTY**

**SUPERIOR COURT**  
**C.A. NO.:**

LERNER CORPORATION

Plaintiff,

v.

AFFILIATED FM INSURANCE COMPANY,

Defendant.

**COMPLAINT FOR DECLARATORY JUDGMENT AND BREACH OF CONTRACT**

Plaintiff, Lerner Corporation (“Lerner”), files this Complaint for Declaratory Judgment and Breach of Contract against Defendant, Affiliated FM Insurance Company (“FM”), alleging as follows:

**I. NATURE OF ACTION**

1. This is an action for declaratory judgment and breach of contract arising out of the refusal of FM, a multi-billion dollar business, to live up to its promise to its policyholder, Lerner. FM promised to pay for, in exchange for premiums paid, physical loss of or damage to and related business interruption losses and expenses at approximately sixty-two (62) covered Lerner locations under an “all risk” insurance policy.

2. Lerner is the managing agent for numerous affiliated entities that own and develop commercial and residential real estate, including office buildings, retail shopping centers, hotels and apartment communities throughout the Washington DC metropolitan area, serving tenants and their clients and guests.

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

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

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

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

7. It is often the case that the source of a covered property insurance loss can ultimately be cleaned, removed, contained, or remediated, yet that does not mean that there was no “loss of or damage to” property in the first place. This was true for mold, odors, smoke, fumes, and asbestos fibers that triggered coverage in other cases and the same is true here. That is especially significant when it comes to business interruption losses, where even modest impacts to property lead to covered losses. There are plenty of cases in which a right to claim business interruption loss was found where nothing had to be done to fix the property damage, which cleared by natural action. FM itself argued in a case filed prior to the onset of the pandemic that the Period of Restoration was the period in which the condition restricting the use of the property at issue continued.<sup>1</sup> At issue in that case was loss caused by mold to a clean room resulting from a power interruption caused by a lightning strike .2 miles away. FM argued that this condition constituted “physical loss.” Beyond this, FM also stated that the physical loss or damage lasted until the policyholder’s customers approved of the restoration of aseptic conditions in the clean room. The coronavirus can be disinfected or cleaned, but it still causes a distinct and demonstrable alteration to property. That is what has triggered coverage for Lerner’s significant losses here.

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

9. As a direct cause from the COVID-19 pandemic and/or the closure orders, together with FM’s failure to live up to its obligations under the “all risk” policy, Lerner was forced to file

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<sup>1</sup> *Factory Mutual Insurance Co. v. Federal Insurance Co.*, No. 17-760 GJF/LF (D.N.M.).

this action. Lerner would not have had to file and incur the cost of this legal proceeding if FM had paid the loss and damage it was obligated to pay.

10. To date, Lerner has suffered millions of dollars in loss and damage, all of which remains unreimbursed by FM despite being covered under the terms of the policy purchased.

11. Lerner is yet another victim of the insurance industry's universal denial and rejection of its coverage obligations for COVID-19 business interruption losses. FM has left Lerner with no choice but to seek judicial intervention to enforce the obligations owed to it by FM pursuant to the terms and conditions of the "all risk" policy (the "All Risk Policy"). The All Risk Policy is attached hereto as **Exhibit A**, and is incorporated herein by reference.

12. Prior to the pandemic, Lerner purchased an "all risk" insurance policy from FM, which included coverage for direct physical loss of or damage to properties (or both) for business interruption exactly like that caused by the COVID-19 pandemic and/or closure orders.

13. The All Risk Policy specifically insures against business interruption losses, losses occasioned by government orders, decontamination costs, extra expense payments to continue business as nearly normal as practicable, loss as a result of communicable disease, among many other covered losses. Lerner has experienced losses that fall within all of these coverages. For this broad, "all risk" business interruption protection, Lerner paid significant premium.

14. Lerner's purchase of this broad "all risk" coverage created a reasonable expectation that the coverage will apply if Lerner has a business interruption resulting from unforeseen and fortuitous events, such as the physical damage to and inability to use its properties or a forced government shutdown of its businesses as a result of a pandemic or other large-scale natural disaster. In particular, Lerner could not foresee the physical damage produced by the COVID-19 pandemic or the government orders shuttering its properties as a result of the physical damage

produced by the COVID-19 pandemic. After faithfully paying a high premium for “all risk” coverage, business owner-insured Lerner, who was forced to close its properties from these unprecedented events, had a reasonable expectation that its “all risk” business interruption insurance would apply and protect it. Lerner had such expectations and sought coverage from FM for the losses.

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

16. The insurance industry has repeatedly and falsely warned courts and the media that COVID-19-related claims will bankrupt insurers and force them to raise premiums and restrict coverages – but they have reaped enormous profits by denying covered claims and have continued to raise premiums despite refusing to uphold their coverage obligations. For example, FM Global, FM’s parent company, reported an increase of almost \$500 million in net premium for 2020 compared with 2019, and net income of over \$1.7 billion.<sup>2</sup>

17. Lerner seeks a declaration that the presence, statistically certain presence, or suspected presence of the SARS-CoV-2 virions in or on Lerner’s property and the ubiquitous presence of the virions throughout the locales and states where Lerner’s covered properties are

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<sup>2</sup> FM Global Annual Report 2020, at 40, <https://fmglobalpublic.hartehanks.com/AssetDisplay?acc=11FM&itemCode=W186258> (last visited June 3, 2021).

located, causes direct physical loss or damage to property within the meaning of those phrases as used in the All Risk Policy sufficient to trigger coverage under the All Risk Policy, including under the coverages for Business Interruption, Extra Expense, and various Additional Coverages and Coverage Extensions, such as Attraction Property, Civil or Military Authority, Extended Period of Liability, Protection and Preservation of Property – Business Interruption, and Supply Chain.

18. Lerner also seeks a declaration that various orders issued by governmental officials on account of the presence of persons infected with and/or suffering from COVID-19 and the presence of SARS-CoV-2 in places of business and gathering prevented Lerner from accessing and using its insured properties to conduct its ordinary business activities and deprived Lerner of its property and the functionality of its property, thereby constituting “physical loss or damage” to property within the meaning of that phrase as used in the All Risk Policy sufficient to trigger coverage in favor of Lerner under the All Risk Policy, including under the coverages for Business Interruption, Extra Expense, and various Additional Coverages and Coverage Extensions, such as Attraction Property, Civil or Military Authority, Extended Period of Liability, Protection and Preservation of Property – Business Interruption, Supply Chain, Contractual Penalties, Leasehold Interest, and Tenant Relocation Expense..

19. Lerner seeks a further declaration that the terms of the All Risk Policy obligate FM to pay for physical loss or damage to the premises described in the All Risk Policy including the Location Schedules attached to it, and all Business Interruption loss, and Extra Expense incurred, including those expenses that would not have been incurred if there had not been “risk of physical loss or damage” or “physical loss or damage” to covered property, including expenses to temporarily continue as close to normal the conduct of the insured premises, and all incurred and to be incurred losses falling within the scope of Additional Coverages and Coverage Extensions,

including Attraction Property, Civil or Military Authority, Extended Period of Liability, Protection and Preservation of Property – Business Interruption, Supply Chain, Contractual Penalties, Leasehold Interest, and Tenant Relocation Expense.

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

## **II. PARTIES**

21. Lerner is a Delaware corporation with its principal place of business in Maryland.

22. Upon information and belief, Defendant Affiliated FM Insurance Company is a Rhode Island corporation with its principal place of business in Johnston, Rhode Island.

23. FM is, and at all relevant times herein, has been engaged in the business of selling property insurance policies, other insurance policies and other products and services to, among others, companies like Lerner.

## **III. JURISDICTION AND VENUE**

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

25. Venue in this Court is proper under Rhode Island General Laws §9-4-4, because FM is located in Providence County.

## **IV. LERNER’S REAL ESTATE AND PROPERTY MANAGEMENT BUSINESSES**

26. Lerner is the managing agent for numerous affiliated entities that own and develop commercial and residential real estate, including office buildings, retail shopping centers, hotels and apartment communities throughout the Washington DC metropolitan area, serving tenants and

their clients and guests. The insured properties were the locations of centers of interaction within the greater Washington D.C. metropolitan area, whose use were impacted by the COVID-19 outbreak and contamination. Multiple tenants and employees at and in contact with the insured premises tested positive for COVID-19, creating a dangerous condition on the properties with actual contamination and extra expenses related to attempts to mitigate the danger.

27. Lerner's insured properties are described in the All-Risk Policy or identified in Location Schedules attached to the All Risk Policy.

## **V. THE COVID-19 GLOBAL PANDEMIC**

28. In December 2019, during the term of the All Risk Policy, an outbreak of illness known as COVID-19 caused by a novel coronavirus formally known as SARS-CoV-2 was first identified in Wuhan, Hubei Province, China. In an unprecedented event that has not occurred in more than a century, a pandemic of global proportions then ensued, with the illness and virus quickly spreading to Europe and then to the United States.

29. In 2020, COVID-19 decimated the economies of the states and federal district where Lerner's properties are located, including Lerner's business operations.

30. COVID-19 is highly transmissible and spreads rapidly. For example, as of March 1, 2020 there were 87,137 confirmed COVID-19 cases across the globe.<sup>3</sup> That number increased to over 800,000 confirmed cases in April and over 3,000,000 cases in May.<sup>4</sup> According to the CDC, to date, COVID-19 has infected more than seventy-eight million people and killed nearly 945,000 in the United States.

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<sup>3</sup> See <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200301-sitrep-41-covid-19.pdf>.

<sup>4</sup> See <https://graphics.reuters.com/CHINA-HEALTH-MAP/0100B59S39E/index.html>.



31. At the pandemic's peak, over 4,000 Americans were perishing per day from COVID-19.<sup>5</sup> A substantial number of Americans are still dying daily, with surges of cases and new and ever more contagious variants of the Coronavirus occurring throughout the U.S.<sup>6</sup> COVID-19 is now the third-leading cause of death in this country, surpassed only by heart disease and cancer.<sup>7</sup>

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

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

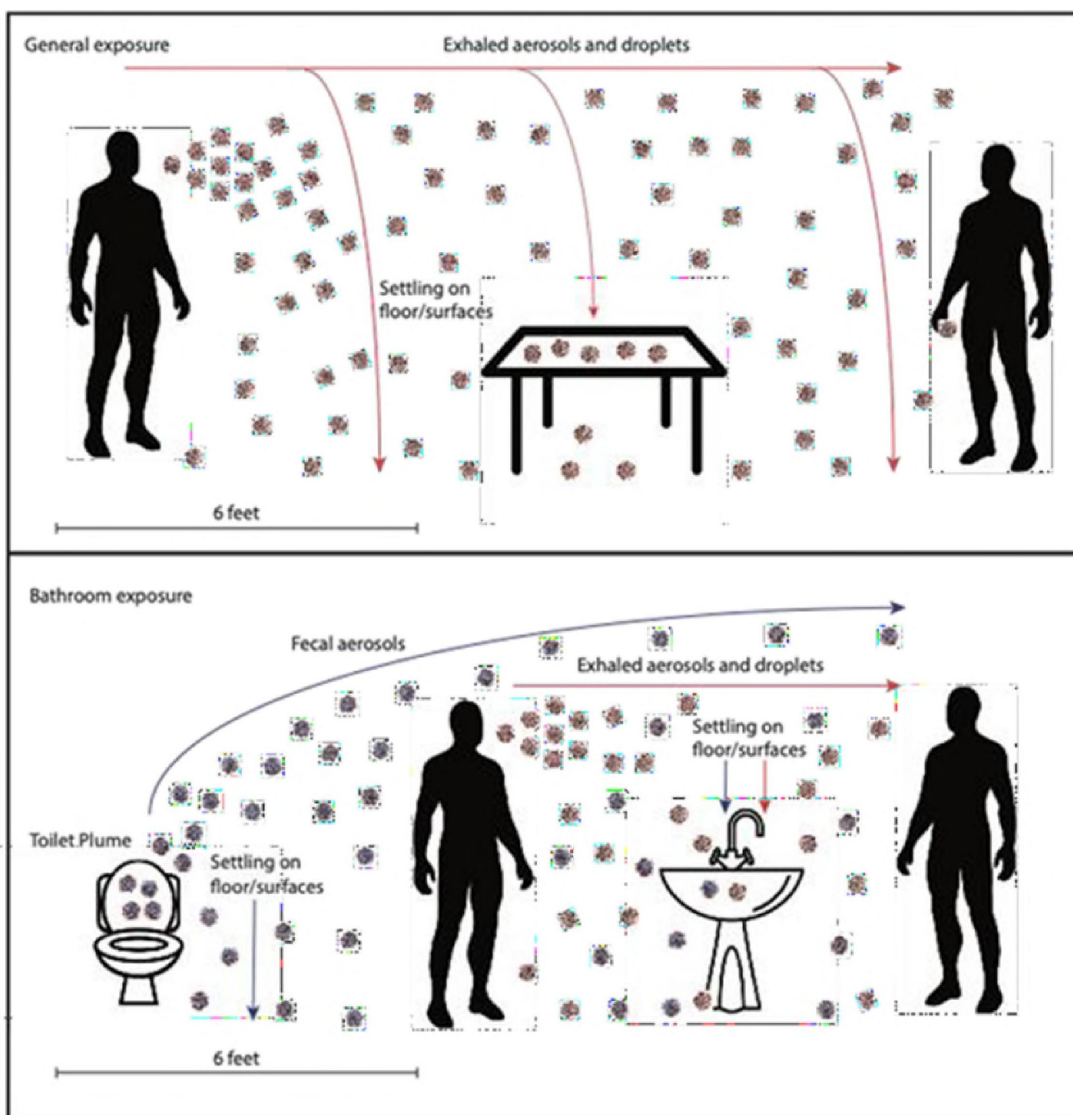
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<sup>5</sup> Eugene Garcia, Lisa Marie Pane and Thalia Beaty, *U.S. tops 4,000 daily deaths from coronavirus for 1st time*, AP NEWS, Jan. 8, 2021, <https://apnews.com/article/us-coronavirus-death-4000-daily-16c1f136921c7e98ec83289942322ee4> (last visited May 25, 2021).

<sup>6</sup> [https://covid.cdc.gov/covid-data-tracker/#trends\\_dailytrendsdeaths](https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendsdeaths) (last visited May 25, 2021); Johns Hopkins Medicine, *Coronavirus Second Wave? Why Cases Increase*, updated Nov. 17, 2020, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/first-and-second-waves-of-coronavirus> (last visited May 25, 2021).

<sup>7</sup> Gary Stix & Youyou Zhou, *COVID-19 Is Now the Third Leading Cause of Death in the U.S.*, SCI. AM. (Oct. 8, 2020), <https://www.scientificamerican.com/article/covid-19-is-now-the-third-leading-cause-of-death-in-the-u-s/> (last visited June 3, 2021).

34. Infected people shed copious amounts of SARS-CoV-2 into the air and surfaces around them by several different mechanisms, as illustrated in the below figure.<sup>8</sup> SARS-CoV-2 damages the air and surfaces of a property.



35.

<sup>8</sup> Lerner already has engaged a virologist expert, Dr. Angela Rasmussen, Ph.D., who at the appropriate phase of this litigation will substantiate and elaborate on SARS-CoV-2 and the physical damage it causes to property. Dr. Rasmussen is an affiliate of the Georgetown Center for Global Health Science and Security and a research scientist III (Associate Professor equivalent) at the Vaccine and Infectious Disease Organization-International Vaccine Centre (VIDO-InterVac), as well as an adjunct professor in the department of biochemistry, microbiology, and immunology at the University of Saskatchewan.

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

37. In addition to damage to the property via transformation of the indoor air, SARS-CoV-2 can be deposited on surfaces either through direct contact with respiratory secretions or saliva of an infected person (transfer by hand or tissue) or by settling of particles from the air.

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

39. All three modes of transmission have been demonstrated in multiple experimental models. Exhaled respiratory particles and fecal bioaerosols present a significant transmission risk

even after they have settled and are no longer suspended in the air, and disturbances can resuspend them in the air.

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

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

42. Making matters worse, pre-symptomatic and asymptomatic individuals can also transmit COVID-19.<sup>9</sup> Over 40% of all infections occur from people without any symptoms.<sup>10</sup> Thus, even individuals who appear healthy and present no identifiable symptoms of the disease have and continue to spread the virus by breathing, speaking, or touching objects and surfaces. These activities deposit SARS-CoV-2 virions in the air and on surfaces rendering the air and surfaces changed from their previous condition. According to the World Health Organization (the "WHO"), the incubation period for COVID-19, i.e., the time between exposure to SARS-CoV-2 and symptom onset, can be up to 14 days. Other studies suggest that the period may be up to 21 days.

43. Before infected individuals exhibit symptoms, *i.e.*, the so-called "pre-symptomatic" period, they are most contagious, as their viral loads will likely be very high, and they may not know they have become carriers. In addition, studies from the CDC and others estimate that

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<sup>9</sup> See <https://www.nature.com/articles/s41591-020-0869-5>.

<sup>10</sup> See *id.*; <https://www.nbcnews.com/health/healthnews/asymptomatic-covid-19-cases-may-be-more-common-suspected-n1215481>.

between 40% to 70% of infected individuals may never become symptomatic (referred to as “asymptomatic” carriers). Pre-symptomatic and asymptomatic carriers are likely unaware that they are spreading SARS-CoV-2 by merely touching objects and surfaces, or by expelling droplets into the air. The National Academy of Sciences has found that the majority of transmission is attributable to people who are not showing symptoms, either because they are pre-symptomatic or asymptomatic.

44. Although these virus-containing droplets are very small, they are still physical, tangible objects that can travel and attach to other surfaces, “such as tables, doorknobs, and handrails,” and cause harm, loss, and damage, and physically alter the property and/or the integrity of the property. Viruses, themselves, are microscopic and made up of genetic material surrounded by a protein shell<sup>11</sup>, but they are capable of being observed and can attach themselves to other things they encounter. When droplets and viruses contact objects, they alter those objects, although not in way perceptible by the naked human eye. These virus-containing droplets physically exist ubiquitously in the communities and buildings in which Lerner operates.

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

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<sup>11</sup> See <https://rockedu.rockefeller.edu/component/what-are-viruses-made-of/>.

46. Numerous scientific studies have reported that SARS-CoV-2 can survive and persist within the air and on surfaces and buildings after infected persons are present at a given location. Studies have found that SARS-CoV-2 remains active and dangerous in the air in properties and on common surfaces, including plastic, stainless steel, glass, wood, cloth, ceramics, rubber, and even money.<sup>12</sup> All of these materials are widely present at Lerner's insured locations and subject to touch by the multitudes of people visiting Lerner's insured locations daily.

47. Generally being enclosed spaces where large numbers of people gather in close proximity for social and business purposes, highly trafficked properties like Lerner's properties, including its hotel, office and retail properties, are reportedly particularly susceptible to circumstances favorable to the spread of SARS-CoV-2 virions. An article published in April 2020 analyzed a case study of three families (families A, B, and C) who had eaten at an air-conditioned restaurant in Guangzhou, China.<sup>13</sup> One member of family A, patient A1, had recently traveled from Wuhan, China. On January 24, 2020, that family member ate at a restaurant with families A, B, and C. By February 5, 2020, 4 members of family A, 3 members of family B, and 2 members of family C had become ill with COVID-19. The only known source for those affected persons in families B and C was patient A1 at the restaurant. Moreover, a study detected SARS-CoV-2 inside the heating and ventilation ("HVAC") system connected to hospital rooms of sick patients. The

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<sup>12</sup> See, e.g., [https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247\(20\)30003-3/fulltext](https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247(20)30003-3/fulltext); <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4659470/>; See <https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days>; <https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html>.

<sup>13</sup> See [https://wwwnc.cdc.gov/eid/article/26/7/20-0764\\_article](https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article).

study found SARS-CoV-2 in ceiling vent openings, vent exhaust filters, and ducts located as much as 56 meters (over 183 feet) from the rooms of the sick patients.<sup>14</sup>

48. Additionally, the CDC has stated that “there is evidence that under certain conditions, people with COVID-19 seem to have infected others who were more than 6 feet away” and infected people who entered the space shortly after the person with COVID-19 had left.<sup>15</sup> A published systematic review of airborne transmission of SARS-CoV-2 corroborated the CDC’s concerns and recommended procedures to improve ventilation of indoor air environments to decrease bioaerosol concentration and physically reduce potential spread of SARS-CoV-2 in properties like the insured locations.<sup>16</sup>

49. The CDC has recommended “ventilation interventions” to help reduce exposure to the airborne Coronavirus in indoor spaces, including increasing airflow and air filtration (such as with high-efficiency particulate air (“HEPA”) fan/filtration systems).<sup>17</sup> These and other remedial measures must be implemented, at high cost and extra expense, to reduce the amount of the SARS-CoV-2 present in a given space and to make property safe for its intended use. These remedial

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<sup>14</sup> Karolina Nissen, et al., *Long-distance airborne dispersal of SARS-CoV-2 in COVID-19 wards*, 10 NATURE SCI. REPORTS 19589 (Nov. 11, 2020), <https://doi.org/10.1038/s41598-020-76442-2> (last visited May 25, 2021).

<sup>15</sup> CDC, *How COVID-19 Spreads* (last updated Oct. 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited May 25, 2021).

<sup>16</sup> Zahra Noorimotlagh, et al., *A systematic review of possible airborne transmission of the COVID-19 virus (SARS-CoV-2) in the indoor air environment*, 193 ENV’T RSCH. 110612, 1-6 (Feb. 2021), [https://www.sciencedirect.com/science/article/pii/S0013935120315097?dgcid=rss\\_sd\\_all](https://www.sciencedirect.com/science/article/pii/S0013935120315097?dgcid=rss_sd_all) (last visited May 25, 2021).

<sup>17</sup> CDC, *Ventilation in Buildings* (last updated Feb. 9, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html#:~:text=HEPA%20filters%20are%20even%20more,with%20SARS%20CoV%2D2> (last visited May 25, 2021).

measures demonstrate direct physical loss of or damage to interior spaces like the insured locations even where no virus is present.

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

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

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

53. A number of studies have also demonstrated that SARS-CoV-2 is “much more resilient to cleaning than other respiratory viruses so tested.”<sup>18</sup> The measures that must be taken to remove the Coronavirus from property are significant and far beyond ordinary or routine cleaning.

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



54. Efficacy of disinfecting agents for viruses is based on a number of factors, including the initial amount of virus present, contact time with the disinfecting agent, dilution, temperature, and pH, among many others. Detergent surfactants are not recommended as single agents, but rather in conjunction with complex disinfectant solutions.<sup>19</sup>

55. Additionally, it can be challenging to accurately determine the efficacy of disinfecting agents. The toxicity of an agent may inhibit the growth of cells used to determine the presence of virus, making it difficult to determine if lower levels of infectious virus are actually still present on treated surfaces.<sup>20</sup>

56. In order to be effective, cleaning and disinfecting procedures require strict adherence to protocols not necessarily tested under “real life” or practical conditions, where treated surfaces or objects may not undergo even exposure or adequate contact time.<sup>21</sup> Studies of coronaviruses have demonstrated viral RNA persistence on objects despite cleaning with 70% alcohol.<sup>22</sup>

57. When considering disinfection, the safety of products and procedures must be considered as well, due to the risks of harmful chemical accumulation, breakdown of treated materials, flammability, and potential for allergen exposure.<sup>23</sup>

58. Moreover, the aerosolized SARS-CoV-2 particles and virions cannot be eliminated by routine cleaning. Cleaning surfaces in an indoor space will not remove the aerosolized SARS-

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Joon Young Song, et al., *Viral Shedding and Environmental Cleaning in Middle East Respiratory Syndrome Coronavirus Infection*, 47 *INFECTION & CHEMOTHERAPY* 4, 252-5 (2015), <https://www.icjournal.org/DOIx.php?id=10.3947/ic.2015.47.4.252> (last visited May 25, 2021).

<sup>23</sup> *Id.*

CoV-2 particles and virions from the air that people can inhale and develop COVID-19 – no more than cleaning friable asbestos particles that have landed on a surface will remove the friable asbestos particles suspended in the air that people can inhale.

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

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

## **VI. COVID-19 AND SARS-CoV-2 CAUSE DIRECT PHYSICAL LOSS AND DAMAGE**

61. Virologists, scientists, and researchers all have confirmed that SARS-CoV-2 remains viable and is active on physical surfaces and in the air. The persistent presence of the deadly, viable SARS-CoV-2 on surfaces and in the air damages buildings and properties rendering them damaged, lost, unsafe, unfit, and uninhabitable for normal occupancy or use.

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

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

64. Medical and scientific research also has established that SARS-CoV-2 and COVID-19 spread through indoor airborne transmission. When individuals carrying SARS-CoV-2 breathe, talk, cough, or sneeze, they expel aerosolized droplet nuclei that remain in the air, accumulate in buildings, and, like dangerous fumes, make the premises unsafe and affirmatively dangerous. According to experts, buildings and properties accumulate the airborne SARS-CoV-2 indoors, which plays a significant role in community transmission. As a result, SARS-CoV-2 and COVID-19 cause direct physical loss of or damage to properties and buildings (or both) by changing the physical condition of air in buildings from safe and breathable to unsafe and dangerous.

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

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

67. The presence of SARS-CoV-2 on property similarly creates the imminent threat of further damage to that property or to nearby property. Individuals who come into contact, for example, with respiratory droplets at one location in the property by touching a doorknob, table, or handrail, will carry those droplets on their hands and deposit them elsewhere in the property, causing additional damage and loss. Property impacted by SARS-CoV-2 is just as dangerous as

property impacted by fire or fumes or vapors (if not more), and all such damaged property is equally incapable of producing revenues. Like the impact of fire, smoke, or noxious fumes, the impact of potentially fatal COVID-19 constitutes direct physical loss of or damage to property (or both).

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

## **VII. REACTIONS AT THE NATIONAL, STATE, AND LOCAL LEVELS**

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

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

71. Beginning in early March 2020, U.S. state and local governments issued orders suspending or severely curtailing the operations of all "non-essential" or "high risk" businesses in

response to the virus and/or risks created by virus. This included properties such as those owned and operated by Lerner.

72. On or about March 2020, states, counties, and cities where Lerner's insured properties are located declared states of emergency to help prepare for broader spread of COVID-19.

73. On or about March 2020, states, counties, and cities where Lerner's insured properties are located issued orders requiring businesses to operate their properties and conduct their operations on those premises so as to reduce their customer occupancy by a significant percentage.

74. State and local officials in Maryland, Virginia, and Washington D.C. began restricting gatherings, access, movement, and closing businesses in March of 2020. The officials' early focus was on nursing homes, long term care facilities, and venues for large gatherings. For example, Governor Larry Hogan of Maryland issued a proclamation which recognized that "as of March 5, 2020, the CDC found that COVID-19 has infected individuals in 17 states." On March 12, Governor Hogan issued an Order which prohibited "large gatherings and events" and closed "senior centers." On March 16, Governor Hogan amended the March 12 Order to include the closure of "bars, restaurants, fitness centers and theaters."

75. In Order 20-03-19-01 on March 16, 2020, Governor Hogan indicated that the government must control occupancy and use of buildings and premises for safety reasons. In that Order, all restaurants, bars, and "other similar establishments that sell food or beverages for consumption on premises" were closed. Only takeout and delivery were allowed. In Order 20-03-23-01, Governor Hogan expanded the closures to include "non-essential businesses." That is,

buildings that were not a part of the critical infrastructure sectors identified by the US Department of Homeland Security Cybersecurity and Infrastructure Security Agency.

76. On March 30, 2020, Governor Hogan issued Order 20-03-30-01 stating the basis for continued enforcement of the government shutdown orders and announcing that “all persons” living in Maryland were ordered to stay at home, with the exception of the participation in “Essential Activities” or employment with businesses that fall within the CISA categories above. Orders suspending such use of property and business continued to be executed for several months, eventually allowing modified re-openings of businesses with reduced capacities. See e.g. Maryland Governor Order 20-05-13-01.

77. Given the proximity of Virginia, Washington D.C., and Maryland, Governor Hogan often warned about rising cases in the context of the “National Capital Region” as all three areas experienced similar issues. Governor Northam declared a state of emergency by Executive Order 51 on March 12, 2020.

78. Virginia enacted orders similar to Maryland which closed restaurants and bars, limited gatherings and identified both essential and non-essential businesses. On March 24, 2020, Executive Order 53 closed all K-12 schools, and noted that all brick and mortar retail businesses which were “non-essential” could no longer operate with more than 10 patrons at any one time. Further, business operations offering non-retail services, like office buildings, were encouraged to use “teleworking.” Executive Order 55 went further, as a stay-at-home order was put in place. Such restrictions were enforced over the next several months.

79. Additionally, in March 2020, the District of Columbia enacted similar orders closing restaurants and bars, limiting large gatherings and identifying both essential and non-essential businesses. On March 24, 2020, Mayor’s Order 2020-053 closed retail businesses and

ordered that other businesses which were “non-essential” could no longer operate with more than 10 patrons at any one time. Further, business operations offering non-retail services, like office buildings, were encouraged to use “take all reasonable steps necessary for employees to work remotely.” On March 30, 2020, the Mayor issued Mayor’s Order 2020-054, ordering all individuals living in Washington DC to stay-at-home. Such restrictions were enforced over the next several months.

80. The orders referenced in paragraphs 74-79 are identified in spreadsheets attached as **Composite Exhibit B**.

81. Because of the danger posed by COVID-19 and its spread as described above, Lerner also determined that closure was necessary to slow the spread of COVID-19 as a result of infected persons on the property or from those who would enter the property. More specifically, Lerner identified at least seventeen (17) property locations where communicable disease was confirmed to be present on the premises, and numerous people who had been present on insured properties with confirmed cases or who had self-quarantined.

82. Other states, and county and city officials have issued similar orders throughout the United States referencing physical property loss or damage or imminent threatened physical property loss or damage from the virus.

83. A motivating factor behind these orders was to protect persons and property from direct physical loss of or damage to property (or both) caused by SARS-CoV-2 and COVID-19.

84. The vast majority of those individuals would spend time indoors at Lerner’s properties, given the nature of the businesses, which include hotel, office and retail operations.

85. Given the number of infected individuals, it is a virtual certainty that infected individuals, both symptomatic and asymptomatic, were present in Lerner’s properties on a daily



basis even prior to the issuance of the governmental orders and would have been present daily in Lerner's properties in an ever-increasing number in the absence of the issuance of those orders.

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

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

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

#### **VIII. LERNER SUFFERED AND CONTINUES TO SUFFER COVERED LOSSES**

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

90. The issuance of the above-referenced closure orders by state, county, and city officials is a covered cause of loss because it is a risk of physical loss or damage, and not otherwise excluded under the All Risk Policy.

91. Whether the SARS-CoV-2 virus and/or the above-referenced orders caused Lerner's losses and expenses presents a factual question that is inappropriate for resolution at the motion to dismiss stage.

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

93. Lerner's operations were suspended in order for Lerner to repair the insured properties, including restoration efforts to rid the premises of and attempt to protect against further physical loss and/or damage SARS-CoV-2. Lerner suffered a complete loss of use of its business premises and the properties were unfit for use for their intended purposes.

94. Lerner's properties were frequented by thousands of individuals a day, including tenants, patrons, employees, vendors, and other individuals carrying SARS-CoV-2 and COVID-19. In addition to breathing SARS-CoV-2 and COVID-19 into the air, these individuals touched countless surfaces in Lerner's insured premises, including walls, furniture, doors, tables, and other surfaces on the floors, restrooms, and other areas on the premises.

95. The thousands of individuals that frequent Lerner's properties daily, ranging from guests, patrons, lessees, vendors and many others, are carrying or otherwise exposed to SARS-CoV-2 and COVID-19 and would have been in contact with each other, furniture, doors, and other surfaces on the floors, restrooms, and other areas on the premises.

96. Lerner has thus been forced to pay decontamination costs, covered under the All Risk Policy, to repair the physical damage caused by COVID-19. It became clear that Lerner's insured properties were inoperable and unusable without the alterations necessary to protect the

safety of its visitors, guests, and employees. These decontamination costs also were necessary to comply with the emergency directives, laws, and/or ordinances promulgated by governmental authorities and the CDC, among others. None of these costs would have been incurred but for the impacts of the COVID-19 pandemic and the resulting closure orders.

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

98. The SARS-CoV-2 virus and/or the above-referenced closure orders issued by state, county, and city officials have caused physical loss or damage to properties Lerner depends on to attract business to its insured properties, which are within one mile of the insured properties.

99. Lerner's properties are within five miles of many significant attractions, restaurants, stores, cafes, bars, parks, and hotels that have also suffered and continue to suffer physical damage due to the SARS-CoV-2 virus and/or closure orders. Many of these attractions, restaurants, stores, cafes, bars, parks, and hotels almost certainly suffered alteration of their premises and contents as a result of the virtually certain and ubiquitous presence of SARS-CoV-2 due to gathering of people affected by COVID-19, whether symptomatic or asymptomatic.

100. These impacts on property directly reduced Lerner's ability to sell and lease property intended for purposes that were restricted by government order and intended for purposes that were made impossible due to the presence of communicable disease. As a direct result, Lerner sustained a significant financial loss across its multifamily, hotel, office, and retail sectors due to the interruption of business and extra expenses incurred.

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

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

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

**IX. THE INSURANCE COVERAGE PURCHASED BY LERNER**

104. Lerner and its properties, listed in the Location Schedules and described in the policy, are protected by the All Risk Policy sold to Lerner by FM for the time period May 1, 2019 to May 1, 2020.

105. Lerner is a Named Insured under the All Risk Policy.

106. Lerner paid all premiums due to FM to purchase the All Risk Policy and otherwise complied with all applicable terms and conditions of coverage, including the submission of a sworn Proof of Loss.

107. The All Risk Policy provides a maximum limit of liability of \$1,000,000,000, with various sublimits and time limits. Claims are subject to a deductible, which is far exceeded by Lerner's covered loss.

108. Occurrence is defined as "the sum total of all loss or damage of the type insured, including any insured Business Interruption loss, arising out of or caused by one discrete event of physical loss or damage . . ."

109. Shortly after Lerner ceased business operations, Lerner’s losses far exceeded the deductible under the All Risk Policy.

110. The policy FM sold to Lerner is an “all-risk” insurance policy. An “all-risk” policy provides the broadest insurance coverage available to policyholders for protection of their property interests, including protection against disruption to their business operations. Under an all-risk policy, the insured’s burden to obtain coverage for a loss is very limited—the insured needs only to show that its loss occurred and that the loss was fortuitous. The burden then shifts to the insurer to show that a clear, express, and unambiguous exception or exclusion in the policy bars or limits coverage.

111. The damages, Business Interruption loss, Extra Expense, and other losses incurred and continuing to be incurred by Lerner are covered under the All Risk Policy sold to Lerner by FM.

112. Lerner gave timely notice of its claims and has satisfied, is excused from performing, or FM has waived or is estopped from insistence upon performance of, all conditions of the All Risk Policy, including but not limited to payment of required premiums and provision of timely notice of claim.

**X. MULTIPLE COVERAGES ARE TRIGGERED UNDER THE ALL RISK POLICY**

113. In addition to triggering the policy’s “all risk” Property Damage and Business Interruption coverages, Lerner’s claims also trigger multiple “Additional Coverages” and “Coverage Extensions” provided under the All Risk Policy.

**A. Lerner sustained losses and expenses caused by the suspension of its operations resulting from covered direct physical loss of or damage to Lerner’s insured properties**

114. The All Risk Policy begins with a clear obligation to “cover[] property, as described in this Policy, against **ALL RISKS OF PHYSICAL LOSS OR DAMAGE**, except as hereinafter

excluded, while located as described in” this All Risk Policy. (emphasis added). Subject to listed sublimits, the full \$1,000,000,000 limit of liability is available for Lerner’s damages.

115. The All Risk Policy “insures the following property, unless otherwise excluded elsewhere in this Policy, at or within 1,000 feet of a described location, to the extent of the interest of the Insured in such property”: “1. Real Property in which the Insured has an insurable interest,” such as Lerner’s properties. The covered locations are identified in a Location Schedule attached to the All Risk Policy.

116. The All Risk Policy does not define the phrase “physical loss or damage of the type insured: 1. To property. . .;”

117. The presence of the disjunctive “or” in “physical loss or damage to property” means that coverage is triggered if *either* a physical loss of property or damage to property occurs.

118. SARS-CoV-2 or SARS-CoV-2-containing fomites, respiratory droplets, and droplet nuclei physically alter the air and airspaces they enter and the property to which they adhere, attach or come in contact, including without limitation, by physically altering the surfaces of those properties and by making air inhalation or physical contact with those previously safe, inert air and air spaces inside the properties and the properties dangerous.

119. When individuals carrying SARS-CoV-2 breathe, talk, cough, or sneeze, they expel aerosolized droplet nuclei that remain in the air and, like dangerous fumes, make the premises unsafe and affirmatively dangerous as SARS-CoV-2 physically alters the air. Air inside buildings that was previously safe to breathe, but can no longer safely be breathed due to SARS-CoV-2 and COVID-19, has undergone a physical alteration.

120. In addition, the presence of SARS-CoV-2 and COVID-19, including but not limited to SARS-CoV-2 droplets or droplet nuclei on solid surfaces and in the air at insured property, also

has caused and will continue to cause direct physical damage to physical property and ambient air at the premises. SARS-CoV-2, a physical entity, has attached and adhered to Lerner's insured properties and by doing so, altered those properties. This has directly resulted in loss of use of those properties and the properties are unusable without substantial physical alteration.

121. Given published reports about SARS-CoV-2 and the outbreak of the pandemic, it is likely that persons who were pre-symptomatic or asymptomatic and unknowingly carrying SARS-CoV-2, including but not limited to patrons, visitors, and employees were present at Lerner's properties, including its hotel, office and retail properties, immediately before the closure orders were issued.

122. SARS-CoV-2 droplets have been conveyed from infected persons (whether symptomatic, pre-symptomatic, or asymptomatic) to solid surfaces, including but not limited to furniture, doors, floors, bathroom facilities, and supplies, and into the air and HVAC systems at Lerner's properties, causing damage and alteration to physical property and ambient air at the premises. Aerosolized SARS-CoV-2 has entered the air in Lerner's properties.

123. Lerner sustained actual loss, including but not limited to substantial sums spent to remediate physical damage to its property, such as for cleaning and disinfecting premises, repairing or replacing air filtration systems, remodeling and reconfiguring physical spaces, and other measures to reduce or eliminate the presence of the SARS-CoV-2 on its properties. Such remediation measures have been ongoing because of the continuous and repeated recurrence of SARS-CoV-2 while the pandemic persists.

124. Pursuant to the "Communicable Disease – Property Damage" additional coverage, the Policy expressly covers, among other things, "the reasonable and necessary costs incurred . . . for the: (a) Cleanup, removal and disposal of . . . communicable disease from insured property."

By providing for the “cleanup, removal and disposal of . . . communicable disease,” the All Risk Policy explicitly recognizes that communicable disease, like COVID-19, physically damages property.

125. In addition to physical damage, Lerner’s insured properties also have suffered direct physical loss. The on-site SARS-CoV-2, fomites, and respiratory droplets or droplet nuclei containing SARS-CoV-2 have attached to and deprived, partially and totally, Lerner of the physical use of its insured properties by making them unsafe and unusable and thereby lost.

126. These direct physical losses to Lerner’s insured properties include without limitation the rendering of its insured property from a satisfactory state to a state dangerous and/or unsatisfactory for use because of the fortuitous presence and effect of SARS-CoV-2, fomites, and respiratory droplets or droplet nuclei directly upon the property.

127. These direct physical losses to Lerner’s insured properties include without limitation the direct physical loss of the ability to use Lerner’s properties for their primary functions.

128. Lerner also has incurred substantial costs in an attempt to mitigate the suspension of its business operations, including without limitation expenses incurred for reconfiguration, to the extent possible. Lerner would not have incurred those costs but for either direct physical loss of or damage to property (or both) caused by SARS-CoV-2 and COVID-19.

**B. Lerner has sustained actual losses and incurred extra expenses insured by the All Risk Policy’s Business Interruption coverage**

129. As part of the protection from “all risk,” the All Risk Policy contains “Business Interruption” coverage for Gross Earnings and Extended Period of Liability<sup>24</sup> or Gross Profit (at

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<sup>24</sup> The All Risk Policy affords a Business Interruption Coverage Extension for Extended Period of Liability as follows:



Lerner's option) "as a direct result of physical loss or damage of the type insured" to Lerner's properties during the "Period of Liability." Under Gross Earnings and Gross Profit, the amount payable as indemnity thereunder includes "ordinary payroll."

130. The Business Interruption coverages include "expenses reasonably and necessarily incurred by the Insured to reduce the loss otherwise payable under this Policy."

131. The Business Interruption coverages include Extra Expense coverage, defined as "extra expense incurred by the Insured of the following during the Period of Liability to: a) Temporarily continue as close to normal the conduct of the Insured's business . . . ."

132. The onset of COVID-19, the ensuing closure orders, direct physical loss of or damage to property (or both) caused by SARS-CoV-2 and COVID-19, and the effects of all of these (including restoration efforts to rid the premises of COVID-19) on Lerner businesses

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## **7. Extended Period of Liability**

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

- a)** The interruption of business as covered by Gross Earnings or Rental Income;
- b)** For such additional length of time as would be required with the exercise of due diligence and dispatch to restore the Insured's business to the condition that would have existed had no loss happened; and
- c)** Commencing with the date on which the liability of the Company for loss resulting from interruption of business would terminate if this Business Interruption Coverage Extension had not been included in this Policy.

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Coverage under this Business Interruption Coverage Extension does not apply for more than the number of consecutive days shown in the Limits of Liability clause of the Declarations section of this Policy.

triggered the All Risk Policy's Business Interruption coverage. Lerner paid substantial premium in anticipation of those coverages being provided.

**C. Lerner has sustained actual losses and incurred extra expenses insured by the All Risk Policy's Civil or Military Authority coverage**

133. The All Risk Policy affords a Business Interruption Coverage Extension for Civil or Military Authority as follows:

**2. Civil or Military Authority**

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

Item B. 3. of Property Excluded does not apply to this Business Interruption Coverage Extension.

The Period of Liability for this Business Interruption Coverage Extension will be:

a) The period of time starting at the time of such order of civil or military authority, but not to exceed the number of consecutive days shown in the Declarations section of this Policy.

134. Lerner has sustained actual loss and incurred Extra Expense because state and local authorities governing the locales in which Lerner's insured properties are situated, have issued orders that impair, limit, restrict, or prohibit partial or total access to insured properties.

135. These civil or military orders limiting, restricting, prohibiting, or impairing access to Lerner's insured properties have all been issued as a direct result of, among other things, direct physical loss of or damage to property (or both) caused by the SARS-CoV-2 and COVID-19, including but not limited to physical damage either at insured locations or within five statute miles thereof. This direct physical damage is caused by the physical presence of, and structural damage caused by, SARS-CoV-2 and COVID-19 on furniture, doors, floors, bathroom facilities, and

supplies; and in the air within the insurer properties, including offices, restrooms, and HVAC systems. Such direct physical loss of or damage to property (or both) is of the type insured by the All Risk Policy generally as well as by the Civil or Military Authority coverage provisions specifically.

136. Numerous outbreaks of COVID-19 in the vicinities of Lerner's properties have led to numerous discrete direct physical loss of or damage to property (or both) at or within five statute miles of the insured locations, and those losses or damages have in turn led to numerous discrete civil or military orders limiting, restricting, impairing or prohibiting access to insured locations. Certain civil or military orders that purport to prevent against future proliferation of SARS-CoV-2 and future transmission of COVID-19 are the direct result of direct physical loss of or damage to property (or both) of the type insured. Such direct physical loss of or damage to property (or both) is of the type insured by the All Risk Policy generally as well as by the Civil or Military Authority coverage provisions specifically.

**D. Lerner has sustained actual losses and incurred extra expenses insured by the All Risk Policy's Supply Chain coverage**

137. The All Risk Policy affords a Supply Chain Business Interruption Coverage Extension as follows:

**16. Supply Chain**

This Policy covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability directly resulting from physical loss or damage of the type insured to property of the type insured at the premises of any of the following within the Policy's Territory:

- a) Direct suppliers, direct customers or direct contract service providers to the Insured;
- b) Any company under any royalty, licensing fee or commission agreement with the Insured; or

c) Any company that is a direct or indirect supplier, customer or contract service provider of those described in a) above,

But not at the premises of entities directly or indirectly supplying to or receiving from a location electricity, fuel, water, steam, refrigeration, sewerage, voice, data or video.

Business Interruption Coverage loss recoverable under this Business Interruption Coverage Extension is extended to include the following Business Interruption Coverage Extensions:

a) Civil or Military Authority

b) Crisis Management

c) Extended Period of Liability

d) Ingress/Egress

e) Off-Premises Service Interruption - Business Interruption

f) Supply Chain

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138. For the reasons described above, Lerner has sustained actual loss and has incurred extra expense directly resulting from direct physical loss of or damage (or both) of the type insured to property of the type insured at premises described in the Supply Chain coverage extension, including locations of a direct customer, supplier, contract manufacturer, or contract service provider to Lerner. This includes direct physical loss of or damage to property (or both) due to the presence of SARS-CoV-2, time element losses and extra expense due to orders of civil authority, and the impact of the COVID-19 pandemic.

139. LERNER has taken reasonable and necessary steps to mitigate its supply chain loss.

**E. Lerner has sustained actual losses and incurred extra expenses insured by the All Risk Policy's Attraction Property coverage**

140. The All Risk Policy affords a Business Interruption Coverage Extension for Attraction Property as follows:

## **1. Attraction Property**

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

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141. For the reasons described above, Lerner has sustained actual loss and has incurred extra expense directly resulting from direct physical loss of or damage to property (or both) caused by SARS-CoV-2 and COVID-19 to properties within one (1) statute mile of Lerner's properties that attract business.

### **F. Lerner has sustained actual losses and incurred extra expenses insured by the All Risk Policy's Contractual Penalties and Leasehold Interest coverage**

142. The All Risk Policy affords Business Interruption Coverage Extensions for Contractual Penalties suffered by Lerner as follows:

#### **1. Contractual Penalties**

This Policy covers contractual penalties incurred by the Insured during the Period of Liability due to late or noncompletion of orders as a direct result of insured physical loss or damage to property of the type insured.

This extension of coverage applies provided that such contractual penalties:

- a) Are written in the provisions of a contract prior to the time of such direct physical loss or damage, and
- b) Will be limited to the contractual sales value of such late or non-completed orders.

143. The All Risk Policy affords Business Interruption Coverage Extensions for Leasehold Interests losses of Lerner as follows:

This Policy covers the loss incurred by the Insured of Leasehold Interest as follows:

If the lease agreement requires continuation of rent; and if the property is wholly untenable or unusable, the actual rent payable for the unexpired term of the lease; or if the property is partially untenable or unusable, the proportion of the rent payable for the unexpired term of the lease.

If the lease is cancelled by the lessor pursuant to the lease agreement or by the operation of law; the Lease Interest for the first three months following the loss; and the Net Lease Interest for the remaining unexpired term of the lease.

Leasehold Interests Exclusions: As respects Leasehold Interest, the following applies:

a) Business Interruption Exclusions 1, 2 and 3 do not apply and the following applies instead:

This Policy does not insure any increase in loss resulting from the suspension, lapse or cancellation of any license, or from the Insured exercising an option to cancel the lease; or from any act or omission of the Insured that constitutes a default under the lease.

b) This Policy does not insure loss directly resulting from physical loss or damage to Personal Property.

As used above, the following terms mean:

**Net Lease Interest:**

That sum which placed at 6 percent interest rate compounded annually would equal the Lease Interest (less any amounts otherwise payable hereunder).

**Lease Interest:**

The excess rent paid for the same or similar replacement property over actual rent payable plus cash bonuses or advance rent paid (including maintenance or operating charges) for each month during the unexpired term of the Insured's lease.

144. For the reasons described above, Lerner has sustained actual loss and has incurred extra expense directly resulting from direct physical loss of or damage (or both) of the type insured to property of the type insured at insured locations described in these coverage extensions. This includes direct physical loss of or damage to property (or both) due to the presence of SARS-CoV-

2, time element losses and extra expense due to orders of civil authority, and the impact of the COVID-19 pandemic.

145. Lerner has taken reasonable and necessary steps to mitigate its contractual penalties and leasehold interest losses.

**G. Lerner has sustained actual losses and incurred extra expenses insured by the All Risk Policy's Real Estate Endorsement coverage**

146. By way of a Real Estate Endorsement, the All Risk Policy affords Contingent Real Property coverage for property that is the contractual responsibility of Lerner's lessees to insure for physical loss or damage of the type insured.

147. Among other things, this endorsement insure against Tenant Relocation Expense when rented space or living quarters at an insured location are made uninhabitable as a direct result of physical loss or damage insured by the All Risk Policy.

148. Tenant Relocation Expense includes the costs to: a) Pack and transport personal property of the type insured of tenants or lawful occupants; b) Store such personal property while awaiting possession of other quarters or restoration of existing quarters; c) Search for new quarters; d) Disconnect and reconnect fixtures and equipment; e) Re-establish new utility services less refunds from discontinued services.

149. For the reasons described above, Lerner has sustained actual loss and has incurred extra expense directly resulting from direct physical loss of or damage (or both) of the type insured to property of the type insured at insured locations described in this endorsement. This includes direct physical loss of or damage to property (or both) due to the presence of SARS-CoV-2, time element losses and extra expense due to orders of civil authority, and the impact of the COVID-19 pandemic.

150. Lerner has taken reasonable and necessary steps to mitigate its Tenant Relocation Expense losses.

**H. Lerner has sustained actual losses and incurred extra expenses insured by the All Risk Policy's Protection and Preservation of Property coverage**

151. The All Risk Policy affords a Business Interruption Coverage Extension for Protection and Preservation of Property as follows:

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

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

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152. Lerner has incurred reasonable and necessary costs for actions to temporarily protect or preserve insured property due to actual or to prevent immediately impending direct physical loss of or damage to property (or both) from SARS-CoV-2 or COVID-19 to such insured property.

153. Lerner has sustained actual loss during the period beginning 48 hours before and lasting until 48 hours after the need to take reasonable action for the temporary protection and preservation of property insured by the All Risk Policy to prevent impending direct physical loss of or damage to such property (or both), including the cost of protecting and preserving property at Lerner's business premises, and ensuring that Lerner's properties are not damaged by SARS-CoV-2 or COVID-19.

**I. The All Risk Policy's Property Damages coverages**

154. The All Risk Policy contains several "Additional Coverages" for Property Damage including coverage for Decontamination Costs:



## 8. Decontamination Costs

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.

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155. As described above and as with the Business Interruption coverages, the onset of the COVID-19 pandemic, the resulting direct physical loss of or damage to property (or both) caused thereby, the ensuing closure orders and emergency directives, and the effects of all these on Lerner's businesses triggered the Property Damages coverages described above including the Decontamination Costs. Lerner paid significant premium in anticipation of that coverage being provided.

### J. The All Risk Policy's Communicable Disease Coverages

156. The All Risk Policy provides both Business Interruption and Property Damage coverages respectively for Communicable Disease.

157. "Communicable disease" is defined as any "disease which is . . . transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges . . . ." This definition clearly includes within its scope COVID-19, which is transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges.

158. The Business Interruption coverage for Communicable Disease provides:

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:

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

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The Period of Liability for this Business Interruption Coverage Extension will be:

The period of time:

- a) Starting at the time of the order of the authorized governmental agency or the Officer of the Insured; but
- b) Not to exceed the time limit shown in the Limits of Liability clause in the Declarations section,

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159. The Property Damage coverage for Communicable Disease provides:

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

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

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 or 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.**

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160. The Business Interruption coverage for Communicable Disease and the Property Damage coverage for Communicable Disease are each subject to a sublimit.

161. For the reasons described above, the direct physical loss of and damage to Lerner's properties has triggered both Communicable Disease coverages in the All Risk Policy. The onset of COVID-19, the ensuing closure orders, and the effects on Lerner's business premises triggered the separate coverages described above. Additionally, Lerner's losses that are due to the actual not suspected presence of communicable disease trigger multiple coverages under the All Risk Policy. Lerner paid substantial premium in anticipation of those coverages being provided without delay.

162. These two Communicable Disease Coverages are denoted as Additional Coverages or Coverage Extensions and do not purport to reduce other coverages available under the All Risk Policy. They are additive. Other coverages under the All Risk Policy that might also apply to loss or damage from or caused by virus, the threat of virus, or communicable disease or the threat of communicable disease, are not impacted by the Communicable Disease Sublimits. Further, any sublimit applicable to the Communicable Disease Sublimits Coverages does not apply to limit the All Risk Policy's other coverages that may apply to physical loss or damage to Lerner's properties.

**K. No exclusions apply to Lerner's losses and damages**

163. No exclusions under the All Risk Policy unambiguously preclude coverage for Lerner's claims. And, more specifically, no exclusions unambiguously preclude coverage for direct physical loss of or damage to property (or both) from the effects of the COVID-19 pandemic and the ensuing closure orders and emergency directives.

164. FM knew how to draft an exclusion specifically excluding losses or damage arising from a pandemic. The risks associated with viruses and pandemics have been known to the insurance industry for a century and have been well known to FM in recent decades during which we all have witnessed outbreaks and pandemics involving viruses such as SARS, MERS, H1N1, and Zika.

165. Because these risks are well known, there are exclusions in common usage in the insurance industry that specifically reference losses caused by pandemics. However, FM did not include such a specific pandemic exclusion as part of the All Risk Policy it sold to Lerner.

166. To the extent that FM alleges that Lerner's claims are excluded by operation of a "contamination" exclusion, said exclusion does not apply to Lerner's claims. The "contamination" exclusion is also ambiguous both on its own and when viewed in the context of the All Risk Policy as a whole. First, the "contamination" exclusion, by its terms, appears to apply only to traditional pollutants and not a communicable disease such as COVID-19 or a pandemic. As an example, the All Risk Policy confirms this understanding by expressly including Communicable Disease coverages and coverage for Decontamination Costs. Second, the "contamination" exclusion's ambiguity is also highlighted when viewed in the context of the All Risk Policy as a whole. For example, the All Risk Policy provides Decontamination Costs coverage to remove 'contaminant(s).' The All Risk Policy's coverage for "contamination(s)" is not limited to this coverage grant but also extends to Debris Removal and Land and Water Contaminant Cleanup, Removal and Disposal Coverages.

167. Moreover, the "contamination" exclusion, by its express terms is limited to costs and not lost business income/revenue. Unlike other exclusions in the Property Damage section of the All Risk Policy, the Contamination Exclusion bars coverage only for "cost[s]," and not "[l]oss

or damage.” As used in the All Risk Policy, the term “costs” clearly refers to out-of-pocket expenditures. “Costs” does not refer to “losses” such as the “loss” covered by the Business Interruption coverages, including the Civil or Military Authority coverage.

168. These above described coverages are rendered illusory by an overly broad application of the “contamination” exclusion.

169. Adding to the ambiguity, the terms “contaminant” and/or “contamination” appear in the All Risk Policy only in the context of pollution and never as relates to a pandemic or communicable disease. For example, the Decontamination, Debris Removal, and Land and Water Contaminant Cleanup, Removal and Disposal coverages all reflect FM’s understanding that “contaminants” and/or “contamination” is meant to apply to pollution only and not to a pandemic like here. Moreover, given these coverage grants for “contamination,” it is unclear whether the “contamination” exclusion is even truly intended to be operative as to the All Risk Policy as a whole. As an example, this point is underscored by the All Risk Policy’s inclusion of a specific “contamination” exclusion within its coverage for Law and Ordinance.

170. Further, FM should be estopped from enforcing the “contamination” exclusion as to Lerner’s claims on principles of regulatory estoppel as well as general public policy.

171. More specifically, the “contamination exclusion” does not address in any way a global pandemic, which is a distinct, catastrophic event, generally occurring once every century. A pandemic is a natural disaster comprising unique features such as the emergence of a *new* communicable disease-causing strain to which the general populations lack sufficient immunity, the ability of this *new* strain to infect humans and to cause severe reactions, and the new strain’s highly contagious transmission capability among humans as a vehicle for worldwide spread. Indeed, the Chief Executive Officer of Zurich Insurance Group AG, a major insurance company,

in an interview with media outlets, referenced the COVID-19 pandemic as “put[ting] it in the framework of a natural catastrophe.”<sup>25</sup>

172. Lerner also has a reasonable expectation that the onset of the COVID-19 pandemic, the ensuing closure orders and later emergency directives, direct physical loss of or damage to property (or both) caused by SARS-CoV-2 and COVID-19, and the effects of all of these on Lerner’s businesses would trigger multiple Business Interruption and Property Damage coverages under the All Risk Policy described above as no exclusion unambiguously applied to preclude coverage and Lerner had paid for extremely broad “all risk” coverage.

#### **XI. FM’S IMPROPER DENIAL OF LERNER’S CLAIMS**

173. Lerner has sustained actual loss and has incurred extra expense directly resulting from direct physical loss of or damage to property (or both) of the type insured under the All Risk Policy. No exclusions under the All Risk Policy apply to preclude coverage for Lerner’s claims. As a result, Lerner promptly notified FM of its claims for losses under the All Risk Policy.

174. At no time subsequent to Lerner providing notice to FM of the claims has FM, or its representatives, requested to access, inspect, and/or test the properties at issue.

175. Rather, FM preemptively sought to limit Lerner’s coverage.

176. In its various letters denying coverage to Lerner, FM concluded that with respect to coverage other than the Communicable Disease coverages, coverage is excluded by the “contamination” exclusion. Simultaneously, in relation to Communicable Disease coverages, FM demanded impossible levels of documentation and proof of the actual presence of “communicable disease” on property.

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<sup>25</sup> <https://www.bloomberg.com/news/videos/2020-05-14/zurich-may-pay-out-750-million-in-2020-due-to-virus-video> (advance video to 1:36).

177. FM waived any additional grounds to contest LERNER's claims under governing law that were not timely reserved by FM in writing.

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

## **XII. FM'S DUTIES PURSUANT TO GOVERNING LAW**

179. On information and belief, FM adopted a company-wide stance at the beginning of the pandemic to deny insureds like Lerner's business interruption claims, regardless of the facts giving rise to each policyholder's loss. As policyholders started to submit claims, senior executives in the FM claims department issued an internal memo to its claim handlers (the "Talking Points Memo"). On information and belief, FM's claim handling department was instructed to use the Talking Points Memo, in part, to shoehorn coverage for COVID-19 related losses into the Communicable Disease coverage provisions of its policies, based on the false assertion that all other coverage for COVID-19 related loss is excluded under its all risk policies. On information and belief, the Talking Points Memo, despite acknowledging that the FM all risk policies "offer[] some of the broadest property coverage available," also contains blanket instructions to deny coverage under other coverage parts without conducting any claims investigation.

180. Indeed, without considering a policyholder's individual circumstances or the applicable law which controls the insurance policy's interpretation—the Talking Points Memo conclusively states that "[a] virus will typically not cause physical damage", the presence of a communicable disease does not constitute physical damage, and the presence of a virus falls within the contamination exclusion.

181. State insurance law requires that insurance companies act in good faith, abstain from deception and practice honesty and equity in all insurance matters. The business of insurance is affected by the public interest and engaging in the business of insurance requires insurers like FM to promptly conduct fair, balanced, and thorough investigations of all bases of claims for benefits made by their insureds, with a view toward honoring the claims. As part of these obligations, an insurance company is obligated to diligently search for and consider evidence that supports coverage of the claimed loss, and in doing so must give at least as much consideration to the interests of its insured as it gives to its own interests.

182. FM has a duty to adopt and maintain a consistent and rational interpretation of the All Risk Policy sold to Lerner.

183. FM is bound to interpret and administer its insurance policies in accordance with the requirements of governing state law.

184. FM is bound to investigate Lerner's claims in good faith and with an individualized investigation into the cause of loss.

185. FM has failed to honor its obligations under the All Risk Policy and governing law to Lerner. As described in greater detail below, FM denied coverage and breached (a) the All Risk Policy sold to Lerner and (b) the duties of good faith and fair dealing owed to Lerner. These breaches have caused great and incalculable damages to Lerner. FM has threatened to violate and has violated its fiduciary duties to Lerner.

186. FM's breach of its duties under the All Risk Policy and as prescribed by law have caused Lerner to continue to incur losses that were unpaid by FM, but should have been compensated under the All Risk Policy, thereby foreseeably placing Lerner in the position necessitating the filing of this lawsuit. FM reasonably foresaw this circumstance as a result of its



failure to pay Lerner for its insured loss and is therefore responsible for the additional consequential damages caused to Lerner by that breach.

**FIRST CAUSE OF ACTION**

**(For Declaratory Relief against FM)**

187. Lerner incorporates by reference the allegations contained in paragraphs 1-186.

188. Lerner seeks a declaration of the parties' rights and duties under the All Risk Policy in accordance with Rhode Island Superior Court Rules of Civil Procedure 57 and R.I.G.L. § 9-30-2.

189. An actual and justiciable controversy exists between Lerner and FM concerning FM's contractual duties to indemnify Lerner's claims for Property Damage losses, Business Interruption losses, and other losses, costs, and expenses under the All Risk Policy.

190. The controversy between Lerner and FM is ripe for judicial review.

191. The controversy is of sufficient immediacy to justify the issuance of declaratory relief.

192. Lerner accordingly seeks a declaration from the Court that:

- a. Each coverage provision identified in the Complaint is triggered by Lerner's claims;
- b. No exclusion in the All Risk Policy applies to preclude or limit coverage for Lerner's claims;
- c. Lerner has satisfied or been excused from satisfying, or FM has waived or is estopped from enforcing, all conditions precedent under the All Risk Policy;
- d. FM is contractually obligated under the All Risk Policy to indemnify Lerner for its claims of Property Damage losses, Business Interruption losses, Extra Expense, and other losses sustained as a result of direct physical loss of or damage to property

- (or both) due to COVID-19, the ensuing closure orders, and emergency directives, up to the applicable limit(s) of liability;
- e. FM is contractually obligated under the All Risk Policy to indemnify Lerner for its claims of Business Interruption losses for Gross Earnings or Gross Profits loss, at Lerner's election, during the Period of Liability;
  - f. FM is contractually obligated under its All Risk Policy to indemnify Lerner for its claims of Extra Expense incurred to continue business during the Period of Liability, up to the applicable limit(s) of liability;
  - g. FM is contractually obligated under the All Risk Policy to indemnify Lerner for its claims of Business Interruption losses and Extra Expense as a result of orders of Civil or Military Authority that have limited, restricted, or prohibited access to insured properties, including Lerner's hotel, office and retail operations, as a result of COVID-19 at insured properties or other locations within five statute (5) miles, up to the applicable limit(s) of liability;
  - h. FM is contractually obligated under the All Risk Policy to indemnify Lerner for its claims of Business Interruption losses and Extra Expense directly resulting from direct physical loss of or damage of the type insured (or both) to property of the type insured (or both) that attracts business to an insured location and is within one (1) statute mile of the insured location, up to the applicable limit(s) of liability;
  - i. FM is contractually obligated under the All Risk Policy to indemnify Lerner for its claims of Business Interruption losses and Extra Expense directly resulting from direct physical loss of or damage of the type insured (or both) to property of the type insured at locations described in the Supply Chain coverage, up to the applicable limit(s) of liability;
  - j. FM is contractually obligated under the All Risk Policy to indemnify Lerner for its claims of Business Interruption losses and Extra Expense directly resulting from direct physical loss of or damage of the type insured (or both) to property of the

- type insured at locations described in the Contractual Penalties, Leasehold Interest, and Tenant Relocation Expense coverages, up to the applicable limit(s) of liability;
- k. FM is contractually obligated under the All Risk Policy to indemnify Lerner for its claims of lost Gross Earnings during the Extended Period of Liability after the end of the Period of Liability;
  - l. FM is contractually obligated under the All Risk Policy to indemnify Lerner for its Decontamination Costs, up to the applicable limit(s) of liability;
  - m. FM is contractually obligated under the All Risk Policy to indemnify Lerner for actual loss sustained to prevent and costs incurred to temporarily protect actual or impending direct physical loss of or damage to insured property (or both), up to the applicable limit(s) of liability; and
  - n. The award of such additional relief as the Court deems just and appropriate.

## **SECOND CAUSE OF ACTION**

### **(Damages for Breach of Contract against FM)**

193. Lerner incorporates by reference the allegations contained in paragraphs 1-192.
194. FM agreed in its insurance contract to provide insurance coverage for all risk of direct physical loss of or damage to property (or both) not otherwise excluded.
195. The COVID-19 pandemic has caused and continues to cause direct physical loss of or damage to Lerner's properties and to properties within five (5) miles of Lerner's properties (or both).
196. Lerner has suffered, and will suffer in the future, actual losses and incurred extra expense due to direct physical loss of or damage to property (or both) caused by the COVID-19 pandemic, a risk not excluded by FM's All Risk Policy.
197. No policy exclusion applies to preclude or limit coverage.

198. FM is contractually obligated under the All Risk Policy to indemnify Lerner for the full amount of its losses, including Property Damage losses, Business Interruption losses, Extra Expense, and costs resulting from, among other things, (i) direct physical loss of or damage to property (or both) caused by COVID-19, (ii) civil or military authority orders, (iii) Supply Chain losses, (iv) Contractual Penalty losses; (v) Leasehold Interest losses; (vi) Tenant Relocation Expenses; (vii) Extra Expense losses, and (viii) decontamination costs, subject only to the applicable deductibles and limits of liability in the All Risk Policy.

199. In breach of the All Risk Policy, FM refused or otherwise failed to recognize coverage afforded for Lerner's losses and reimburse Lerner for the losses suffered to date, thereby causing damage to Lerner, including the reasonably foreseeable damage flowing from the need to file this action brought about by FM's failure to honor its promise to pay Lerner's covered losses.

200. Lerner's losses as a result of FM's breach of contract are continuing, and Lerner reserves the right to seek the full and exact amount of its damages at the time of trial.

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

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

**JURY DEMAND**

Pursuant to the Superior Court Rules of Civil Procedure, the Plaintiff demands a trial by jury as to all issues properly so tried.

Dated: March 4, 2022

Respectfully submitted,

Plaintiff,

LERNER CORPORATION.

By its Attorneys,

/s/ Robert G. Flanders, Jr.

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