

471-06122-2020

CAUSE NO. _____

CINEMARK HOLDINGS, INC.;	§	
CINEMARK USA, INC.; CNMK TEXAS	§	
PROPERTIES, LLC; CENTURY	§	IN THE DISTRICT COURT
THEATERS, INC.; CINEMARK	§	
PARTNERS II, LTD.; GREELEY, LTD.;	§	
and LAREDO THEATRE, LTD.,	§	
	§	
Plaintiffs,	§	COLLIN COUNTY, TEXAS
	§	
VS.	§	
	§	
FACTORY MUTUAL INSURANCE	§	
COMPANY,	§	
	§	
Defendant.	§	_____ JUDICIAL DISTRICT
	§	

PLAINTIFFS' ORIGINAL PETITION AND REQUEST FOR DISCLOSURES

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs, Cinemark Holdings, Inc.; Cinemark USA, Inc.; CNMK Texas Properties, LLC; Century Theaters, Inc.; Cinemark Partners II, Ltd.; Greeley, Ltd.; Laredo Theatre, Ltd. (collectively, "Cinemark") file this Original Petition for damages and declaratory relief and Request for Disclosures against Defendant, Factory Mutual Insurance Company ("FM"), and respectfully show as follows:

I. INTRODUCTION

1. This action for declaratory judgment, breach of contract, breach of the covenant of good faith and fair dealing, and violations of the Texas Insurance Code arises out of Cinemark's claim of coverage under an "all risks" commercial property insurance policy that FM sold to Cinemark.

2. Despite agreeing to cover Cinemark for all risks of physical loss or damage to covered property from any cause unless specifically excluded and Cinemark's resulting business

interruption loss, FM refuses to stand by the insurance policy that it wrote and sold to Cinemark. Instead, FM choreographed a calculated claims handling strategy designed to limit or altogether deny Cinemark the recovery it is entitled to under an insurance contract it relies on as protection against unforeseen loss or damage and resulting loss of income. Undeniably, FM chose to insure against loss caused by communicable disease, both at and away from Cinemark's property. FM should be required to cover Cinemark's losses.

II. DISCOVERY CONTROL PLAN

3. Cinemark intends for discovery to be conducted under Level 3 of Rule 190.4 of the Texas Rules of Civil Procedure.

III. PARTIES

4. Cinemark Holdings, Inc. is a corporation organized under the laws of the State of Delaware with its principal place of business in Plano, Texas.

5. Cinemark USA, Inc. is a corporation organized under the laws of the State of Texas with its principal place of business in Plano, Texas.

6. CNMK Texas Properties, LLC is a limited liability company organized under the laws of the State of Texas with its principal place of business in Plano, Texas.

7. Century Theaters, Inc. is a corporation organized under the laws of the State of California with its principal place of business in Plano, Texas.

8. Cinemark Partners II, Ltd. is a limited partnership organized under the laws of the State of Texas with its principal place of business in Plano, Texas.

9. Laredo Theatre, Ltd. is a limited partnership organized under the laws of the State of Texas with its principal place of business in Plano, Texas.

10. Greeley, Ltd. is a limited partnership organized under the laws of the State of Texas with its principal place of business in Plano, Texas.

11. FM is a corporation organized under the laws of the State of Rhode Island with its principal place of business in Johnston, Rhode Island. FM is, among other things, in the business of insuring companies like Cinemark. FM is a foreign insurance corporation that conducts business within the State of Texas. FM may be served with process by serving its registered agent, CT Corporation System, at 1999 Bryan Street, Suite 900, Dallas, Texas 75201-3136.

IV. JURISDICTION AND VENUE

12. This Court has subject matter jurisdiction over this dispute because the amount in controversy exceeds the minimum jurisdiction limits of this Court. Pursuant to Texas Rule of Civil Procedure 47, Cinemark seeks monetary relief over \$400 million, including attorneys' fees, pre-judgment and post-judgment interest, and damages.

13. This Court has personal jurisdiction over FM pursuant to the Texas long-arm statute because FM has submitted to jurisdiction in this State by transacting business in Texas, contracting to insure a person, property or risk located in Texas at the time of contracting, and making a contract substantially connected with Texas. FM' business includes: (a) making and issuing an insurance contract to Cinemark; (b) taking or receiving applications for insurance from Texas residents, including Cinemark; (c) receiving or collecting premiums, commissions, membership fees, assessments, dues or other consideration for any insurance or any part thereof, including any such consideration or payments from Cinemark; and (d) the issuance or delivery of contracts of insurance to residents of the State of Texas or persons authorized to do business in the State of Texas, including Cinemark. In addition, FM exercises substantial, systematic, and continuous contacts with Texas by doing business in Texas, serving insureds in Texas, and seeking additional business in Texas.

14. Venue is proper in Collin County, Texas because, among other reasons, all or a substantial portion of the events involved in this lawsuit occurred in Collin County, Texas.

15. Furthermore, this Court has jurisdiction to grant declaratory relief under Chapter 37 of the Texas Civil Practice and Remedies Code because an actual controversy exists between the parties as to their respective rights and obligations under the policy with respect to Cinemark's insurance claim, detailed below.

V. FACTUAL BACKGROUND

A. Cinemark's Operations and Purchase of the FM Policy

16. Cinemark is a leader in the motion picture exhibition industry, as the third largest movie theater circuit in the U.S., with approximately 332 theatres and 4,522 screens in 42 states. Cinemark also has approximately 200 theatres in 17 countries outside of the U.S.

17. Cinemark relies on numerous other businesses in its supply chain to operate its theatres, including the production and shipping companies that supply it with cinematic content, the food and beverage companies that supply its concession and food areas, and many others.

18. FM is an insurance company that sold an "all risks" insurance policy, which provides coverage to Cinemark for "ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as . . . excluded" *See* Policy No. 1051832, attached as Ex. A (the "Policy").

19. The Policy has an effective term of April 30, 2019 to April 30, 2020.

20. Cinemark's insured locations, referred to as "insured **locations**" and "**location**" throughout the Policy, are "as specified in the Schedule of Locations" or "if not so specified in the Schedule of Locations: a building, yard, dock, wharf, pier or bulkhead (or any group of the foregoing)," as further specified in the Policy's definition of **location**. Ex. A at COMPLAINT_000084-85. These locations are referred to herein as "Cinemark Locations."

21. The Policy contains two independent triggers of coverage: the Policy insures against "physical loss" of property and, separately, against "damage" to property.

22. As used in the Policy, the term “physical loss” is separate, distinct, and has an independent meaning from the term “damage.”

23. The Policy does not define the term “physical.”

24. The Policy does not define the term “physical loss.”

25. The Policy does not define the term “damage.”

26. The Policy does not define the phrase “physical loss or damage.”

27. When undefined, the phrase “physical loss or damage” is susceptible to more than one reasonable interpretation.

28. When the undefined phrase “physical loss or damage” is susceptible to more than one reasonable interpretation, it should be construed against the drafter.

29. The Policy also affords coverage to Cinemark for Time Element loss resulting from physical loss or damage of the type insured under the Policy. *Id.* at COMPLAINT_000048.

30. Physical loss or damage caused by “communicable disease,” as defined in the Policy, is “physical loss or damage of the type insured” under the Policy.

31. The Policy provides up to \$500 million in coverage for property damage and business interruption losses, inclusive, per occurrence. *Id.* at COMPLAINT_000010.

32. In exchange for FM’s agreement to take on Cinemark’s risk of loss, Cinemark paid FM \$3,785,253 in premium.

B. COVID-19 is a Deadly Communicable Disease That Causes Physical Loss and Damage to Property

33. COVID-19 is a deadly communicable disease that has already infected over 11 million people in the U.S. and caused more than 246,232 deaths.¹ There is no publically available vaccine for COVID-19.

34. The World Health Organization (the “WHO”) has declared the COVID-19 outbreak a pandemic, and President Trump has declared a nationwide emergency due to the public health emergency caused by the COVID-19 outbreak in the U.S.

35. A pandemic, by definition, is “an epidemic occurring worldwide”²

36. As a declared pandemic, COVID-19 is present globally, including at each Cinemark Location.³

37. The Centers for Disease Control and Prevention (the “CDC”) estimates that infection rates for COVID-19 likely are at least ten (10) times higher than reported.⁴

38. In addition, the CDC has estimated that approximately 40% of COVID-19 positive individuals remain asymptomatic.⁵

¹ CDC, *Cases in the U.S.* (<https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>) (last visited Nov. 18, 2020).

² Heath Kelly, *The classical definition of a pandemic is not elusive*, 89 Bulletin of the WHO 7, at 540-41 (2011) (<https://www.who.int/bulletin/volumes/89/7/11-088815/en/#:~:text=A%20pandemic%20is%20defined%20as>) (last visited Nov. 18, 2020).

³ The omnipresence of COVID-19 as a pandemic is referred to herein as the “Pandemic.”

⁴ Erika Edwards, *CDC says COVID-19 cases in U.S. may be 10 times higher than reported*, NBC News (June 25, 2020) (<https://www.nbcnews.com/health/health-news/cdc-says-covid-19-cases-u-s-may-be-10-n1232134>) (last visited Nov. 18, 2020).

⁵ Ellen Cranley, *40% of people infected with COVID-19 are asymptomatic, a new CDC estimate says*, Business Insider (Jul 12, 2020) (<https://www.businessinsider.com/cdc-estimate-40-percent-infected-with-covid-19-asymptomatic-2020-7>) (last visited Nov. 18, 2020).

39. The incubation period for COVID-19, which is the time between exposure and the onset of symptoms, can be up to fourteen (14) days.⁶

40. During the incubation period, or “pre-symptomatic” period, infected persons can be contagious, and disease transmission can occur before the infected person shows any symptoms or has any reason to believe he or she has become infected.⁷

41. Pre-symptomatic persons carry the greatest viral-load (i.e., the quantity of virus in an individual’s system) among all infected persons,⁸ meaning their ability to transmit COVID-19 is greater than symptomatic persons.⁹

42. COVID-19 is spread by multiple modes of transmission.¹⁰

43. These multiple modes of COVID-19 transmission include person-to-person, property-to-person and airborne transmission.¹¹

⁶ WHO, *Coronavirus disease 2019 (COVID-19) Situation Report – 73* (Apr. 2, 2020) (https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_2) (last visited Nov. 18, 2020).

⁷ *Id.* (“In a small number of case reports and studies, pre-symptomatic transmission has been documented through contact tracing efforts and enhanced investigation of clusters of confirmed cases. This is supported by data suggesting that some people can test positive for COVID-19 from 1-3 days before they develop symptoms.”).

⁸ Xi He, *et al.*, *Temporal dynamics in viral shedding and transmissibility of COVID-19*, 26 NATURE MED. 672, 674 (Apr. 15, 2020) (<https://www.nature.com/articles/s41591-020-0869-5>) (“A total of 414 throat swabs were collected from these 94 patients, from symptom onset up to 32 days after onset. We detected high viral loads soon after symptom onset, which then gradually decreased towards the detection limit at about day 21. . . . Our analysis suggests that viral shedding may begin 5 to 6 days before the appearance of the first symptoms. After symptom onset, viral loads decreased monotonically, consistent with two recent studies.”) (last visited Nov. 18, 2020).

⁹ Lirong Zou, M.Sc., *et al.*, *SARS-CoV-2 Viral Load in Upper Respiratory Specimens of Infected Patients*, N. ENG. J. MED. (Mar. 19, 2020) (<https://www.nejm.org/doi/full/10.1056/nejmc2001737>) (last visited Nov. 18, 2020) (“The viral load that was detected in the asymptomatic patient was similar to that in the symptomatic patients, which suggests the transmission potential of asymptomatic or minimally symptomatic patients.”); Roman Wolfel, *et al.*, *Virological assessment of hospitalized patients with COVID-2019*, 581 NATURE 465 (Apr. 1, 2020) (<https://www.nature.com/articles/s41586-020-2196-x>) (last visited Nov. 18, 2020).

¹⁰ Neeltje van Doremalen, *et al.*, *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, N. ENG. J. MED. (Apr. 16, 2020) (<https://www.nejm.org/doi/full/10.1056/NEJMc2004973>) (last visited Nov. 18, 2020).

¹¹ *Id.*

44. COVID-19 spreads by person-to-person transmission when an uninfected person inhales droplets of the saliva or nasal discharge of an infected person.¹²

45. COVID-19 spreads via airborne transmission.¹³ Airborne transmission of COVID-19 occurs in two general ways.¹⁴

46. Clouds of droplets of saliva or nasal discharge of an infected person, which may be released by a cough, a sneeze, or loud speech, can linger in the air for minutes or hours, and can affect persons or property directly, or affect indoor air and property by being pulled into air circulation systems.¹⁵

47. Airborne COVID-19 also spreads via aerosol transmission.¹⁶

48. Aerosol transmission involves the airborne transmission of viral RNA in particles smaller than 50 microns (human hair is about 80 microns), and which do not settle onto surfaces

¹² 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 accessed Nov. 18, 2020).

¹³ Doremalen, *et al.*, *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-I*, *supra*, at n.10.

¹⁴ CDC, *Scientific Brief: SARS-CoV-2 and Potential Airborne Transmission* (last updated Oct. 5, 2020), (<https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html>) (last visited Nov. 18, 2020).

¹⁵ Ramon Padilla & Javier Zarracina, *Coronavirus might spread much farther than 6 feet in the air. CDC says wear a mask in public*, USA Today (last updated Sep. 21, 2020) (www.usatoday.com/in-depth/news/2020/04/03/coronavirusprotection-how-masks-might-stop-spread-throughcoughs/5086553002/) (last visited Nov. 18, 2020).

¹⁶ Jose-Luis Jimenez, *COVID-19 Is Transmitted Through Aerosols. We Have Enough Evidence, Now It Is Time to Act*, Time (Aug. 25, 2020) (<https://time.com/5883081/covid-19-transmitted-aerosols/>) (last visited Nov. 18, 2020); Pien Huang, *Researchers Say Fresh Air Can Prevent Aerosol Transmission Of The Coronavirus*, NPR (Sep. 7, 2020) (<https://www.npr.org/2020/09/07/910499236/researchers-say-fresh-air-can-prevent-aerosol-transmission-of-the-coronavirus>) (last visited Nov. 18, 2020).

like larger droplets emitted through saliva and nasal discharge.¹⁷ Aerosol transmission typically involves viral RNA emitted through exhaled breath.¹⁸

49. Viral RNA contained in aerosol form can circulate through a room via ventilation systems or natural airflow.¹⁹

50. The CDC published a study in July 2020 concluding that droplets circulating via a restaurant's ventilation system caused a COVID-19 outbreak among people who dined in the restaurant, even though they were not seated together.²⁰

51. The presence of COVID-19 causes a physical transformation of the air and surfaces. It changes the air and the surfaces into dangerous transmission mechanisms for the disease, rendering the affected property unsafe, unfit and uninhabitable for ordinary functional use. Medical researchers have advised that HEPA and other specialized air filtration systems can be

¹⁷ Jose-Luis Jimenez, *COVID-19 Is Transmitted Through Aerosols*, *supra*. (“‘Aerosol’ (sometimes referred to as ‘airborne’) transmission is similar to droplet transmission, except that the bits of fluid are so small that they can linger in the air for minutes to hours. To understand the scale of aerosols, the diameter of a human hair is about 80 microns, and aerosols smaller than about 50 microns can float in the air long enough to be inhaled. SARS-CoV-2 is only 0.1 microns in diameter, so there is room for plenty of viruses in aerosols.”).

¹⁸ Ramon Padilla & Javier Zarracina, *Coronavirus might spread much farther than 6 feet in the air*, *supra* (“‘You cannot separate out droplet and fine aerosol emissions in everyday activities like talking, breathing and laughing.’ Many scientists believe droplets and aerosols are on a continuum of sizes. ‘So if they accept that droplet transmission is happening they cannot exclude any contribution from aerosols.’”); Wenzhao Chen, *et al.*, *Short-range airborne route dominates exposure of respiratory infection during close contact*, *BUILDING & ENV’T* 176 (June 2020) (<https://www.sciencedirect.com/science/article/abs/pii/S0360132320302183>) (last visited Nov. 18, 2020) (Abstract) (“The short-range airborne route is found to dominate at most distances studied during both talking and coughing.”).

¹⁹ Jianyun Lu & Zhicong Yang, *COVID-19 outbreak associated with air conditioning in restaurant, Guangzhou, China, 2020*, 26 *Emerging Infectious Diseases* 11 (Sep. 11, 2020) (https://wwwnc.cdc.gov/eid/article/26/11/20-3774_article#suggestedcitation) (last visited Nov. 18, 2020) (“We conclude that the air conditioner prompted transmission of SARS-CoV-2; the customers in the airflow were at high risk for infection with SARS-CoV-2 in the poorly ventilated environment. Because the staff and other diners were not exposed to the airflow mixed with SARS-CoV-2 transmitted by patient A1, their risk for infection was lower.”).

²⁰ Jianyun Lu, *et al.*, *COVID-19 Outbreak Associated with Air Conditioning in Restaurant, Guangzhou, China, 2020*, 26 *Emerging Infectious Diseases* 7 (July 2020) (https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article) (last visited Nov. 18, 2020).

used to remediate the presence of COVID-19.²¹ In other words, physical alteration of property may be necessary to render it safe from COVID-19 and return the property to a safe and useable state.

52. COVID-19 also spreads by property- or surface-to-person transmission, where an uninfected person touches an object or surface that has come into contact with the saliva or nasal discharge of an infected person, and the uninfected person then touches his or her eyes, nose, or mouth.²²

53. *The New England Journal of Medicine* study's results suggest that individuals could become infected with COVID-19 through indirect contact with surfaces or objects used by an infected person, whether they were symptomatic or not.²³

54. Surfaces, once physically affected by COVID-19, are referred to as fomites.²⁴

55. Fomites consist of both porous and nonporous surfaces or objects that can become infected with a virus and serve as vehicles of transmission.²⁵

56. During and after illness, viruses are shed in large numbers in body secretions, including blood, feces, urine, saliva, and nasal fluid.²⁶

²¹ Zeynep Tufekci, *We Need to Talk About Ventilation*, The Atlantic (July 30, 2020) (<https://www.theatlantic.com/health/archive/2020/07/why-arent-we-talking-more-about-airborne-transmission/614737/>) (last visited Nov. 18, 2020).

²² *Id.*

²³ National Institutes of Health, *New coronavirus stable for hours on surfaces* (Mar. 17, 2020) (<https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces>) (last visited Nov. 18, 2020); Neeltje van Doremalen, *et al.*, *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, *New England Journal of Medicine* (2020), <https://www.nejm.org/doi/full/10.1056/nejmc2004973> (last visited Nov. 18, 2020).

²⁴ Stephanie A. Boone and Charles P. Gerba, *Significance of Fomites in the Spread of Respiratory and Enteric Viral Disease*, *American Society for Microbiology* (Mar. 13, 2007) (<https://aem.asm.org/content/73/6/1687>) (last visited Sep. 25, 2020).

²⁵ *Id.*

²⁶ *Id.*

57. Fomites become infected with virus by direct physical contact with body secretions or fluids, contact with soiled hands, contact with aerosolized virus (large droplet spread) released while talking, sneezing, coughing, or vomiting, or contact with airborne virus that settles after disturbance of an infected fomite (*e.g.*, opening theatre curtains).²⁷

58. Once a fomite is infected, the transfer of infectious virus may readily occur between inanimate and animate objects, or vice versa, and between two separate fomites.²⁸

59. Infection of frequently touched surfaces is, therefore, a potential source of viral transmission.²⁹

60. *The New England Journal of Medicine* has reported that COVID-19 was detectable in aerosols for up to three hours, up to four hours on copper, up to twenty-four hours on cardboard, and up to three days on plastic and stainless steel.³⁰

61. The CDC has reported that the virus can remain on polystyrene plastic, aluminum, and glass for eight days at the humidity recommended for indoor living spaces.³¹

62. Another scientific study documented in the *Journal of Hospital Infection* found that COVID-19 can remain infectious on inanimate surfaces at room temperature for up to nine days.³²

63. All of these materials are used by Cinemark throughout its facilities and operations.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ See sources, *supra*, at n.23.

³¹ Boris Pastorino, *et al.*, *Prolonged Infectivity of SARS-CoV-2 in Fomites*, 26 Emerging Infectious Diseases 9 (Sep. 2020) (https://wwwnc.cdc.gov/eid/article/26/9/20-1788_article) (last visited Nov. 18, 2020).

³² G. Kampf, *et al.*, *Persistence of coronaviruses on inanimate surfaces and their inactivation with biocidal agents*, 104 J. OF HOSP. INFECTION 246-51 (Jan. 31, 2020) (<https://www.journalofhospitalinfection.com/action/showPdf?pii=S0195-6701%2820%2930046-3>) (last visited Nov. 18, 2020).

64. A study by the *Virology Journal* showed that stable COVID-19 can survive on surfaces up to 28 days, serving as a vehicle for viral transmission during that time span.³³

65. As a global pandemic, the presence of COVID-19 is, by definition, worldwide.

66. The ubiquitous presence of COVID-19 also is confirmed by statistics.

67. Because COVID-19 is a pandemic and is statistically certain to be carried by a number of individuals who visit Cinemark Locations daily, COVID-19 is continually reintroduced to the air and surfaces of Cinemark Locations.³⁴

68. The presence of COVID-19 on property, including Cinemark's property, causes a tangible alteration to that property.

69. The presence of COVID-19 on property, including Cinemark's property, therefore, caused and continues to cause physical loss and/or damage to Cinemark's property.

70. The presence of COVID-19 also caused and continues to cause physical loss and/or damage by rendering Cinemark's property hazardous and unsafe to human health, thereby depriving Cinemark of the functionality and reliability of its property.

71. This physical loss and/or damage to property, including Cinemark's property, has required Cinemark to close Cinemark Locations, incur extra expense, adopt remedial and precautionary measures to restore and remediate the air and surfaces at its Cinemark Locations, and limit or cease operations across all of its Cinemark Locations.

³³ Shane Riddell, *et al.*, *The effect of temperature on persistence of SARS-CoV-2 on common surfaces*, 17 *VIROLOGY J.* 145 (Oct. 7, 2020) (<https://doi.org/10.1186/s12985-020-01418-7>) (last visited Nov. 18, 2020).

³⁴ Terms appearing in bold font are defined terms in the Policy and are as they appear in the Policy.

72. Beginning in or around March 2020, COVID-19 caused tangible alteration to Cinemark Locations and property that Cinemark depends upon to conduct its normal business operations.

73. Given the absence of commercially-available tests for surface and aerosol presence of COVID-19 and the shortage of testing kits for humans, however, positive test results are not and cannot be the only means of proving the presence of COVID-19.

74. In addition, numerous Cinemark employees exhibited signs or actual symptoms of COVID-19, or tested positive for COVID-19, throughout the period of June to November 2020. During this period, Cinemark employees recorded a combined total of more than 5,562 sick days. During that period, almost 500 employees had COVID-19 symptoms, were exposed to COVID-19, or tested positive for COVID-19. Approximately 128 of those cases remain open as of this filing.

75. Symptomatic employees were required to take a minimum of 10 days off work. From June to November 2020, at least 270 employees were symptomatic, and approximately 54 such cases remain open as of this filing.

76. Employees exposed to COVID-19 were required to take a minimum of 14 days off work. From June to November 2020, at least 158 employees were exposed to COVID-19, and approximately 58 of those cases remain open as of this filing.

77. Employees who tested positive for COVID-19 were required to take a minimum of 10 days off work. From June to November 2020, at least 65 employees tested positive for COVID-19, and approximately 15 of those cases remain open as of this filing.

78. From June to November 2020, at least 14 employees who were exposed to COVID-19 or tested positive for COVID-19 were exposed to COVID-19 at a Cinemark Location. Approximately one of those cases remains open as of this filing.

79. Additionally, during the period of March 17, 2020 to November 3, 2020, Cinemark Locations had 3,690,952 registered guests from all over the world.

80. Even without actual detection, COVID-19 also is statistically certain to be present at Cinemark Locations. Statistical modeling also confirms that COVID-19 was and continues to be present at Cinemark Locations.³⁵

81. Positivity rates, which are material to statistical modeling, measure saturation of COVID-19 in a particular locale. Among other things, positivity rates are used to determine the statistical likelihood that at least one COVID-19 positive person will enter a facility. Positivity rates are an indicator of the ubiquitous presence of COVID-19.³⁶

82. The WHO recommends that a particular area reach a positivity rate of 5.00% or lower before reopening.³⁷

83. As of this filing, Johns Hopkins University calculates 45 states to have a positivity rate that is above 5.00%.³⁸

C. Governmental Orders Because of COVID-19 and Related Physical Loss or Damage to Property

³⁵ *COVID-19 Event Risk Assessment Planning Tool*, Georgia Institute of Technology (<https://covid19risk.biosci.gatech.edu/>) (last visited Nov. 12, 2020).

³⁶ David Dowdy & Gypsyamber D'Souza, *COVID-19 Testing: Understanding the "Percent Positive"*, Johns Hopkins Bloomberg School of Public Health (Aug. 10, 2020), <https://www.jhsph.edu/covid-19/articles/covid-19-testing-understanding-the-percent-positive.html> (last visited Nov. 4, 2020).

³⁷ See Johns Hopkins University & Medicine, *WHICH U.S. STATES MEET WHO RECOMMENDED TESTING CRITERIA?*, (<https://coronavirus.jhu.edu/testing/testing-positivity>) (last visited Oct. 24, 2020).

³⁸ *Id.*

84. In an effort to slow the spread of COVID-19 and as a consequence of physical damage caused by COVID-19, federal, state and local governments imposed unprecedented directives through governmental orders (the “Governmental Orders”) prohibiting travel to and within the United States, requiring certain businesses to close, and requiring residents to remain in their homes unless performing “essential” activities. Excerpts from representative Governmental Orders are attached as Exhibit B.

85. The Governmental Orders have limited, restricted, or prohibited partial or total access to Cinemark Locations by, among other things, (a) requiring businesses deemed “non-essential” to close; (b) requiring businesses, after reopening, to make tangible alterations to their property and operations; and (c) requiring businesses, after reopening, to restrict customers from patronizing those businesses.

86. Cinemark Locations were damaged by stringent requirements of the Government Orders to the same extent they were damaged from COVID-19 and the Pandemic as the Locations were unusable.

87. The Government Orders were issued because of physical loss and/or damage to property caused by the presence of COVID-19 and the Pandemic.

88. The Governmental Orders also were issued because of the physical loss and/or damage to property that was caused by and continues to be an imminent risk of harm from the spread of COVID-19 and, in particular, the transmission of the virus through human contact with affected property. *See supra*, ¶¶ 51-53.

89. The Governmental Orders also were issued because, among other things, COVID-19 causes physical loss and/or damage to property due to its ability to attach to surfaces for

prolonged periods, remain viable in indoor air, and render property unsafe for normal use. *See supra*, ¶¶ 42-64.

90. The Governmental Orders also were issued because, among other things, COVID-19 causes loss of functionality and/or reliability of property by transforming air and property into a dangerous instrumentality.

91. Numerous Governmental Orders remain in effect and continue to require the suspension of business operations for non-essential businesses.

92. As a business that relies on materials and customers from next door, to across the country and around the world, Cinemark is subject to and has been adversely affected by these various Governmental Orders.

93. The Governmental Orders, the damage caused by COVID-19, and the transmission of COVID-19 have had a devastating effect on Cinemark's business.

94. As a result of COVID-19, the Pandemic, and the Governmental Orders, Cinemark was required to tangibly alter its property resulting in a limitation on business operations at Cinemark Locations.

95. Persons infected with COVID-19 were present at Cinemark Locations prior to March 13, 2020.

96. Even with the reopening and loosening of restrictions in certain jurisdictions, Cinemark's operations have not yet returned to pre-loss levels.

97. In some jurisdictions, new Governmental Orders restricting or closing businesses have been issued as a result of a resurgence in COVID-19 cases after reopening for only a short period of time. Some states have begun to re-implement tighter restrictions and have required

businesses to close again after uncontrollable spread of COVID-19 and surges of COVID-19 cases and deaths.

98. To mitigate against further tangible alteration of its property, Cinemark has implemented, at great expense, the use of personal protective equipment (PPE) and other administrative and engineering controls to mitigate and control the presence of COVID-19 and the damage it causes to property.

D. The “All Risks” Coverage Is Triggered

99. The “All Risks” coverage that FM sold to Cinemark “covers property, as described in this Policy, against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded, while located as described in this Policy.” Ex. A at COMPLAINT_000001.

100. FM drafted the Policy.

101. **Communicable disease** is a risk of physical loss or damage covered under the Policy.

102. Pursuant to the “Communicable Disease Response” coverage, the Policy expressly covers, among other things, “the reasonable and necessary costs incurred ... for the: 1) cleanup, removal and disposal of ... **communicable disease** from insured property.” *Id.* at COMPLAINT_000033.

103. The Policy defines **communicable disease**, in relevant part, as a disease which is “transmissible from human to human by direct or indirect contact with an affected individual or the individual’s discharges[.]” *Id.* at COMPLAINT_000081.

104. The Policy contains no exclusion that mentions **communicable disease**.

105. COVID-19 is a disease that is transmissible from human to human by direct or indirect contact with an affected individual or the individual’s discharges. *Ibid.* Therefore, COVID-19 is a **communicable disease** under the Policy.

106. By providing for the “cleanup, removal and disposal of ... **communicable disease**,” the Policy explicitly recognizes that **communicable disease** physically damages property. *Id.* at COMPLAINT_000033.

107. Accordingly, because the Policy specifically covers remediation of the damages caused by **communicable disease**, the physical damage to property caused by communicable disease is “physical loss or damage of the type insured” under the Policy.

1. COVID-19 Has Caused Damage to Cinemark’s Property, Triggering Coverage Under the “All Risks” Policy

108. The actual presence of COVID-19 at Cinemark Locations has triggered coverage under the Policy.

109. In addition, the presence of COVID-19 on property away from Cinemark Locations has triggered coverage under the Policy.

110. COVID-19 has caused and continues to cause physical loss and damage (*i.e.*, tangible alteration of air and surfaces) at Cinemark Locations.

111. Cinemark has experienced and continues to experience damage of the type insured under the Policy to its property as a result of COVID-19.

112. COVID-19 also has caused and continues to cause Cinemark to experience covered business interruption.

113. Cinemark has submitted a claim pursuant to the Policy as a result of sustaining losses covered by the Policy. Notwithstanding, FM denied, or effectively denied, coverage for Cinemark’s claim and did so in bad faith based on an apparent systematic company practice designed to minimize payments for covered COVID-19 claims.

2. Multiple “Additional Coverages” Are Triggered under the “All Risks” Policy

114. In addition to triggering the Policy’s “all risks” coverage, Cinemark’s claim also triggers multiple coverage extensions provided under the Policy, including, but not limited to, the following:

a. *COVID-19 Triggered the Policy’s Communicable Disease Response Coverage*

115. The actual presence of COVID-19 at the Cinemark Locations has caused physical damage to property at these Cinemark Locations resulting in the issuance of an order by an authorized governmental agency regulating communicable disease, thereby triggering coverage under the Policy’s Communicable Disease Response coverage.

116. The actual presence of COVID-19 continues to exist at Cinemark Locations.

b. *COVID-19 Triggered the Policy’s Claims Preparation Costs Coverage*

117. The Policy covers Claim Preparation Costs, which it defines as the actual costs incurred by Cinemark for producing and certifying any particulars or details contained in its books or documents, or such other proofs, information or evidence required by FM resulting from insured loss payable under this Policy for which FM has accepted liability.

118. Cinemark has incurred actual costs to respond to FM’s requests for additional information regarding Cinemark’s claim, thereby triggering the Policy’s Claims Preparation Costs coverage.

c. *COVID-19 Triggered the Policy’s Protection and Preservation of Property*

119. COVID-19 also has caused and continues to cause actual physical loss and damage to insured property. In addition, COVID-19 has threatened and continues to threaten to cause physical loss and damage to property.

120. This actual and threatened physical loss and damage to insured property has prompted Cinemark to take action to temporarily protect or preserve its property, thereby triggering the Policy's Protection and Preservation of Property coverage.

d. *COVID-19 Triggered the Policy's Time Element Loss Coverage*

121. The Policy affords coverage for Cinemark's Time Element losses, subject to the Policy's terms and conditions.

122. COVID-19 has caused Cinemark to suffer Time Element loss as a result of physical loss and damage of the type insured under the Policy.

123. This loss triggers coverage under the Policy's Time Element Loss provisions including, without limitation, coverage for Gross Earnings and Extended Period of Liability, or Gross Profit, at Cinemark's option.

e. *COVID-19 Triggered the Contingent Time Element Extended Coverage*

124. The actual presence of COVID-19 at **contingent time element locations** has caused physical damage to property at those **contingent time element locations** resulting in actual loss and extra expense to Cinemark, thereby triggering coverage under the Policy's Contingent Time Element Extended coverage.

125. Upon information and belief, the actual presence of COVID-19 continues to exist at **contingent time element locations**.

f. *COVID-19 Triggered the Policy's Extra Expense*

126. COVID-19 has caused Cinemark to incur reasonable and necessary expenses to continue as close to normal as possible the conduct of Cinemark's business. Such expenses are beyond those that Cinemark would have normally incurred in conducting its business absent the presence of COVID-19.

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

g. COVID-19 Triggered the Policy's Civil or Military Authority

128. The physical damage caused by the presence of COVID-19 at property located within five (5) statute miles of Cinemark Locations has directly resulted in the issuance of the Governmental Orders prohibiting access to Cinemark Locations.

129. Cinemark has sustained and will continue to sustain business interruption losses because orders from civil authorities, issued as a direct result of physical damage of the type insured at a Cinemark Location or within five (5) statute miles of such a Cinemark Location, have prohibited access to Cinemark Locations.

130. These Governmental Orders were issued as a direct result of physical damage to property from COVID-19, which is damage of the type insured, at a Cinemark Location and/or within five (5) statute miles of a Cinemark Location.

h. COVID-19 Triggered the Policy's Ingress/Egress

131. COVID-19 and the physical loss and damage it has caused have resulted in the necessary interruption of Cinemark's business by totally or partially preventing ingress to or egress to and from Cinemark Locations as a direct result of physical loss and damage of the type insured to property of the type insured, thereby triggering the Policy's Ingress/Egress coverage. For example:

- a. El Paso, Texas: The shopping mall in which Cinemark Location No. 367 closed down, and reopened under limited capacity, due to COVID-19.³⁹ As a result of the closure, ingress and egress from the Cinemark Location was partially or totally prevented.
- b. Los Angeles, California: The shopping mall in which Cinemark Location No. 1084 is located has been closed since March due to COVID-19.⁴⁰ As a result of the closure, ingress and egress from the Cinemark Location was partially or totally prevented.
- c. West Dundee, Illinois: The shopping mall in which Cinemark Location No. 1139 is located was closed due to COVID-19.⁴¹ As a result of the closure, ingress and egress from the Cinemark Location was partially or totally prevented.
- d. Monroeville, Pennsylvania: The shopping mall in which Cinemark Locations No. 1065 is located was closed in March 2020 due to COVID-19.⁴² As a result of the closure, ingress and egress from the Cinemark Location was partially or totally prevented.

i. *COVID-19 Triggered the Policy's Logistics Extra Cost*

132. COVID-19 caused Cinemark to incur extra cost due to the disruption of the **normal** movement of goods or materials directly between insured Cinemark Locations or directly between a Cinemark Location and a **location** of a direct customer, supplier, contract manufacturer or contract service provider to Cinemark, thereby triggering the Policy's Logistics Extra Cost coverage.

³⁹ Veronica Martinez, *Some El Paso malls prepare to open Friday as stay home orders to curb COVID-19 spread expire*, El Paso Times (Apr. 30, 2020) (<https://www.elpasotimes.com/story/news/2020/04/30/coronavirus-stay-home-order-ending-el-paso-malls-plans-reopen/3040345001/>) (last visited Oct. 29, 2020).

⁴⁰ Roger Vincent, *Baldwin Hills Crenshaw Plaza shopping mall to be sold to New York developers*, LA Times (Oct. 6, 2020) (<https://www.latimes.com/business/story/2020-10-06/baldwin-hills-crenshaw-plaza-shopping-mall-to-be-sold-to-new-york-developers>) (last visited Oct. 29, 2020).

⁴¹ Lauren Zumbach, *Many Illinois stores are reopening Friday as phase 3 begins. Here's the latest on where you can shop and what to expect.*, Chicago Tribune (May 29, 2020) (<https://www.chicagotribune.com/coronavirus/ct-coronavirus-illinois-stores-reopening-20200528-upvwab6cuvgh5gcrefoqfimloy-story.html>) (last visited Oct. 29, 2020).

⁴² Megan Tomasic, *Westmoreland, Monroeville malls closed per Wolf's order*, Trib Live (Mar. 20, 2020) (<https://triblive.com/local/westmoreland/westmoreland-monroeville-malls-close-due-to-coronavirus-fears/>) (last visited Oct. 29, 2020).

133. For example, many of the films scheduled for release in 2020 have not and will not be released in Cinemark theaters due to COVID-19, including, but not limited to:

- a. *Black Widow*, the highly-anticipated Marvel Studios' thriller, now is expected to be released May 7, 2021.⁴³
- b. Steven Spielberg's adaptation of *West Side Story* has been pushed to December 10, 2021.⁴⁴
- c. *The King's Man* release date was postponed from September 18, 2020, to February 12, 2021.⁴⁵
- d. *Soul*, a Pixar Animation film, will no longer be released in theaters in November, instead, the film will debut exclusively on Disney+, an on-demand streaming service.⁴⁶

j. *COVID-19 Triggered the Policy's Attraction Property*

134. COVID-19 also caused and is continuing to cause physical loss and damage to property away from Cinemark Locations, including property located within one (1) statute mile of Cinemark Locations, thereby triggering the Policy's Attraction Property coverage. For example:

- a. Grapevine, Texas: Dallas Fort Worth Airport is within one mile of Cinemark Location No. 206, where five TSA agents tested positive for COVID-19, as of April 14, 2020.⁴⁷
- b. Boca Raton, Florida: Florida Atlantic University ("FAU") is less than one mile from Cinemark Location No. 1048, and tallied 41 FAU students and

⁴³ *Movies delayed (again) by COVID-19*, USA Today (Nov. 5, 2020) <https://www.usatoday.com/picture-gallery/entertainment/movies/2020/03/24/movies-postponed-by-coronavirus-crisis-mulan-matrix-batman-wonder-woman/111460070/>

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Sarah Whitten, *Pixar's 'Soul' ditches theaters, is heading to Disney+ for Christmas*, CNBC (Oc. 8, 2020) <https://www.cnbc.com/2020/10/08/pixars-soul-ditches-theaters-is-heading-to-disney-for-christmas.html>

⁴⁷ Kyle Arnold, *Two More TSA Screeners at DFW Airport Test Positive for COVID-19*, AviationPros (Apr. 14, 2020) (citing The Dallas Morning News) (<https://www.aviationpros.com/aviation-security/news/21133812/two-more-tsa-screeners-at-dfw-airport-test-positive-for-covid19>).

one FAU employee as having tested positive for COVID-19 as of September 9, 2020.⁴⁸

- c. Los Angeles, California: Loyola Marymount University (“LMU”) is located less than one mile of Cinemark Location No. 1014, where three LMU community members were confirmed to have tested positive for COVID-19 as of March 12, 2020.⁴⁹
- d. Melrose Park, Illinois: The Gottlieb Memorial Hospital, where patients are treated for COVID-19, is located less than one mile from Cinemark Location No. 221.
- e. Pittsburgh, Pennsylvania: Grocery stores within one mile of Cinemark Locations Nos. 1034 and 1084 reported employees tested positive for COVID-19 as of March 28, 2020.⁵⁰

3. No Exclusion Impacts Coverage

135. No exclusion in the Policy applies to preclude or limit coverage for the actual presence of COVID-19 at or away from Cinemark Locations, the physical loss and damage to property at Cinemark Locations, and/or the business interruption losses that have and will continue to result from the physical loss and damage to property. To the extent FM contends any exclusions apply, such exclusions are unenforceable.

4. The Policy’s Contamination Exclusion Does Not Apply

136. The Policy’s Communicable Disease Response coverage provides coverage for, among other things, “the reasonable and necessary costs incurred . . . for the: 1) cleanup, removal

⁴⁸ Zachary Weinberger, *FAU reports 42 positive COVID-19 cases in new system that updates every 30 minutes*, University Press (Sept. 9, 2020) (<https://www.upressonline.com/2020/09/fau-reports-42-positive-covid-19-cases-in-new-system-that-updates-every-30-minutes/>).

⁴⁹ *Coronavirus (COVID-19) | Update*, LMU Community Messages (Mar. 12, 2020), (https://www.lmu.edu/together/communitymessages/coronaviruscovid-19update/#:~:text=There%20are%20currently%20no%20confirmed,and%20are%20following%20their%20guidance.)).

⁵⁰ Andrew Limberg, *Two More Cases Of Coronavirus Reported At Two Local Giant Eagle Location*, NewsRadio 1020 KDKA (Apr. 1, 2020) (<https://www.radio.com/kdkaradio/articles/two-more-cases-of-coronavirus-reported-at-giant-eagle-stores>).

and disposal of . . . **communicable disease** from insured property.” Ex. A at COMPLAINT_000033-34.

137. COVID-19 is a communicable disease transmissible from human to human. *Id.* at COMPLAINT_000081.

138. COVID-19 therefore meets the definition of **communicable disease** under the Policy.

139. The Policy contains an exclusion that purports to preclude coverage for **contamination**. *Id.* at COMPLAINT_000025.

140. The Policy defines **contamination** as, among other things, a “virus.” *Id.* at COMPLAINT_000081.

141. The Policy’s Contamination exclusion does not mention **communicable disease**.

142. The Policy’s Contamination exclusion therefore does not exclude coverage for loss caused by **communicable disease**.

143. The Policy’s Contamination exclusion does not exclude coverage for loss caused by COVID-19.

144. The Policy’s Contamination exclusion does not contain an exception for coverage for **communicable disease**.

145. The Policy’s Contamination exclusion does not exclude coverage for Cinemark’s claim.

146. To the extent FM contends that the Policy’s Contamination exclusion bars coverage for loss caused by **communicable disease** or some other aspect of Cinemark’s claim, the Policy is, at worst for Cinemark, ambiguous, and therefore, must be construed in favor of coverage. *Dall. Nat. Ins. Co. v. Sabic Americas, Inc.*, 355 S.W.3d 111, 122 (Tex. App. – Houston [1st Dist.] 2011,

pet. denied) (finding pollution exclusion ambiguous and acknowledging that the court must adopt the construction of the policy urged by the insured “as long as [the insured’s] construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties’ intent”).

5. The Policy’s Communicable Disease Sublimit Does Not Cap Cinemark’s Losses

147. The Policy affords coverage to Cinemark for the actual presence of **communicable disease** at a Cinemark Location. This **communicable disease** coverage is found under two sections of the Policy titled “Communicable Disease Response” and “Interruption by Communicable Disease” (together, the “On-Site Sublimited Communicable Disease Coverages”).

148. The Communicable Disease Response provision expressly provides that it is an “Additional Coverage.”

149. The Interruption by Communicable Disease provision expressly provides that it is a coverage “Extension.”

150. The On-Site Sublimited Communicable Disease Coverages were added to the Policy as “enhancements” to what the base policy form already covered as **communicable disease**. See Ex. C at COMPLAINT_000181.

151. The On-Site Sublimited Communicable Disease Coverages do not operate to limit any other coverage under the Policy that may also apply to loss or damage resulting from or caused by **communicable disease**, including physical loss or damage resulting from or caused by **communicable disease** at or away from Cinemark Locations.

152. Likewise, any sublimit applicable to the On-Site Sublimited Communicable Disease Coverages does not apply to limit any other coverage under the Policy that may also apply

to loss or damage resulting from or caused by **communicable disease**, including physical loss or damage resulting from or caused by **communicable disease** at or away from Cinemark Locations.

153. Rather, coverage for covered physical loss and damage, and/or resulting business interruption loss, from or caused by **communicable disease**, including physical loss or damage resulting from or caused by **communicable disease** at or away from Cinemark Locations, is subject to the Policy limits associated with the coverage or coverages implicated.

E. FM's Bad Faith Conduct

1. FM Conducted an Inadequate and Improper Investigation of Cinemark's Claim

154. Aware that its Policy broadly affords coverage for COVID-19 losses beyond the On-Site Sublimited Communicable Disease Coverages, FM devised a plan designed to steer its policyholders, including Cinemark, into at most, the On-Site Sublimited Communicable Disease Coverages for their COVID-19 losses.

155. FM executed that plan in response to Cinemark's claim.

156. By e-mail dated April 20, 2020, and in further discussion by phone on April 27, 2020, Cinemark notified FM that Cinemark had shut down its business operations worldwide due to COVID-19. Ex. D at COMPLAINT_000182.

157. By letter dated May 18, 2020, FM reserved its right to limit or deny coverage to Cinemark. Ex. E at COMPLAINT_000185-188.

158. In communications with FM, Cinemark explained that its claim was based on the physical loss and/or physical damage to property caused by, among other things, the presence of COVID-19 at Cinemark Locations and elsewhere, as well as related Governmental Orders prohibiting access to Cinemark Locations and mandating that Cinemark close its doors.

159. FM ignored Cinemark's statements and, instead, focused on whether any employees of Cinemark or other persons at Cinemark Locations had tested positive for COVID-19.

160. FM failed to further investigate Cinemark's claimed losses.

161. FM's May 18, 2020 letter, purported to recap the April 27th conversation. *Id.* at COMPLAINT_000185.

162. The May 18 letter notes that the Policy contains the On-Site Sublimited Communicable Disease Coverages, and that "COVID-19 meets the definition of a communicable disease under the policy." *Id.* at COMPLAINT_000186. The letter also states that "[o]ther key conditions of this coverage are the actual not suspected presence of a communicable disease at a location owned, leased or rented by Cinemark Holdings, Inc., access to which has been limited, restricted or prohibited for more than 48 hours." *Ibid.*

163. However, the May 18 letter does not acknowledge that any coverage applies to Cinemark's losses. Instead, FM requested information that Cinemark had already provided and further stated, "[o]nce we have had an opportunity to complete our investigation and review of your policy information, we will confirm any applicable coverages, loss payables, and deductibles in effect." *Id.* at COMPLAINT_000188.

164. Since the May 18 letter, FM has not provided any further communication regarding its coverage position.

2. FM's Attempt to Steer Cinemark into the Policy's On-Site Sublimited Communicable Disease Coverages

165. Based on information and belief, FM's delay in providing a written coverage position and its request for voluminous information Cinemark had already provided are not by

accident, but rather, they are part of a systematic claims-handling practice and procedure that FM has deployed across all COVID-19 claims.

166. FM's systematic practice is outlined in a set of "Talking Points" (the "FM Talking Points"), a true copy of which is attached as Exhibit F, which were prepared for FM claim adjusters to use to ensure that they reach the same conclusion for all COVID-19 claims.

167. The FM Talking Points explicitly acknowledge that FM "ha[s] a wide range of clients who may be affected in a variety of ways" by COVID-19. Ex. F at COMPLAINT_000189.

168. The FM Talking Points outline only a few of the many different coverages contained in FM's standard commercial property policies, including policies of the type FM sold to Cinemark, that specifically afford coverage for COVID-19 claims. *Id.* at COMPLAINT_000189-190.

169. The FM Talking Points outline certain specific "triggers" of coverage that the adjuster should look for when investigating any COVID-19 claim. *Id.* at COMPLAINT_000189.)

170. But the FM Talking Points fail to include all of the different "triggers" of coverage that may be implicated by COVID-19 claims.

171. Among those "triggers" included by FM in its Talking Points is an employee of the insured that "actually has the communicable disease." *Id.* at COMPLAINT_000190.

172. The FM Talking Points also recognize that some insureds may be unable to disclose that an employee actually has COVID-19 due to medical privacy restrictions.

173. By including only the On-site Sublimated Communicable Disease Coverages as coverages potentially applicable to a COVID-19 claim, the FM Talking Points steer adjusters to only seek information that pertains to the Communicable Disease Coverages.

174. In fact, the FM Talking Points expressly and unequivocally foreclose the availability of coverage under the Policy's Civil or Military Authority coverage provision, where the FM Talking Points state:

Q. Does coverage under Civil or Military Authority apply?

A. No

Ex. F at COMPLAINT_000190; Ex. A at COMPLAINT_000061.

175. The FM Talking Points make similar statements with respect to the Policy's Contingent Time Element Extended coverage. Ex. F at COMPLAINT_000190; Ex. A at COMPLAINT_000062.

176. The FM Talking Points further instruct that "the presence of a **communicable disease** does not constitute physical damage and is not of the type insured against as a virus falls within the definition of **contamination**, which is excluded." Ex. F at COMPLAINT_000190.

177. But as alleged above, the Policy FM sold to Cinemark expressly recognizes that the presence of **communicable disease** causes physical damage to property because, among other things, it provides coverage for the resulting "cleanup, removal and disposal of ... **communicable disease**." Ex. A at COMPLAINT_000033.

178. Regardless, FM failed to conduct any investigation with respect to Cinemark's claim to determine whether Cinemark had in fact sustained physical loss or damage as a result of **communicable disease**.

179. The FM Talking Points direct the claims adjuster to reach conclusions without considering the specific facts of a particular claim or the applicable law that governs interpretation of the relevant insurance policy.

180. Instead, the FM Talking Points coach the adjuster to suggestively steer the policyholder toward the On-Site Sublimited Communicable Disease Coverages, which provide only a fraction of the coverage limits otherwise available under the Policy.

181. The FM Talking Points are contrary to the accepted practices of good faith insurance claim handling.

182. FM's practice and procedure constitutes an unfair or deceptive act or practice in the business of insurance.

183. FM's use of the FM Talking Points reflects a conscious disregard of the policyholder's rights under the Policy.

184. To date, FM has not provided Cinemark with any written coverage decision.

185. FM continues to refuse to pay Cinemark's claim and, therefore, has effectively denied its claim.

186. FM knowingly or recklessly failed to conduct a reasonable investigation of Cinemark's claim and, therefore, the basis for FM's denial is unreasonable.

187. In denying Cinemark's claim, FM knew its denial lacked any reasonable basis.

188. In denying Cinemark's claim, FM failed to faithfully apply its own Policy language, failed to conduct a reasonable investigation, and failed to consider the facts relevant to Cinemark's claim against the Policy language as interpreted by Texas law.

189. Because of FM's bad faith conduct, including its wrongful denial and inadequate claim investigation, Cinemark has suffered and continues to suffer significant damages.

VI. DECLARATORY JUDGMENT

190. Cinemark repeats and realleges the allegations in the preceding paragraphs.

191. Cinemark seeks a declaration of the parties' rights and duties under the Policy pursuant to Texas Civil Practice & Remedies Code § 37.003. A justiciable controversy exists

between Cinemark and FM concerning the availability of coverage under the Policy for Cinemark's claim.

192. The controversy between Cinemark and FM is ripe for judicial review.

193. Texas has adopted the Uniform Declaratory Judgment Act for purposes of declaring parties' right in this precise circumstance.

194. Accordingly, Cinemark seeks a declaration from the Court that:

- a. Each coverage provision identified herein is triggered by Cinemark's claim;
- b. No exclusion in the Policy applies to bar or limit coverage for Cinemark's claim;
- c. The Policy covers Cinemark's claim;
- d. FM violated the implied covenant of good faith and fair dealing;
- e. FM violated the Texas Insurance Code; and
- f. Any other declaratory relief that would be useful to the resolution of the dispute between the parties.

VII. BREACH OF CONTRACT (Property Damage)

195. Cinemark repeats and realleges the allegations in the preceding paragraphs.

196. The Policy is a valid and enforceable contract between Cinemark and FM.

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

198. COVID-19 has caused and is continuing to cause physical loss and/or damage to Cinemark's property.

199. No exclusions apply to bar coverage.

200. Cinemark is entitled to coverage for the physical loss and/or damage up to the Policy's \$500 million limit of liability or any applicable sublimits.

201. Cinemark has complied with all applicable Policy provisions, including paying premiums and providing timely notice of its claim.

202. To the extent Cinemark has not complied with a condition in the Policy, it is because the condition does not apply or FM waived it.

203. Nonetheless, FM unjustifiably refuses to pay for Cinemark's physical loss or damage in breach the Policy.

204. Cinemark has suffered and continues to suffer damages because of FM's breach of the Policy.

205. Cinemark is entitled to damages because of FM's breach of contract in an amount to be determined at trial, including pre- and post-judgment interest and any other costs and relief that this Court deems appropriate.

VIII. BREACH OF CONTRACT (Time Element)

206. Cinemark repeats and realleges the allegations in the preceding paragraphs.

207. The Policy is a valid and enforceable contract between Cinemark and FM.

208. In the Policy, FM agreed to cover Time Element loss, as provided in the Time Element Coverages, as a direct result of physical loss or damage of the type insured under the Policy.

209. COVID-19 has caused and, upon information and belief, is continuing to cause physical loss and/or damage to Cinemark's property and the property of others that has caused Cinemark to suffer Time Element loss.

210. No exclusions apply to bar coverage.

211. Cinemark is entitled to coverage for its Time Element loss related to COVID-19 up to the Policy's \$500 million limit of liability or any applicable sublimits.

212. Cinemark has complied with all applicable Policy provisions, including paying premiums and providing timely notice of its claim.

213. To the extent Cinemark has not complied with a condition in the Policy, it is because the condition does not apply or FM waived it.

214. Nonetheless, FM unjustifiably refuses to pay for these losses and expenses in breach the Policy.

215. Cinemark has suffered and continues to suffer damages because of FM's breach of the Policy.

216. Cinemark is entitled to damages because of FM's breach in an amount to be determined at trial, including pre- and post-judgment interest and any other costs and relief that this Court deems appropriate.

IX. BREACH OF CONTRACT (Time Element Extensions)

217. Cinemark repeats and realleges the allegations in the preceding paragraphs.

218. The Policy is a valid and enforceable contract between Cinemark and FM.

219. In the Policy, FM agreed to cover Time Element loss, as provided in the Time Element Coverage Extensions, as a direct result of physical loss or damage of the type insured under the Policy.

220. COVID-19 has caused and, upon information and belief, is continuing to cause physical loss and/or damage to Cinemark's property and the property of others that has caused Cinemark to suffer Time Element loss under the Policy's Time Element Coverage Extensions.

221. No exclusions apply to bar coverage.

222. Cinemark is entitled to coverage for its Time Element loss related to COVID-19 up to each Time Element Coverage Extension's limit of liability or any applicable sublimits.

223. Cinemark has complied with all applicable Policy provisions, including paying premiums and providing timely notice of its claim.

224. To the extent Cinemark has not complied with a condition in the Policy, it is because the condition does not apply or FM waived it.

225. Nonetheless, FM unjustifiably refuses to pay for these losses and expenses in breach the Policy.

226. Cinemark has suffered and continues to suffer damages because of FM's breach of the Policy.

227. Cinemark is entitled to damages because of FM's breach in an amount to be determined at trial, including pre- and post-judgment interest and any other costs and relief that this Court deems appropriate.

X. BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

228. Cinemark repeats and realleges the allegations in the preceding paragraphs.

229. FM denied Cinemark's claim for coverage under the Policy relating to its losses from COVID-19.

230. FM has a duty to Cinemark under the Policy's implied covenants of good faith and fair dealing.

231. FM's denial of Cinemark's claim lacks any reasonable basis.

232. FM failed to conduct a reasonable investigation of Cinemark's claim under the Policy and, therefore, FM's basis for its denial is unreasonable.

233. FM acted maliciously, intentionally, fraudulently, or with gross negligence in its failure to conduct a reasonable investigation of Cinemark's claim under the Policy.

234. FM employed a systematic "one-size-fits-all" approach to adjusting and denying coverage for all COVID-19 claims, including Cinemark's claim.

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

236. FM acted with reckless disregard as to the unreasonableness of its denial.

237. FM breached its duty of good faith and fair dealing by failing to reasonably investigate Cinemark's claim and provide coverage.

238. FM's denial of coverage constitutes bad faith.

239. As a result of FM's bad faith, Cinemark has suffered and is continuing to suffer damages.

240. Cinemark is entitled to an award of damages because of FM's bad faith in an amount to be determined at trial, including attorney's fees, pre- and post-judgment interest and any other costs and relief that this Court deems appropriate.

XI. VIOLATION OF THE TEXAS INSURANCE CODE

241. Cinemark repeats and realleges the allegations in the preceding paragraphs.

242. FM's wrongful conduct alleged above constitute unfair and deceptive acts and practices in the business of insurance, under Section 541.060 of the Texas Insurance Code ("Section 541.060").

243. FM's systemic practice of mischaracterizing the facts provided by policyholders in connection with claims for coverage for losses from COVID-19 constitutes an unfair or deceptive act or practice in the business of insurance pursuant to subdivisions (1), (2), (3), and (7) of Section 541.060.

244. FM's systemic practice of attempting to influence and direct policyholders' claims for coverage for losses from COVID-19 to the On-Site Sublimited Communicable Disease Coverages constitutes an unfair or deceptive act or practice in the business of insurance pursuant to subdivisions (1), (2), and (7) of Section 541.060.

245. FM's use of the FM Talking Points with pre-determined coverage conclusions for COVID-19 claims without consideration of the particular facts or applicable law constitutes an unfair or deceptive act or practice in the business of insurance pursuant to subdivisions (1), (2), and (7) of Section 541.060. FM's use of the FM Talking Points designed to coach its claim adjusters to steer the policyholder to the On-Site Sublimited Communicable Disease Coverages also constitutes an unfair or deceptive act or practice in the business of insurance pursuant to subdivisions (1), (2), and (7) of Section 541.060.

246. FM's systemic practice and policy of denying coverage for COVID-19 without conducting an adequate investigation of the facts and the applicable law constitutes an unfair or deceptive act or practice in the business of insurance pursuant to subdivisions (1), (2), and (7) of Section 541.060.

247. FM has failed to adopt and implement reasonable standards for the prompt investigation and processing of COVID-19 claims, which constitutes a violation of subdivisions (2), (3), and (4) of Section 541.060.

248. FM's systemic practices and procedures of restricting recovery to the limited coverage available for communicable disease compelled Cinemark to institute this litigation to recover amounts due under the Policy. FM's acts constitute a violation of subdivisions (2) and (7) of Section 541.060.

249. As a result of FM's unfair or deceptive acts or practices, Cinemark has suffered and is continuing to suffer damages.

250. Cinemark is entitled to an award of damages because of FM's unfair or deceptive acts or practices in an amount to be determined at trial, including attorney's fees, pre- and post-judgment interest and any other costs and relief that this Court deems appropriate.

XII. CONDITIONS PRECEDENT

251. All conditions precedent to the filing of this lawsuit have been performed or have occurred.

XIII. JURY DEMAND

252. Cinemark requests a trial by jury on all issues raised in this petition or by supplemental or amended pleading, and contemporaneous with this filing has tendered the necessary jury fee.

XIV. REQUEST FOR DISCLOSURES

253. Pursuant to Texas Rule of Civil Procedure 194, Cinemark requests that FM disclose, within 50 days of the service of this request, the information or material described in Rule 194.2.

PRAYER

WHEREFORE, Cinemark demands a jury trial on all issues so triable and respectfully prays for judgment in its favor and against FM. Cinemark further prays that, upon final hearing:

- a. Cinemark be awarded a judgment declaring that:
 1. Each of the coverage provisions identified herein is triggered by Cinemark's claim;
 2. No exclusion in the Policy applies to bar or limit coverage for Cinemark's claim;
 3. FM has breached the Policy by failing to pay Cinemark claim;
 4. FM violated the implied covenant of good faith and fair dealing;
 5. FM violated Section 541.060 of the Texas Insurance Code; and
 6. Any other declaratory relief that would be useful to the resolution of the dispute between the parties;

- b. Cinemark be awarded its damages resulting from FM's breach of the Policy, including pre-judgment and post-judgment interest;
- c. Cinemark be awarded punitive and exemplary damages resulting from FM's breach of good faith and fair dealing;
- d. Cinemark be awarded treble damages as permitted under the Texas Insurance Code;
- e. Cinemark be awarded an order enjoining FM's improper denial of benefits under the Policy;
- f. Cinemark be awarded its reasonable and necessary attorneys' fees and court costs; and
- g. Cinemark be awarded such other and further relief, general or special, at law or in equity, to which it may be justly entitled.

Respectfully submitted,

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**Attorneys for Cinemark Holdings,
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** Pro hac vice applications to be
filed.*