

IN THE CHANCERY COURT
FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

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FORM

AVENUE DINER, LLC, HARRY O'S
STEAKHOUSE, LLC d/b/a KID
ROCK'S BIG ASS HONKY TONK
STEAKHOUSE, TOOTSIE'S
ENTERTAINMENT, LLC,
HTDG, LLC d/b/a HONKY TONK
CENTRAL, RSF INVESTORS, LLC,
and TOOTSIE'S PANAMA CITY, LLC,

Plaintiffs,

v.

SELECTIVE INSURANCE COMPANY
OF THE SOUTHEAST, MAXUM
INDEMNITY COMPANY, ABBM
COMPANY, LLC d/b/a ANDERSON
BENSON INSURANCE & RISK
MANAGEMENT, and AmWINS
ACCESS INS. SERVICES, LLC

Defendants.

No. 21-0124-III
JURY DEMAND

COMPLAINT

Plaintiffs, Avenue Diner, LLC ("Avenue Diner"), Harry O's Steakhouse, LLC d/b/a Kid Rock's Big Ass Honky Tonk Steakhouse ("Harry O's"), Tootsie's Entertainment, LLC ("Tootsie's"), HTDG, LLC d/b/a Honky Tonk Central ("HTDG"), and RSF Investors, LLC ("Rippy's") (collectively "the Nashville Plaintiffs"), and Tootsie's Panama City, LLC ("Tootsie's PC") (all collectively "Plaintiffs"), for their Complaint against Selective Insurance Company of The Southeast ("Selective"), Maxum Indemnity Company ("Maxum"), ABBM Company, LLC d/b/a Anderson Benson Insurance & Risk Management ("ABBM") and AmWINS ACCESS Ins. Services, LLC ("AmWINS") (collectively the "Defendants"), allege as follows:

I. PARTIES

1. The Nashville Plaintiffs are the owners and operators of restaurants and bars in Nashville, Tennessee which have been forced, by recent orders issued by the City of Nashville ("City") and the State of Tennessee ("State"), to lose the use and functionality of portions of their properties and to cease and/or curtail their operations as part of the efforts by the City and State to address the COVID-19 crisis. The suspension of operations and limitations upon the use and functionality of the Nashville Plaintiffs' properties mandated by these orders presents a threat to the survival of small local businesses such as the Nashville Plaintiffs.

2. Avenue Diner is a Tennessee Limited Liability Company operating as a restaurant and bar at 200 3rd Avenue South, Nashville, Tennessee 37201.

3. Harry O's is a Tennessee Limited Liability Company operating as a restaurant and bar at 217 and 221 Broadway, Nashville, Tennessee 37201.

4. Tootsie's is a Tennessee Limited Liability Company operating as bar at 422 Broadway, Nashville, Tennessee 37203.

5. HTDG is a Tennessee Limited Liability Company operating as a restaurant and bar at 329 Broadway, Nashville, Tennessee 37201.

6. RSF is a Tennessee Limited Liability Company operating as a restaurant and bar at 425 – 429 Broadway, Nashville, Tennessee 37203.

7. Tootsie's PC is a Tennessee Limited Liability Company which owns and operates a restaurant and bar at 700 Pier Park Drive in Panama City Beach, Florida 32413, which has been forced, by recent orders issued by the State of Florida ("Florida"), to lose the use of portions of its properties, lose functionality of the property and to cease

and/or curtail its operations as part of the efforts by the State of Florida to address the COVID-19 crisis. The suspension of operations and limitations upon the use and functionality of Tootsie's PC properties mandated by these orders and COVID-19 presents a threat to the survival of small local businesses such as Tootsie's PC.

8. To protect their business from situations like these, which threaten their livelihood based on factors wholly outside of their control, Plaintiffs obtained business property damage and business interruption insurance (also called business income or "income coverage") from Defendants through insurance brokers and producers, as more specifically set forth below.

9. Selective issued policies to the Nashville Plaintiffs which were in effect when the losses described herein took place. The Nashville Plaintiffs submitted timely claims for insurance coverage under the policies, and Selective has denied the Nashville Plaintiffs' claims arising from the property damage and business interruption created by the governmental response to State and City to the COVID-19 crisis. Selective may be served through its statutory agent for service of process, the Tennessee Department of Commerce & Insurance, 500 James Robertson Pkwy., Nashville, TN 37243.

10. Maxum issued policies to Tootsie's PC which were in effect when the losses described herein took place. Tootsie's PC submitted timely claims for insurance coverage under the policies, and Maxum has denied Tootsie's PC's claims arising from the property damage and business interruption created by the governmental response to the COVID-19 crisis. Form the City of Panama and the State of Florida. Maxum may be served through its designated agent for service of process, the Tennessee Department of Commerce & Insurance, 500 James Robertson Pkwy., Nashville, TN 37243 and/or C/O

Florida Chief Financial Officer as RA, Service of Process Statio, P.O. Box 6200, Tallahassee, FL 32314-6200.

11. The Nashville Plaintiffs obtained the Selective policies discussed herein through ABBM, which operates as an insurance agent/broker, with a principal place of business located at 3322 West End Avenue, Suite 500, Nashville, Tennessee 37203. ABBM may be served through its agent for service for process, CT Corporation System, 300 Montvue Road, Knoxville, Tennessee 37919-5546.

12. Tootsie's PC obtained the Maxum policy discussed herein through ABBM and AmWINS, which operates as an insurance agent/broker, with a principal place of business at 1 Gresham Landing, Stockbridge, Georgia, 30281, but doing business under the name AmWINS ACCESS Ins. Services, LLC (Nashville, TN). AmWINS may be served through its agent for service for process, James Anthony Gresham, AmWINS ACCESS Ins. Services, LLC, 1 Gresham Landing, Stockbridge, Georgia, 30281.

II. VENUE AND JURISDICTION

13. This action is brought pursuant to T.C.A. §§ 29-14-102 and 29-14-103, and the request of the Plaintiffs that this Court issue a declaration as to the rights, status, and legal relationships between them and the Defendants, as established by the insurance policies, at issue in this matter (discussed in more detail below) and also award monetary damages for claims denied by Selective and Maxum based upon the failure of ABBM and AmWins to procure coverage to protect the Plaintiffs from risks known at the time of the renewals of policy coverage.

14. Selective issued the following policies which were in effect at the time of the losses referenced herein:

- a. Policy S 2373417 issued to Avenue Diner for the policy period of February 14, 2020 through February 14, 2021 (a true and exact copy of which is attached as Exhibit A);
- b. Policy S 2404744 issued to Harry O's for the policy period of August 27, 2019 through October 2, 2020 (a true and exact copy of which is attached as Exhibit B);
- c. Policy S 2372125 issued to Tootsie's for the policy period of February 14, 2020 through February 14, 2021 (a true and exact copy of which is attached as Exhibit C);
- d. Policy S 2339699 issued to HTDG for the policy period of February 14, 2020 through February 14, 2021 (a true and exact copy of which is attached as Exhibit D); and
- e. Policy S2372126 issued to Rippy's for the policy period of February 14, 2020 through February 14, 2021 (a true and exact copy of which is attached as Exhibit E).

These policies were issued to the Nashville Plaintiffs covering risks of loss at the locations of operations set forth above. A claim against each of these policies has been submitted to Selective resulting from damage at each of these operating locations. Selective has denied all claims for insurance benefits.

15. Maxum issued Policy BDG-0134108-02 to Tootsie's Panama City, LLC at its address of 5484 Lickton Pike, Goodlettsville, TN 37072 covering the operations of Tootsie's PC for the policy period of February 14, 2020 through February 14, 2021 (a true and exact copy of which is attached as Exhibit F). A claim against this policy has been

submitted to Maxum resulting from damage at Tootsie's PC's operating location, and Maxum has denied all claims for insurance benefits.

16. ABBM and AmWINS placed each of the above-referenced insurance policies for the Plaintiffs by dealing with representatives of the Plaintiffs in the State of Tennessee, and within this Judicial District.

17. Accordingly, venue is proper in this Court Venue because, among other things, the defendants procured or issued policies of insurance to plaintiffs in this County and/or properties located in this County. and because all or part of plaintiffs' claims for relief arose in this County. This Honorable Court has jurisdiction over the subject matter and parties herein.

III. FACTS

18. On and before February 2019, the Nashville Plaintiffs relied upon ABBM to understand, evaluate and meet their needs for insurance coverage on the properties addressing risks of loss that could be covered by insurance. By virtue of its review of prior policies and of meetings with the Nashville Plaintiffs, ABBM knew of the needs of the Nashville Plaintiffs for insurance coverage for losses to the property and for interruption of business operations.

19. On and before February 2019, Tootsie's PC relied upon ABBM and AmWINS to understand, evaluate and meet its needs for insurance coverage on the property addressing risks of loss that could be covered by insurance. By virtue of its review of prior policies and of meetings with representatives of Tootsie's PC, ABBM and AmWINS knew of the needs of Tootsie's PC for insurance coverage for losses to the property and for interruption of business operations.

20. In late December 2019, Wuhan Municipal Health Commission, China, reported a cluster of cases of pneumonia in Wuhan, Hubei Province. A novel coronavirus was identified, which became commonly known as COVID-19.

21. On or about January 5, 2020, the World Health Organization published its first Disease Outbreak News on COVID-19. This is a flagship technical publication to the scientific and public health community as well as global media which contained a risk assessment and advice and reported on what China had told the organization about the status of patients and the public health response on the cluster of pneumonia cases in Wuhan.

22. On or before January 28, 2020, person to person transmission of COVID-19 was reported.

23. On or before February 3, 2020, the World Health Organization released the international community's Strategic Preparedness and Response Plan to help protect states with weaker health systems.

24. In addition to this specialized knowledge, news media reports of the COVID-19 issues began to appear in the mainstream media in the United States prior to February 14, 2020.

25. Further, the United States Department of Health and Human Services declared a public health emergency for the United States due to COVID-19 on January 31, 2020.

26. By February 7, 2020, returning traveler monitoring had been implemented in many jurisdictions, including Tennessee.

27. The COVID-19 concerns set forth above, and others, were known to ABBM and AmWINS prior to February 14, 2020, when the policies of insurance covering the operating properties set forth herein renewed. ABBM and Maxum were also aware that the policies of insurance referenced herein contained exclusions applicable to losses caused by virus, but also knew or should have known that some insurance carriers offered policies which did not contain an exclusion specifically applicable to loss or damage caused by virus. Despite their knowledge of the insurance needs of the Plaintiffs, neither ABBM nor AmWINS sought to place insurance coverage with any insurance carrier which offered policies not containing a virus exclusion, nor did they market the policies for renewal to any carrier offering coverage for specific losses arising from virus exposure. In fact, there was no mention of the risks to insurability due to COVID-19 from either ABBM or AmWINS to the Plaintiffs when the above-referenced policies were renewed, even though they knew of the worsening impact of the COVID-19 virus.

28. Business interruption insurance (also known as "business income insurance" or "BI insurance" or "Income Coverage") is a type of insurance that covers the loss of income that a business suffers after certain fortuitous events or disasters. Property casualty insurance differs from BI insurance in that property casualty insurance generally only covers physical loss or physical damage to specific "covered property," typically structures and personal property identified in the policy, while BI insurance covers profits that would have been earned by the business but for the fact that it was required to suspend business operations.

29. Broadly speaking, business owners that purchase business interruption coverage have a reasonable expectation that the coverage would apply if they are

forced to suspend business operations as a result of an unforeseen, fortuitous event, such as a forced government shutdown or interruption of their business, as a result of a pandemic (e.g., COVID-19) or other large-scale disaster. Indeed, it is hard to imagine a more unforeseen, fortuitous event than the government orders imposing limitations upon the use, functionality and occupancy of private property without due process of law, such as has occurred throughout virtually the entire country as a result of the COVID-19 pandemic. After faithfully paying high premiums for business interruption coverage for years, owners of restaurants and bars (such as the Plaintiffs herein) forced to lose the use of their business property as a result of government ordered shutdowns have a reasonable expectation that this coverage would apply and protect them in such circumstances.

30. Nonetheless, even though many business interruption policies expressly cover such an event and/or could reasonably be interpreted as providing such coverage, insurance companies have routinely and universally denied claims submitted by businesses for business interruption coverage during the COVID-19 public health crisis, falsely asserting in many cases that no coverage exists unless there is physical damage to tangible property at the insured location (e.g., the structure of the building in which the business operates or related personal property) and/or that the loss is excluded in the event due to the virus exclusions contained in policies of insurance. To the contrary, in many cases (including this matter), the applicable policy provisions do not require physical damage to any specific, tangible property, and in many cases, the exclusions relied upon by the insurer are not applicable and/or could be reasonably construed as not being applicable.

31. On or about March 15, 2020, during the term of the policies issued by Selective to the Nashville Plaintiffs, and pursuant to a Declaration of Public Health Emergency adopted by the Board of Health for Nashville and Davidson County, the Chief Medical Director for the Metro Public Health Department issued an Order that limited Plaintiffs and other restaurants to “half the capacity specified” in its “food service establishment permit” effective March 17, 2020. On March 20, 2020 that Order was amended to prohibit Plaintiff and all other restaurants from “allow[ing] customers to consume food or beverage on the premises until further notice,” effective that same day (Metro Order, as amended, attached hereto as Exhibit G). These orders resulted in the loss of use of the Nashville Plaintiffs property.

32. On or around April 1, 2020, and effective beginning April 2, 2020, during the term of the policies issued by Selective to the Nashville Plaintiffs, the Metro Health Department of Nashville/Davidson County issued a “Safer At Home Order” closing all dine-in restaurant operations in an effort to mitigate the impact of COVID-19, to bend the curve of new infections and to disrupt the spread of the virus, with the goal of saving lives and reducing strain on local healthcare resources (“Safer At Home Order,” as amended attached hereto as Exhibit H). The Safer At Home Order remained in effect until the Metropolitan Government of Nashville/Davidson County instituted as phase plan, which allowed restaurants and bars to use more of their property as each phase was implemented. As of the date of filing of this Complaint, the Nashville Plaintiffs remain unable to use all of their property, thus sustaining continue loss of use.

33. On or about March 22, 2020, during the term of the policies issued by

Selective to the Nashville Plaintiffs, Tennessee Governor Bill Lee issued Executive Order No. 17 that prohibited persons in the State from eating or drinking onsite at restaurants, bars, or other similar food or drink establishments. Although that Order was amended for most parts of the State by Executive Order No. 29 issued on April 24, 2020 (and effective April 27, 2020), it specifically did not apply to Nashville or Davidson County. On or about March 30, 2020, during the term of the policies issued by Defendants to Plaintiffs, Tennessee Governor Bill Lee issued Executive Order #22 which ordered all Tennesseans to stay home unless otherwise engaged in an enumerated essential service/activity to avoid exposure to and the spread of COVID-19. (Said Order and its extension by Executive Order #22 are attached hereto as Exhibit I).

34. On March 17, 2020, during the term of the policy issued by Maxum to Tootsie's PC, Florida Governor Ron DeSantis ordered all bars and restaurants in the state of Florida, including Tootsie's PC, to close for 30 days in response to the COVID-19 pandemic. This governmental suspension and closure of business had a devastating effect on Tootsie's PC's business and resulted in the loss of use of Tootsie's PC's property. On April 1, 2020, Governor DeSantis further ordered a state-wide "stay at home" order for the entire state of Florida in response to the COVID-19 pandemic for an additional 30 days, which further harmed Tootsie's PC's business. Since that time, Governor Ron DeSantis has implemented a phased approach to reopening, that has not yet resulted in Tootsie's PC being able to use all of its property. (See March 17, 2020 Executive Order attached hereto as Exhibit J).

35. These State and City Orders are hereinafter collectively referred to as the "Loss of Use Orders." The Loss of Use Orders have been modified from time to time,

but the Plaintiffs have remained under their restrictions.

36. As a result of the Loss of Use Orders, Plaintiffs have been forced to halt ordinary operations and use and functionality of their properties, resulting in substantial lost revenues and forcing the Plaintiffs to stop scheduling employees for work, resulting in most leaving the employment of the Plaintiffs.

37. The Nashville Plaintiffs submitted claims to Selective seeking coverage under the above-referenced policies. Despite Selective's express promise in its policies to cover their insureds' business interruption losses and loss of use, Selective began issuing blanket denials to the Nashville Plaintiffs for any losses related to the Loss of Use Orders without first conducting any meaningful coverage investigation, let alone a "reasonable investigation based on all available information" as required under Tennessee law.

38. Selective denied the Nashville Plaintiffs' claims by letters dated April 10, 2020, and April 16, 2020. See Denial Letters attached hereto as Collective Exhibit K.

39. Tootsie's PC submitted claims to Maxum seeking coverage under the above-referenced policy. Despite Maxum's express promise in its policies to cover their insureds' business interruption losses and claims for property damage, which include loss of use, Maxum denied coverage to Tootsie's PC for any losses related to the Loss of Use Orders without first conducting any meaningful coverage investigation, let alone a "reasonable investigation based on all available information" as required under Tennessee law.

40. Maxum denied Tootsie's PC's claim by letters.

41. The denials of Selective and Maxum were based, at least in part, upon an improper reading of their own policies, as well as the presence of the virus exclusion in each of the policies. Neither Selective nor Maxim conducted a good faith or “best practices” investigation into the claims made by the Plaintiffs.

42. The physical closing and/or inability of Plaintiffs to use their properties constitutes a physical loss so as to entitle it to coverage under the policy. None of Plaintiffs’ Insured Premises were limited in use because of the known or confirmed presence of SARS-CoV-2 or COVID 19 at any of the Insured Premises or Locations.

43. Unbeknownst to the Plaintiffs, but well known to the defendants, and specifically ABBM and AmWINS, many commercial property policies are available in the market which did not include an exclusion for loss caused by a virus.

44. ABBM and AmWINS knew or should have known that insurance being procured for the Plaintiffs would provide more benefit to the Plaintiffs, in light of their restaurant and bar operations, without a virus exclusion. However, ABBM and AmWINS placed coverage for the Plaintiffs with insurance carriers whose policies contained these virus exclusions. More amazingly, ABBM and AmWINS renewed coverage with Selective and Maxum after the COVID-19 virus had become a matter of concern in the insurance industry, and neither sought coverage from insurance carriers whose policies did not contain the virus exclusion, nor did they advise the Plaintiffs of the options available for obtaining coverage without the virus exclusion. Thus, Plaintiffs reasonably expected that the insurance they purchased from and through the Defendants would include coverage for property damage and business interruption losses under the circumstances set forth herein.

45. The fact that Selective and Maxum utilize specific exclusions for pandemic-related losses undermines their assertion that losses resulting from a virus, like COVID-19, does not cause “physical loss or damage” to property. Indeed, if a virus could never result in a “physical loss” to property, there would be no need for such an exclusion.

46. The denial letters issued by Selective and Maxum are arbitrary and unreasonable, and inconsistent with the facts and plain language of the issued policies. These denials appear to be driven by Defendants’ desire to preempt their own financial exposure to the economic fallout resulting from the COVID-19 crisis, rather than to honor the contractual obligations to the Plaintiffs.

47. As a result of acts and omissions set forth herein, Plaintiffs file this action for a declaratory judgment and monetary damages asserting they are entitled to receive the benefit of the insurance coverage they purchased from Selective and Maxum, for indemnification of the business losses and extra expenses they have sustained, for breach of contract, and for punitive damages. In the alternative, if it should be determined that the virus exclusions apply to exclude coverage for the Plaintiffs’ claims, then recovery is sought against ABBM and AmWINS based upon their failure to procure insurance to meet the insurable needs of the Plaintiffs, and to move the coverages to insurers whose policies did not contain the virus exclusions when the policies were up for renewal after the COVID-19 crisis began to emerge.

IV. THE COVERAGE AFFORDED BY THE POLICIES

48. In exchange for substantial premiums, Selective sold commercial property insurance policies promising to indemnify the Nashville Plaintiffs for the following losses:

“We” cover direct physical loss to covered property at a “covered location” caused by a covered peril.

49. The claims presented to Selective as described herein all asserted claims of direct physical loss to covered property at "covered locations," as that term was defined by the policy.

50. The Selective policies provided as follows:

PERILS COVERED

"We" cover risks of direct physical loss unless the loss is limited or caused by a peril that is excluded.

As explained above, the Nashville Plaintiffs have sustained a direct physical loss of use and functionality of their properties.

51. The Selective policies included the following exclusion, upon which Selective improperly relied in denying coverage to the Nashville Plaintiffs:

VIRUS OR BACTERIA EXCLUSION

AAIS
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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ THIS CAREFULLY.

DEFINITIONS

Definitions Amended –

When 'fungus' is a defined 'term', the definition of 'fungus' is amended to delete reference to a bacterium.

When 'fungus or related perils' is a defined 'term', the definition of 'fungus or related perils' is amended to delete reference to a bacterium.

PERILS EXCLUDED

The additional exclusion set forth below applies to all coverages, coverage extensions, supplemental coverages, optional coverages, and endorsements that are provided by the policy to which this endorsement is attached, including, but not limited to, those that provide coverage for property, earnings, extra expense, or interruption by civil authority.

1. The following exclusion is added under Perils Excluded, Item 1.:

Virus or Bacteria –

'We' do not pay for loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress.

This exclusion applies to, but is not limited to, any loss, cost, or expense s a result of:

- a. Any contamination by any virus, bacterium, or other microorganism; or
 - b. Any denial or access to property because of any virus, bacterium, or other microorganism.
2. **Superseded Exclusions** – The Virus or Bacteria exclusion set forth by this endorsement supersedes the 'terms' of any other exclusions referring to 'pollutants' or to contamination with respect to any loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress.

OTHER CONDITIONS

Other Terms Remain in Effect –

The 'terms' of this endorsement, whether or not applicable to any loss, cost, or expense, cannot be construed to provide coverage for a loss, cost, or expense that would otherwise be excluded under the policy to which this endorsement is attached.

52. None of the Nashville Plaintiffs' Insured Premises were limited in use because of the known or confirmed presence of SARS-CoV-2 or COVID 19 at any of the Insured Premises or Locations. The exclusion does not apply because the loss of use was not caused by or the result of COVID-19.

53. The Selective policies also included "Income Coverage" for Earnings/"Rents"/Extra Expense, as follows:

1. Covered Property —

a. Covered Location — "We" provide the coverages described below during the "restoration period" when "your" "business" is necessarily wholly or partially interrupted by direct physical loss of or damage to building property or business personal property as a result of a covered peril. This coverage applies only when the loss to building property or business personal property is at a "covered location".

54. This coverage includes coverage for a partial interruption of the business operations caused by physical loss of or damage to a covered location. As set forth above, the Nashville Plaintiffs sustained a loss of use at functionality of the properties identified as the "covered locations."

55. Thus, coverage is afforded for the following:

a. Earnings — If coverage for Earnings is indicated on the "schedule of coverages", "we" cover "your" actual loss of net income (net profit or loss before income taxes) that would have been earned or incurred and continuing operating expenses normally incurred by "your" "business", including but not limited to payroll expense.

b. Extra Expense — If coverage for Extra Expense is indicated on the "schedule of coverages", "we" cover only the extra expenses that are necessary during the

"restoration period" that "you" would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a covered peril.

56. All losses of earnings and all extra expenses incurred are as a result of the Nashville Plaintiffs sustaining a loss of use at functionality of the properties identified as the "covered locations. The Nashville Plaintiffs have sustained a loss of earnings and extra expense loss in the approximate amount of \$75 Million Dollars, as of the date of filing of this Complaint.

57. The terms and phrases "physical loss of," "damage to" and "building property" as used in the Selective Coverage are not defined in the Selective Policies. The "Income Coverage" contains no requirement that the buildings, structures and/or personal property or that any tangible or "covered property" at the Insured Locations sustain actual physical loss or physical damage.

58. The specific phrase "physical loss of or damage to property" found in the Policy and similar phrases have been found by courts across the country to not require the existence of actual physical damage to tangible property at an insured's premises and/or have been found to be ambiguous. See, e.g., Essex Ins. Co. v. BloomSouth Flooring Corp., 562 F.3d 399 (1st Cir. 2009) (copy attached) (and cases cited therein) (allegation that an unwanted odor permeated building and resulted in a loss of use of the building are reasonably susceptible to an interpretation that "physical injury" to property has been claimed); Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am., D.N.J. No. 2:12-cv-04418, 2014 U.S. Dist. LEXIS 165232 (Nov. 25, 2014) (and cases cited there in) (copy attached) (ammonia discharge inflicted "direct physical loss of or damage to" packaging facility even in the absence of any structural or physical damage to facility itself); W. Fire Ins. Co. v. First Presbyterian Church, 165 Colo. 34,437 P.2d 52 (Colo.

1968) (copy attached) (dismissing the concept that physical damage could only occur if "some tangible injury to the physical structure itself could be detected"); Matzner v. Seaco Ins. Co., Mass.Super, No. 96-0498-B, 1988 Mass . Super. LEXIS 407 (Aug. 26, 1998) (and cases cited therein) (copy attached) (finding the phrase "direct physical loss or damage" to be ambiguous, and interpreting it to include a loss of use resulting from contamination by carbon monoxide).

59. Webster' s Dictionary defines "physical" as follows: "of or pertaining to that which is material."

60. Webster's Dictionary de fines "loss" as follows: "detriment, disadvantage or deprivation from failure to keep, have or get; something that is lost *** the state of being deprived of or being without something one has had."

61. Webster's Dictionary defines "damage" as follows: "injury or harm that reduces value or usefulness ."

62. Webster's Dictionary defines "property" as including intangible property (e.g., right to use or occupy land pursuant to a lease or otherwise): "that which a person owns; the possession or possessions of a particular owner; goods, land, etc. considered as possessions; a piece of land or real estate; *ownership, right of possession, enjoyment or disposal of anything*, esp. of something tangible; something at the disposal of a person." (Emphasis added.)

63. As a direct result of the Loss of Use Orders, the Nashville Plaintiffs' businesses have suffered a loss of "earnings" (in addition to extra expense) due to a partial interruption of their businesses caused by "physical loss of or damage to property" and directly caused by a "covered cause of loss." Plaintiffs' loss has clearly and

unambiguously been caused by (a) a material deprivation of something Plaintiffs had and/or (b) an injury or harm that has reduced the value or usefulness of property -- e.g., the Insured Locations and/or the right to use/access the Insured Locations.

64. Moreover, as a direct result of the Loss of Use Orders, the Nashville Plaintiffs' businesses have suffered a loss of "earnings" (in addition to extra expense) due to a partial interruption of their businesses caused by "physical loss of or damage to property" and caused by orders of civil authorities prohibiting access to the locations. The Loss of Use Orders result from civil authorities' response to direct physical loss or damage to property. The loss or damage was directly caused by a "covered cause of loss."

65. Selective could have easily drafted the Policy language to limit coverage to physical or structural alteration/damage to tangible property. Instead, it chose the language "direct physical loss of or damage to property." The policies do not state that "direct physical loss of or damage to property" required physical alteration or structural damage to any property at the Insured Location.

66. The Income Coverage provisions of the Selective policies were also subject to extensions, one of which provided:

INCOME COVERAGE EXTENSIONS

The following Income Coverage Extensions indicate an applicable 'limit' or limitation. This 'limit' or limitation may also be shown on the 'schedule of coverages'. If a different 'limit' or limitation is indicated on the 'schedule of coverage', that 'limit' or limitation will apply instead of the 'limit' or limitation shown below.

The following Income Coverage Extensions are part of and not in addition to the applicable Income Coverage 'limit'.

- 1. Interruption by Civil Authority** – 'We' extend 'your' coverage for earnings and extra expense to include loss sustained while access to 'covered locations' or a 'dependent location' is specifically denied

by an order of civil authority. This order must be a result of direct physical loss of or damage to property, other than at a 'covered location' and must be caused by a covered peril. Unless otherwise indicated on the 'schedule of coverages', this Income Coverage Extension is limited to 30 consecutive days from the date of the order.

67. In exchange for substantial premiums, Maxum sold commercial property insurance policies promising to indemnify Tootsie's PC for the following losses:

"We" will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

68. The claims presented to Maxum as described herein all asserted claims of direct physical loss of or damage to covered property at Tootsie's PC business in Panama City, which is the premises described in the Declarations.

69. The Maxum policy provided as follows:

A. Covered Causes Of Loss

When Special is shown in the Declarations, Covered Causes of Loss means Risks Of Direct Physical Loss unless the loss is:

1. Excluded in Section B., Exclusions; or
2. Limited in Section C., Limitations;

that follow.

As explained above, Tootsie's PC has sustained a direct physical loss of use and functionality of their properties.

70. The Maxum policy contained the following exclusion, which Maxum improperly relied upon in denying coverage:

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART STANDARD
PROPERTY POLICY

A. The exclusion set forth in Paragraph **B.** applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

However, this exclusion does not apply to loss or damage caused by or resulting from "fungus", wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.

C. With respect to any loss or damage subject to the exclusion in Paragraph **B.**, such exclusion supersedes any exclusion relating to 'pollutants'.

D. The following provisions in this Coverage Part or Policy are hereby amended to remove reference to bacteria:

1. Exclusion of 'Fungus', Wet Rot, Dry Rot And Bacteria; and
2. Additional Coverage – Limited Coverage for 'Fungus', Wet Rot, Dry Rot And Bacteria, including any endorsement increasing the scope or amount of coverage.

E. The terms of the exclusion in Paragraph **B.**, or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.

71. Tootsie' PC's loss of use of the property was not because of the known or confirmed presence of SARS-CoV-2 or COVID 19 at any of the Insured Premises or

Locations. The exclusion does not apply because the loss of use was not caused by or the result of COVID-19.

72. In addition to property damage losses, Maxum also agreed to “pay for the actual loss of Business Income” sustained by Tootsie’s PC “due to the necessary ‘suspension’” of its operations during the period of business interruption caused by “by direct physical loss of or damage” to the insured’s premises.

73. With respect to business income and extra expense losses, “suspension” means: a. “The slowdown or cessation of your business activities”; or b. “That a part or all of the described premises is rendered untenable, if coverage for Business Income including ‘Rental Value’ or ‘Rental Value’ applies [sic].”

74. “Business Income” is defined in relevant part under the Maxum Policy as “Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred” and “Continuing normal operating expenses incurred, including payroll.”

75. The terms and phrases “physical loss of,” “damage to” and “building property” as used in the Maxum Policy is not defined in the Maxum Policy. The “Business Income Coverage” contains no requirement that the buildings, structures and/or personal property or that any tangible or “covered property” at the Insured Locations sustain actual physical loss or physical damage.

76. The specific phrase “physical loss of or damage to property” found in the Maxum Policy and similar phrases have been found by courts across the country to not require the existence of actual physical damage to tangible property at an insured’s premises and/or have been found to be ambiguous. See, e.g., Essex Ins. Co. v. BloomSouth Flooring Corp., 562 F.3d 399 (1st Cir. 2009) (copy attached) (and cases cited

therein) (allegation that an unwanted odor permeated building and resulted in a loss of use of the building are reasonably susceptible to an interpretation that "physical injury" to property has been claimed); Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am., D.N.J. No. 2:12-cv-04418, 2014 U.S. Dist. LEXIS 165232 (Nov. 25, 2014) (copy attached) (and cases cited there in) (ammonia discharge inflicted "direct physical loss of or damage to" packaging facility even in the absence of any structural or physical damage to facility itself); W. Fire Ins. Co. v. First Presbyterian Church, 165 Colo. 34,437 P.2d 52 (Colo. 1968) (copy attached) (dismissing the concept that physical damage could only occur if "some tangible injury to the physical structure itself could be detected"); Matzner v. Seaco Ins. Co., Mass.Super, No. 96-0498-B, 1988 Mass. Super. LEXIS 407 (Aug. 26, 1998) (copy attached) (and cases cited therein) (finding the phrase "direct physical loss or damage" to be ambiguous, and interpreting it to include a loss of use resulting from contamination by carbon monoxide).

77. Webster' s Dictionary defines "physical" as follows: "of or pertaining to that which is material."

78. Webster's Dictionary de fines "loss" as follows: "detriment, disadvantage or deprivation from failure to keep, have or get; something that is lost *** the state of being deprived of or being without something one has had."

79. Webster's Dictionary defines "damage" as follows: "injury or harm that reduces value or usefulness ."

80. Webster's Dictionary defines "property" as including intangible property (e.g., right to use or occupy land pursuant to a lease or otherwise): "that which a person owns; the possession or possessions of a particular owner; goods, land, etc. considered

as possessions; a piece of land or real estate; *ownership, right of possession, enjoyment or disposal of anything*, esp. of something tangible; something at the disposal of a person." (Emphasis added.)

81. As a direct result of the Loss of Use Orders, Tootsie's PC has suffered a business income loss (in addition to extra expense) due to the slowdown of its businesses caused by "physical loss of or damage to property" and directly caused by a "covered cause of loss." Plaintiffs' loss has clearly and unambiguously been caused by (a) a material deprivation of something Plaintiffs had and/or (b) an injury or harm that has reduced the value or usefulness of property -- e.g., the Insured Locations and/or the right to use/access the Insured Locations.

82. Maxum could have easily drafted the Policy language to limit coverage to physical or structural alteration/damage to tangible property. Instead, it chose the language "direct physical loss of or damage to property." The policy does not state that "direct physical loss of or damage to property" required physical alteration or structural damage to any property at the Insured Premises.

83. Maxum also promised to pay necessary expenses Tootsie's PC incurred during the period of restoration that it "would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss."

84. "Extra Expense" is defined in relevant part under the Maxum Policy as any expense incurred to (1) "Avoid or minimize the 'suspension' of business and to continue operations at the described premises"; (2) "Minimize the 'suspension' of business if you

[Plaintiff] cannot continue 'operations'"; or (3) "repair or replace property" if it reduces the amount otherwise payable.

85. The Maxum Policy also includes "Civil Authority" coverage, pursuant to which Maxum promised to pay for the loss of Business Income and necessary Extra Expense sustained by Tootsie's PC "caused by action of civil authority that prohibits access" to its insured premises.

86. As a direct result of the Loss of Use Orders, Tootsie's PC has suffered a business income loss (in addition to extra expense) due to a partial interruption of their businesses caused by "physical loss of or damage to property" and caused by orders of civil authorities prohibiting access to the locations. The Loss of Use Orders result from civil authorities' response to direct physical loss or damage to property. The loss or damage was directly caused by a "covered cause of loss."

87. This Civil Authority coverage is triggered when access to the insured premises is prohibited due to direct physical loss or damage to property, other than the described premises, caused by or resulting from any Covered Cause of Loss.

COUNT I: DECLARATORY JUDGMENT (AGAINST SELECTIVE AND MAXUM)

88. Plaintiffs incorporate by reference, as if fully set forth herein, the facts set forth in the foregoing paragraphs.

89. Each Policy is an insurance contract under which Defendants were paid premiums in exchange for their promises to pay Plaintiffs' losses for claims covered by the Policy, including those described herein.

90. At a minimum, the Policies' language of "direct physical loss of or damage to property" is ambiguous, and the Court must construe it in favor of the insured and against

the insurers. The language covering “direct physical loss of or damage to property” is very expansive and must be interpreted in accordance with its ordinary and customary meaning.

91. Physical loss of the real property means something different than damage to the real property, otherwise, why would both phrases appear in the same policy provision? This is a reasonable interpretation of the policy. Further, there is no requirement that any loss of property be permanent.

92. Plaintiffs have complied with all applicable provisions of the Policies, including payment of the premiums in exchange for coverage under the Policies.

93. Defendants have without justification refused to reimburse Plaintiffs for any losses incurred by Plaintiffs in connection with the covered business losses stemming from the COVID-19 pandemic.

94. An actual case or controversy exists regarding Plaintiffs’ rights and Defendants’ obligations under the Policies to reimburse Plaintiffs for the full amount of losses incurred by Plaintiff in connection with Loss of Use Orders and the necessary interruption of its businesses stemming from the COVID-19 pandemic.

95. Accordingly, Plaintiffs seek a declaratory judgment from this Court declaring the following:

- (a) Plaintiff’s losses incurred in connection with the Loss of Use Orders and the necessary interruption of its businesses are insured losses under the Policies;
- (b) Defendants waived any right they may have had to assert defenses to coverage or otherwise seek to bar or limit coverage for Plaintiffs’ losses by issuing blanket coverage denials without conducting a good faith or “best practices” claim investigation as required under Tennessee law and industry standards; and
- (c) Defendants are obligated to pay Plaintiff for the full amount of the losses incurred and to be incurred in connection with the covered

business losses related to the Loss of Use Orders during the indemnity period and the necessary interruption of its businesses stemming from the COVID-19 pandemic.

COUNT II: BREACH OF CONTRACT (AGAINST SELECTIVE AND MAXUM)

96. Plaintiffs incorporate by reference, as if fully set forth herein, the facts set forth in the foregoing paragraphs.

97. Each Policy is an insurance contract under which Defendants were paid premiums in exchange for their promises to pay Plaintiffs' losses for claims covered by the Policy, such as those described herein.

98. Plaintiffs have complied with all applicable provisions of the Policies, including payment of the premiums in exchange for coverage under the Policies, and yet Defendants have abrogated their insurance coverage obligations pursuant to the Policies' clear and unambiguous terms.

99. By denying coverage for any business losses incurred by Plaintiffs in connection with the Loss of Use Orders and the COVID-19 pandemic, without conducting a good faith or "best practices" investigation, Defendants breached their coverage obligations under the Policies.

100. As a result of Defendants' breaches of the Policies, Plaintiffs have sustained substantial damages for which Defendants is liable, in an amount to be established at trial but not less than \$75 Million Dollars.

101. Defendants' breach of contract was intentional, fraudulent, malicious, and/or reckless, therefore justifying an award of punitive damages. See, e.g., Riad v. Erie Ins. Exchange, 436 S.W.3d 256, 276 (Tenn. Ct. App. Oct. 31, 2013). Specifically, Defendants intentionally, fraudulently, maliciously, and/or recklessly: (1) failed to

effectuate a prompt and fair settlement of Plaintiffs' claim when liability was clear; (2) refused and failed to conduct a reasonable, good faith or "best practices" investigation of Plaintiffs' claim based on all available information; (3) unjustly refused to pay Plaintiffs' claim for their own financial preservation with no reasonable or justifiable basis; (4) refused and failed to obtain all reasonably available information and generally ignored Plaintiffs' claim; (5) failed to adopt, implement, and enforce reasonable standards for the prompt investigation and settlement of claims arising under the insurance policies; (6) failed to treat Plaintiffs' interests equal to that of their own; (7) failed to timely and fully pay all amounts due and owing under the Policies with no reasonable or justifiable basis; (8) engaged in premature and outcome determinative decision-making process engineered to result in the ultimate denial of Plaintiffs' Claims; and (9) engaged in such other acts toward Plaintiffs as are contrary to the duties owed to Plaintiffs as established by the customs and practices in the industry, the law, and the Policies. Defendants knew, or reasonably should have known, that Plaintiffs were justifiably relying on the money and benefits due them under the terms of the Policies. Nevertheless, acting with conscious disregard for Plaintiffs' rights and with the intention of causing or willfully disregarding the probability of causing unjust and cruel hardship on Plaintiffs, Defendants consciously refused to compensate Plaintiffs for their losses, and withheld monies and benefits rightfully due Plaintiffs. In so acting, Defendants intended to and did injure Plaintiffs in order to protect their own financial interests and should be punished. Plaintiffs seek and are entitled to punitive damages.

COUNT III – BREACH OF CONTRACT (AGAINST ABBM AND AmWINS)

102. Plaintiffs incorporate by reference all allegations in all other sections of this Complaint as if fully set forth herein.

103. Plaintiffs retained Anderson Benson and AmWins to properly obtain an insurance policy covering their business operations, including all foreseeable risks of loss.

104. Defendants, Anderson Benson and AmWins, breached that contract by failing to obtain insurance to cover the Plaintiffs for risks known to them, particularly when renewing policies after they knew or should have known of the presence and concerns over the presence of COVID-19.

105. Thus, if the Court determines that the insurance policies issued by Selective and/or Maxum do not apply, then the defendants, Anderson Benson and AmWins, are liable for the damages set forth above.

COUNT IV – NEGLIGENCE AND INSURANCE MALPRACTICE (AGAINST ABBM AND AmWINS)

106. Plaintiffs incorporate by reference all allegations in all other sections of this Complaint as if fully set forth herein.

107. Plaintiffs retained ABBM and AmWins to properly obtain an insurance policy to cover known risks of loss. Plaintiffs relied upon the experience and expertise of ABBM and AmWins to procure insurance coverage designed to maximize the indemnity coverage available to them in the event of any loss.

108. On and before February 14, 2020, COVID-19 was being reported as a risk, with multiple scientific and other reports raising concern about the means of transmission of this virus and the impact it could have on businesses in the United States.

109. Defendants, ABBM and AmWins, despite knowing of the risks presented by the COVID-19 virus, renewed the Selective and Maxum policies, knowing that each of the policies contained a “virus” exclusion. Selective and Maxum have indeed relied upon the virus exclusions contained in their policies as a basis of denial of coverage to the Plaintiffs.

110. Defendants, ABBM and AmWins, knew or should have known that many insurance carriers issue property damage policies in the United States without a “virus” exclusion.

111. Defendants, ABBM and AmWins, despite knowing of the risks presented by the COVID-19 virus, failed to recommend to the Plaintiffs that they move their insurance coverages to an insurer which did not utilize a “virus” exclusion in its policies. In fact, this issue was never even brought up by ABBM and AmWins as part of the policy renewal and was completely unknown to the Plaintiffs.

112. Defendants, ABBM and AmWins, despite knowing of the risks presented by the COVID-19 virus and despite being aware of the availability of other insurance coverages not containing a “virus” exclusion, failed to move the Plaintiffs’ insurance coverage to an insurer which did not utilize a “virus” exclusion in its policy.

113. These acts and omissions of the Defendants, ABBM and AmWins, were negligent and constituted malpractice and a failure to procure insurance to the benefit of the Plaintiffs, knowing that the Plaintiffs were relying upon their experience and expertise.

114. In addition, and/or in the alternative, these acts and omissions of the Defendants, ABBM and AmWins, in failing to move policy coverages from Selective and Maxum were motivated by the desire to continue to receive lucrative commissions from each carrier, with whom existing relationships existed. By choosing to not move

coverages to insurers with no "virus" exclusion, the Defendants, ABBM and AmWins, placed their interests ahead of those of the Plaintiffs and were reckless in their conduct, entitled the Plaintiffs to punitive damages.

115. Thus, if the Court determines that the Selective and Maxum insurance policies do not apply because of the virus exclusion, the Defendants, ABBM and AmWins, are liable for the damages set forth above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that the Court:

1. Enter a declaratory judgment in favor of Plaintiffs and against Defendants, Selective and Maxum, declaring as follows:
 - (a) Plaintiff's losses incurred in connection with the Loss of Use Orders and the necessary interruption of its businesses are insured losses under the Policies;
 - (b) Defendants waived any right they may have had to assert defenses to coverage or otherwise seek to bar or limit coverage for Plaintiffs' losses by issuing blanket coverage denials without conducting a good faith or "best practices" claim investigation as required under Tennessee law and industry standards; and
 - (c) Defendants are obligated to pay Plaintiff for the full amount of the losses incurred and to be incurred in connection with the covered business losses related to the Loss of Use Orders during the indemnity period and the necessary interruption of its businesses stemming from the COVID-19 pandemic;
2. Enter a judgment on Count II of the Complaint in favor of Plaintiffs and against Defendants Selective and Maxum and award damages for breach of contract in an amount to be determined by the jury, but not less than \$75 Million Dollars;
3. Enter an award for punitive damages in an amount the jury may find appropriate against the Defendants, Selective and Maxum;

4. In addition, and/or in the alternative, should the Court find that the Selective and Maxum policies do not provide coverage, enter a judgment in favor of Plaintiffs and against Defendants, ABBM and AmWins, based upon the breach of contract or negligence and insurance malpractice as alleged herein in the in an amount to be determined by the jury, but not less than \$75 Million Dollars;

5. Enter an award for punitive damages in an amount the jury may find appropriate against the Defendants, ABBM and AmWins;


6. Award to Plaintiffs and against Defendants prejudgment interest, to be calculated according to law, to compensate Plaintiffs for the loss of use of funds caused by Defendants' conduct as set forth herein; and

7. Award Plaintiffs such other, further, and additional relief as this Court deems just and appropriate.

JURY DEMAND

Plaintiffs hereby demand trial by jury on all issues so triable.

Respectfully submitted,



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