

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

**COMPLAINT**

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**Index No.:** \_\_\_\_\_

CAR WASH PARTNERS, INC. AND MISTER CAR  
WASH, INC F/K/A HOTSHINE HOLDINGS INC.

Plaintiffs,

-against-

NORTH AMERICAN ELITE INSURANCE COMPANY

Defendant.

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Car Wash Partners, Inc. and Mister Car Wash, Inc. f/k/a Hotshine Holdings Inc. ("Plaintiffs" or "Mister Car Wash") by and through its attorneys, Anderson Kill P.C., for its Complaint against Defendant, North American Elite Insurance Company ("Swiss Re" or "Defendant"), alleges and states as follows:

**NATURE OF THE ACTION**

1. This is a breach of contract and declaratory judgment action arising out of Swiss Re's failure to honor contractual obligations owed to Mister Car Wash for the insured business interruption losses Mister Car Wash has incurred as a result of COVID-19 and the resulting orders of civil authority.

2. Mister Car Wash operates over 300 car wash facilities in the following states: Alabama, Arizona, California, Colorado, Florida, Georgia, Iowa, Idaho, Illinois, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Mexico, Pennsylvania, Tennessee, Texas, Utah, Washington, and Wisconsin (the "Locations").

3. To protect its businesses in the event of property loss or business interruption, each year Mister Car Wash purchased a \$100,000,000 insurance policy from Swiss Re.

4. In exchange for the payment of annual premiums of \$500,000 and \$640,000.00 Swiss Re sold Mister Car Wash Policy No. NAP 2003350-00 which provides \$100,000,000 in coverage for the policy period March 31, 2019 to March 31, 2020 (“2019 Policy”), and Policy No. NAP 2003350-01 which provides \$100,000,000 in coverage for the policy period of March 31, 2020 to March 31, 2021 (“2020 Policy”) (collectively, the “Policies”). A true and correct copy of the 2019 Policy is attached hereto as Exhibit A, and a true and correct copy of the 2020 Policy is attached hereto as Exhibit B.

5. The property damage and orders of civil authority associated with COVID-19 have caused Plaintiffs to sustain tens of millions of dollars in business interruption losses. These losses are covered under the Policies that Plaintiffs purchased from Swiss Re.

6. The Policies provide “all risk” insurance coverage – that is, they provide coverage for all risks, except as specifically excluded.

7. The risks associated with pandemics have been known to the insurance industry for a century and have been well known to Swiss Re in recent decades during which we all have witnessed outbreaks and pandemics involving diseases such as SARS, MERS and Ebola.

8. In fact, the section of Swiss Re’s 2017 and 2018 Annual Reports describing the company’s “[i]nsurance, operational and other risks” expressly acknowledged that risk from

catastrophic events – specifically including pandemics – may expose Swiss Re to unexpected large losses.

9. The Policies that Swiss Re sold to Mister Car Wash did not include an exclusion for losses from a pandemic. To the contrary, the Policies specifically acknowledge that losses caused by “Communicable Disease” are covered.

10. The Policies include coverage for business interruption losses, as well as several “Time Element Coverage Extensions” that cover business interruption losses like Mister Car Wash is suffering due to the damage from COVID-19 and the related orders of civil authority.

11. These extensions of coverage include, inter alia:

- a. “Order of Civil Authority” coverage for losses when physical loss or damage results in an order of civil authority that prohibits partial or total access to the Locations.
- b. “Interruption by Communicable Disease” coverage for losses due to the actual presence of communicable disease at the Locations.
- c. “Attraction Property” coverage for losses due to physical loss or damage to nearby properties that attract business to the Locations.

12. Mister Car Wash submitted a timely claim and presented a proof of loss requesting payment owed under the Policies (the “Claim”).

13. Rather than pay the amounts owed, Swiss Re responded with repeated requests for information and documentation – needlessly stretching out the claims adjustment process for nearly a year.

14. Plaintiffs bring this lawsuit for a declaration that the Policies cover Plaintiffs' business interruption losses and for breach of contract.

### **PARTIES**

15. Plaintiffs are corporations incorporated in Delaware, operated out of headquarters in Tucson, Arizona and with locations in Alabama, Arizona, California, Colorado, Florida, Georgia, Iowa, Idaho, Illinois, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Mexico, Pennsylvania, Tennessee, Texas, Utah, Washington, and Wisconsin.

16. Upon information and belief, Swiss Re is a property and casualty insurance company organized and existing under the laws of the State of New Hampshire and licensed to do business in the State of New York.

17. Upon information and belief, Swiss Re is a resident of the State of New York and is authorized to do business in New York or, if not a resident of or authorized to do business in New York, has transacted business within New York or has contracted to supply goods or services in New York, including in Kings County.

### **JURISDICTION**

18. A declaratory judgment action may be properly sought in this Court pursuant to CPLR § 3001 and under Judiciary Law § 140-b.

19. Personal jurisdiction over Swiss Re is proper pursuant to CPLR § 301. The Policy provides that Swiss Re irrevocably submits to the exclusive jurisdiction of the Courts of the State of New York and that Swiss Re expressly waives all rights to challenge or otherwise limit such jurisdiction. *See* Exhibit A at ¶IX.F.2. Alternatively, or in addition to the Policy’s exclusive jurisdiction provision, this Court has jurisdiction over Swiss Re pursuant to CPLR §§ 301 or 302 because, upon information and belief, Swiss Re was at all relevant times a business authorized to transact business in New York and/or conducted continuous and substantial business in New York.

20. Venue for this action is proper in this Court pursuant to CPLR § 501 under the exclusive jurisdiction provision of the Policy that Swiss Re sold to Mister Car Wash.

### **FACTUAL BACKGROUND**

#### **A. Mister Car Wash’s Insurance Policies**

21. The Policies are “all-risk” policies that insure “all risks of direct physical loss or damage to INSURED PROPERTY, while on INSURED LOCATION(S) provided such physical loss or damage occurs during the term of this POLICY.” *See* Exhibit A, Declarations ¶A.1.

22. The Policies cover business interruption losses (referred to as “Time Element” coverage) “directly resulting from physical loss or damage insured by this POLICY.” *Id.*, ¶V.A.

23. The Policies do not define the phrase “physical loss or damage.”

24. The Policies provide up to \$100,000,000.00 of coverage. *Id.*, ¶II.B.

25. Swiss Re drafted the Policies.
26. The Policies are “all risk” policies, which means they insure for all risks unless specifically excluded.
27. There is no exclusion in the Policies for the risks or perils of pandemic or communicable disease.
28. To the contrary, the Policies include coverage for losses caused by “Communicable Disease.” *See* Exhibit A, at ¶IV B.3 and ¶V H.8.
29. As part of the Policies’ “Property Damage” coverage, Swiss Re promised to provide the following coverage for “Communicable Disease Response”:

If an INSURED LOCATION owned, leased or rented by the Insured has the actual not suspected presence of COMMUNICABLE DISEASE and access to such INSURED LOCATION is limited, restricted or prohibited by:

- a. an order of an authorized governmental agency regulating the actual not suspected presence of COMMUNICABLE DISEASE; or
- b. a decision of an Officer of the Insured as a result of the actual not suspected presence of COMMUNICABLE DISEASE,

this POLICY covers the reasonable and necessary costs incurred by the Insured at such INSURED LOCATION with the actual not suspected presence of COMMUNICABLE DISEASE for the:

cleanup, removal and disposal of the actual not suspected presence of COMMUNICABLE DISEASES from INSURED PROPERTY; and actual costs of fees payable to public relations services or actual costs of using the Insured’s employees for reputation management resulting from the actual not suspected presence of COMMUNICABLE DISEASES on INSURED PROPERTY.

This extension of coverage will apply when access to such INSURED LOCATION is limited, restricted or prohibited in excess of the WAITING PERIOD specified for this extension.

This extension of coverage does not cover any costs incurred due to any law or ordinance with which the Insured was legally obligated to comply prior to the actual not suspected presence of COMMUNICABLE DISEASE.

Exhibit A, ¶IV.B.3.

30. As part of the Policies' "Time Element Coverage Extensions," Swiss Re promised to provide the following coverage for "Interruption by Communicable Disease":

If an INSURED LOCATION owned, leased or rented by the Insured has the actual not suspected presence of COMMUNICABLE DISEASE and access to such INSURED LOCATION is limited, restricted or prohibited by:

- a. an order of an authorized governmental agency regulating the actual not suspected presence of COMMUNICABLE DISEASE;  
or
- b. a decision of an Officer of the Insured as a result of the actual not suspected presence of COMMUNICABLE DISEASE,

this POLICY is extended to insure loss of Gross Earnings, Gross Profits, Rental Insurance, and Extra Expense incurred by the Insured during the Period Of Liability at such INSURED LOCATION with the actual not suspected presence of COMMUNICABLE DISEASE.

Exhibit A, at ¶V.H.8.

31. As part of the Policies' "Time Element Coverage Extensions," Swiss Re promised to provide the following coverage for an "Order of Civil or Military Authority":

This POLICY is extended to insure loss of Gross Earnings, Gross Profits, Rental Insurance, and Extra Expense incurred by the Insured due to the necessary interruption of the Insured's business, provided that:

- a. the interruption directly results from an order of a civil or military authority that prohibits partial or total access to INSURED LOCATION(S); and
- b. the order referenced above is caused by direct physical loss or damage as insured by this POLICY to property, including property excluded under Property Not Insured.

*See* Exhibit A, at ¶V,H.11.

32. The "Time Element" coverage under the Policies, including under the Order of Civil Authority Coverage, includes the following coverage for "Extra Expense":

The recoverable Extra Expense loss is the reasonable and necessary extra costs incurred by the Insured during the Period of Liability as respects the following:

- a. extra costs to temporarily continue as nearly normal as practicable the conduct of the Insured's business . . .

*See* Exhibit A, at ¶V.F.1.

33. As part of the Policies' "Property Damage" section, Swiss Re promised to provide the following coverage for "Protection and Preservation of Property – Property Damage":

This Policy is extended to insure reasonable and necessary costs incurred for actions to temporarily protect or preserve INSURED PROPERTY; provided such actions are necessary due to actual, or to prevent immediately impending, direct physical loss or damage insured by this POLICY to such INSURED PROPERTY.

*See* Exhibit A, at ¶IV.B.24.

34. As part of the Policies' "Time Element Coverage Extensions," Swiss Re promised to provide the following coverage for an "Protection and Preservation of Property – Time Element":

This POLICY is extended to insure loss of Gross Earnings, Gross Profits, Rental Insurance, and Extra Expense incurred by the Insured for a period of time after the Insured has first taken reasonable action for the temporary protection and preservation of property insured by this POLICY provided such action is necessary to prevent immediately impending direct physical loss or damage insured by this POLICY to such INSURED PROPERTY.

*See* Exhibit A, at ¶V.H.12.

35. Certain of the coverage under the Policies is subject to sublimits, which represent "the total payable arising out of one OCCURRENCE." *See* Exhibit A, at ¶II.c.7.

36. The Policies define "Occurrence" as "[t]he sum total of all loss or damage of the type insured caused by or arising out of one event, including any insured TIME ELEMENT loss, regardless of the number of LOCATIONS affected." *See* Exhibit A, at ¶X.W.

37. The Sublimit for "Order of Civil or Military Authority" is \$5,000,000 per "Occurrence." *See* Exhibit A, at ¶II.D.

38. The coverage for an "Order Of Civil Or Military Authority" also is subject to a time limit of "30 consecutive calendar days from the date of OCCURRENCE." *See* Exhibit A, at ¶II.E.

39. The Sublimit for “Extra Expense” is \$5,000,000 per “Occurrence.” *See* Exhibit A, at ¶II.D.

40. The Sublimit for Communicable Disease Response and Interruption by Communicable Disease is \$250,000. *See* Exhibit A, at ¶II.D.

41. The Policy contains a Liberalization provision that states:

If during the period that insurance is in force under this POLICY, or within forty-five (45) days prior to the inception date thereof, on behalf of the Company there be filed with and approved or accepted by the insurance supervisory authorities, in conformity with law, any changes in the forms or endorsements attached to this POLICY, or the rules or regulations applying thereto, by which this insurance could be extended or broadened, without increased premium charge, by endorsement or substitution of form, then such extended or broadened insurance shall inure to the benefit of the Insured as though such endorsement or substitution of form has been made.

*See* Exhibit A, at ¶IX.H.

**B. The Damage from the Coronavirus**

42. Businesses generally buy property and business interruption insurance to ensure that their property functions and produces revenue. When property is impacted in a way that renders it incapable of producing income, whether it is caused by a fire, or a flood, or toxic fumes, or a communicable disease – the loss or damage from any of these causes is the same.

43. When COVID-19 impacts property, it renders the property dangerous and potentially fatal.

44. COVID-19 alters property – turning it from something that is safe and useful into something that potentially is deadly and cannot be used.

45. Property impacted by COVID-19 is, in practical effect, unusable for the purpose of generating business income.

46. COVID-19 causes physical loss or damage to property.

47. COVID-19 causes physical loss or damage even though it is invisible to the naked eye. Property impacted by COVID-19 is just as dangerous as property impacted by fire or fumes (if not more so), and all such damaged property is equally incapable of producing revenues. Like the impact of fire or smoke or noxious odors, the impact of a potentially fatal communicable disease constitutes physical loss or damage to property.

48. Swiss Re expressly acknowledged in the Policy it sold to Mister Car Wash that relatively imperceptible things invisible to the naked eye, such as communicable disease, spores or microorganisms cause or constitute physical loss or damage.

49. Swiss Re acknowledged as much by providing coverage for losses from “Communicable Disease” (*see* Exhibit A, at ¶IV B.3 and ¶V H.8) and by including an exclusion in the Policies for “types of loss or damage” such as “spores or other microorganism of any type . . .” (*see* Policies at ¶VI.C.6).

50. Neither COVID-19 nor SARS-CoV-2 is a microorganism because it is not a living thing and lacks many key characteristics of living things, including the ability to: (1) maintain homeostasis; (2) reproduce on its own; and (3) grow.

51. COVID-19 is transmitted through both person-to-person contact and contact by persons with fomites, which are surfaces of objects or materials on which coronavirus is present.

52. Human contact with such surfaces is known to transmit the disease, making property impacted by COVID-19 very dangerous and potentially fatal.

53. The World Health Organization (“WHO”) explains that COVID-19 “spreads primarily from person to person through small droplets from the nose or mouth, which are expelled when a person with COVID-19 coughs, sneezes, or speaks...People can catch COVID-19 if they breathe in these droplets from a person infected with the virus...”<sup>1</sup>

54. In addition to transmission by inter-personal contact, the WHO states that viral “droplets can land on objects and surfaces around the person such as tables, doorknobs and handrails. People can become infected by touching these objects or surfaces, then touching their eyes, nose or mouth<sup>2</sup>.” A team of researchers from UCLA, Princeton University, the National Institute of Allergy and Infectious Diseases, and the Centers for Disease Control and Prevention

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<sup>1</sup> “How does COVID-19 spread?,” World Health Organization (last visited June 16, 2020), available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses>.

<sup>2</sup> CDC – Frequently Asked Questions, How does the virus spread? <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Spread> (“A person may get COVID-19 by touching the surface or object that has the virus on it and then touching their own mouth, nose, or eyes.”).

("CDC") studied the persistence of COVID-19 on various surfaces and materials. The researchers reported in the April 16, 2020 edition of the New England Journal of Medicine that it persisted on plastic and stainless steel surfaces for up to seventy-two hours in laboratory studies.<sup>3</sup>

55. Scientists also have studied the persistence of COVID-19 on surfaces in cruise ships with documented outbreaks of COVID-19. One such study, reported by the CDC on March 23, 2020, found that COVID-19 was present in the cabins of a Diamond Princess cruise ship seventeen days after it had been vacated, but before it had been disinfected.<sup>4</sup>

56. According to the CDC, COVID-19 can spread in several ways, including: (i) from person to person through respiratory droplets, (ii) through airborne transmission, and (iii) by contact with objects or surfaces.<sup>5</sup>

57. The CDC has noted that airborne transmission involves exposure to COVID-19 in small droplets and particles that can linger in the air for minutes to hours and can infect individuals who are further than six feet away from the person who is infected or after that person has left the space.<sup>6</sup>

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<sup>3</sup> Neeltje van Doremalen, *et al.*, Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1, N. ENGL. J. MED. (March 17, 2020), available at <https://www.nejm.org/doi/full/10.1056/NEJMc2004973>.

<sup>4</sup> Leah F. Moriarty, *et al.*, Public Health Responses to COVID-19 Outbreaks on Cruise Ships — Worldwide, February–March 2020, CDC Morbidity and Mortality Weekly Report (Mar. 27, 2020), available at <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.htm>.

<sup>5</sup> <https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html>

<sup>6</sup> *Id.*

58. The WHO has confirmed that COVID-19 can remain viable on objects or surfaces.<sup>7</sup>

59. COVID-19 also spreads by property- or surface-to-person transmission, where, for example, an uninfected person touches an object or surface that has come into contact with the saliva or nasal fluid of an infected person, and the uninfected person then touches his or her eyes, nose, or mouth.<sup>8</sup>

60. According to at least one study, during and after illness, COVID-19 particles are shed in large numbers in bodily secretions, including saliva, oral and nasal fluid, respiratory droplets, blood, feces, and urine particles. As noted by that study, COVID-19 can be introduced to surfaces by direct physical contact with such surfaces; contact with soiled hands; contact with aerosolized COVID-19 (i.e., large droplet spread) exhaled while breathing, talking, sneezing, or coughing; and contact with airborne COVID-19 that settles after disturbance of a surface damaged by COVID-19 (e.g., shaking a tablecloth).<sup>9</sup>

61. Multiple studies, including studies from the National Institute of Health (“NIH”) and various academic, scientific journals, have concluded that COVID-19 can remain viable on various objects, surfaces, or materials for a period of up to 28 days.<sup>10</sup>

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<sup>7</sup> <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions>

<sup>8</sup> <https://www.who.int/vietnam/news/detail/14-07-2020-q-a-how-is-covid-19-transmitted>

<sup>9</sup> <https://publichealth.sdsu.edu/covid-19/bodily-fluids/>

<sup>10</sup> <https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days>

62. There have been over 18,366,000 confirmed cases of COVID-19 in Alabama, Arizona, California, Colorado, Florida, Georgia, Iowa, Idaho, Illinois, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Mexico, Pennsylvania, Tennessee, Texas, Utah, Washington, and Wisconsin.

63. The number of confirmed cases of COVID-19 nationwide is over 29,400,000 and growing.

64. As has been widely reported and acknowledged by civil and government authorities, there are even larger numbers of infected people that have not been counted as “confirmed” cases due, in part, to the at-times asymptomatic nature of some COVID-19 carriers and a lack of widespread testing.

65. The loss and damage to property from COVID-19 is ubiquitous and widespread across the United States, including in every state and county where Mister Car Wash has its Locations.

**C. Orders of Civil Authorities in Connection with COVID-19 Closures of Non-Essential Businesses**

66. There have been hundreds, if not thousands, of separate orders of civil authority as a result of COVID-19, including orders by state, county, and municipal officials deeming a limited number of businesses to be “essential”; requiring the closure of non-essential businesses; directing individuals to “shelter in place,” stay in their homes, and not travel except to receive medical care or buy groceries or other necessities for living.

67. The various orders were the result of events that occurred in different locations at different dates and based on the varying assessments and determinations made by different government officials at such locations and dates.

68. In Alabama, on March 13, 2020, Governor Ivey declared all counties in the State of Alabama to be in a public health Emergency due to the COVID-19 pandemic. In a March 27, 2020 Executive Order (the “Alabama Order”), Governor Ivey declared which businesses were essential and were allowed to remain open. Plaintiffs’ Alabama car wash Locations did not qualify as essential businesses. As such, Mister Car Wash’s Alabama Locations were required to close and access to the Locations in Alabama was partially or totally prohibited from March 27, 2020 until at least April 24, 2020. Mister Car Wash’s Alabama locations were also required to close in response to separate orders issued by different counties and cities in Alabama at different times in March and April 2020 and, as a result, access to those Locations were partially or totally prohibited for over 30 days following the issuance of such order(s).

69. In Arizona, on March 17, 2020, Regina Romero the mayor of Tucson,<sup>11</sup> declared Tucson to be in an emergency due to COVID-19 pandemic, and on March 30, 2020, Governor Ducey issued Executive Order 2020-18 closing all non-essential businesses (collectively, the “Arizona Order”). Plaintiffs’ Arizona car wash Locations did not qualify as essential businesses. As such, Plaintiffs’ Arizona locations were required to close and access to those Locations were partially or totally prohibited from March 30, 2020 until at least April 17, 2020. Plaintiffs’ Arizona locations were also required to close in response to separate orders issued by different

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<sup>11</sup> All but one of Mister Car Wash’s Arizona Locations are in Tucson or Pima County.

counties and cities in Arizona at different times in March and April 2020 and, as a result, access to those Locations were partially or totally prohibited for over 30 days following the issuance of such order(s).

70. In California, on March 19, 2020, Governor Newsom issued Executive Order N-33-20, closing all non-essential businesses (the “California Order”). Plaintiffs’ California Locations did not qualify as essential businesses. As such, Plaintiffs’ California Locations were required to close and access to the Locations in California was partially or totally prohibited from March 19, 2020 until at least April 19, 2020. Mister Car Wash’s California locations were also required to close in response to separate orders issued by different counties and cities in locations at different times in March and April 2020 and, as a result, access to those Locations were partially or totally prohibited for over 30 days following the issuance of such order(s).

71. In Colorado, on March 25, 2020, Governor Polis issued Executive Order D 2020 which required all Coloradans to stay at home and directed all business other than those qualified as “Critical Businesses” to close (the “Colorado Order”). Plaintiffs’ Colorado Locations did not qualify as “Critical Business” and were required to close, such that access to the Locations in Colorado was partially or totally prohibited from March 25, 2020 until at least April 23, 2020. Plaintiffs’ Colorado locations were also required to close in response to separate orders issued by different counties and cities in Colorado at different times in March and April 2020 and, as a result, access to those Locations were partially or totally prohibited for over 30 days following the issuance of such order(s).

72. In Florida, on April 1, 2020 Governor DeSantis issued Executive Order 20-91 a state-wide Stay at home Order, authorizing Florida counties to close all non-essential business (the “Florida Order”). In accordance with the Florida Order, Plaintiff’s Florida Locations were required to close in response to separate orders issued by different counties in Florida at different times in March and April 2020 and, as a result, access to those Locations were partially or totally prohibited for over 30 days following the issuance of such order(s).

73. In Georgia, April 2, 2020 Governor Kemp issued Executive Order 04.02.20.1 that instructed all non-essential businesses to close (the “Georgia Order”). Plaintiffs’ Georgia Locations did not qualify essential business. Plaintiffs’ Georgia Locations were partially or totally prohibited from March 14, 2020 until at least April 21, 2020. Plaintiffs’ Georgia locations were also required to close in response to separate orders issued by different counties and cities in Georgia at different times in March and April 2020 and, as a result, access to those Locations were partially or totally prohibited for over 30 days following the issuance of such order(s).

74. In Idaho, on March 25, 2020, Governor Little required the Idaho Department of Health and Welfare to declare an emergency and issued a statewide stay-home order instructing all non-essential businesses to close (the “Idaho Order”). Plaintiffs’ Idaho locations were required to close and access to the Locations in Idaho was partially or totally prohibited from March 25, 2020 until at least April 18, 2020. Plaintiffs’ Idaho locations were also required to close in response to separate orders issued by different counties and cities in Idaho at different times in March and April 2020 and, as a result, access to those Locations were partially or totally prohibited for over 30 days following the issuance of such order(s).

75. In Illinois, on March 20, 2020, Governor Pritzker issued Executive Order 2020-10, requiring that all non-essential businesses close (the “Illinois Order”). Plaintiffs’ car wash Location did not qualify as essential businesses. As such, Plaintiffs’ Illinois Location was required to close and access to the Locations in Illinois was partially or totally prohibited from March 20, 2020 until at least April 20, 2020.

76. In Maryland, on March 23, 2020, Governor Hogan issued Executive Order 2020-03-30 that closed all non-essential businesses the (“Maryland Order”). Plaintiffs’ car wash Locations did not qualify as essential businesses. As such, Plaintiffs’ Maryland Locations were required to close and access to the Locations in Maryland was partially or totally prohibited from March 23, 2020 until at least April 23, 2020. Mister Car Wash’s Maryland locations were also required to close in response to separate orders issued by different counties and cities in Maryland at different times in March and April 2020 and, as a result, access to those Locations were partially or totally prohibited for over 30 days following the issuance of such order(s).

77. In Michigan, on March 24, 2020, Governor Whitmer, issued Executive Order 2020-42, which was a Shelter-At-Home Order that closed all non-essential businesses (the “Michigan Order”). Plaintiffs’ car wash Locations did not qualify as essential businesses. As such, Plaintiffs’ Michigan Locations were required to close and access to the Locations in Michigan was partially or totally prohibited from March 24, 2020 until at least April 24, 2020. Mister Car Wash’s Michigan locations were also required to close in response to separate orders issued by different counties and cities in Michigan at different times in March and April 2020

and, as a result, access to those Locations were partially or totally prohibited for over 30 days following the issuance of such order(s).

78. In Minnesota, on March 27, 2020 Governor Walz issued Executive Order 20-20, which was a Stay-At-Home Order that closed all non-essential businesses (the “Minnesota Order”). Plaintiffs’ car wash Locations did not qualify as essential businesses. As such, Plaintiffs’ Minnesota Locations were required to close and access to the Locations in Minnesota was partially or totally prohibited from March 27, 2020 until at least April 20, 2020. Mister Car Wash’s Minnesota locations were also required to close in response to separate orders issued by different counties and cities in Minnesota at different times in March and April 2020 and, as a result, access to those Locations were partially or totally prohibited for over 30 days following the issuance of such order(s).

79. In Mississippi, on April 1, 2020, Governor Reeves issued Executive Order 1466, which was a Stay-At-Home Order that closed all non-essential businesses (the “Mississippi Order”). Plaintiffs’ car wash Locations did not qualify as essential businesses. As such, Plaintiffs’ Mississippi Locations were required to close and access to the Locations in Mississippi was partially or totally prohibited from April 3, 2020 until at least April 27, 2020. The Mississippi Order was subsequently extended so the period that Plaintiffs’ Mississippi locations were closed for at least 30 consecutive days. The Governor Mister Car Wash’s Mississippi locations were also required to close in response to separate orders issued by different counties and cities in Mississippi at different times in March and April 2020 and, as a

result, access to those Locations were partially or totally prohibited for over 30 days following the issuance of such order(s).

80. In Missouri, Ken McClure, Mayor of the City of Springfield, and Bob Dixon, Greene County, Missouri Presiding Commissioner, on or about March 24, 2020, issued a Proclamation of Civil Emergency which was a Stay-At-Home Order that closed all non-essential businesses (the “Springfield/Greene County Order”). All of Plaintiffs’ Missouri locations are within Springfield/Greene County. Plaintiffs’ car wash Locations did not qualify as essential businesses. As such, Plaintiffs’ Missouri Locations were required to close and access to the Locations in Missouri was partially or totally prohibited from March 25, 2020 until at least April 25, 2020. Furthermore, Mister Car Wash’s Missouri Locations were also required to close in response to an Executive Order issued by Missouri Governor Parson on April 3, 2020 partially or totally prohibiting access to all Missouri Locations.

81. In New Mexico, on March 23, 2020, the New Mexico Department of Health issued a Public Health Emergency Order closing all non-essential businesses (the “New Mexico Order”). Plaintiffs’ car wash Locations did not qualify as essential businesses. As such, Plaintiffs’ New Mexico Locations were required to close and access to the Locations in New Mexico was partially or totally prohibited from March 23, 2020 until at least April 23, 2020. Mister Car Wash’s New Mexico locations were also required to close in response to separate orders issued for individual counties in New Mexico at different times in March and April 2020 and, as a result, access to those Locations were partially or totally prohibited for over 30 days following the issuance of such order(s).

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82. In New Mexico, on November 13, 2020, Governor Grisham issued Executive Order 2020-080 re-closing all non-essential businesses (the “November New Mexico Order”). Plaintiffs’ car wash Locations did not qualify as essential businesses under the November New Mexico Order. As such, Plaintiffs’ New Mexico Locations were required to close and access to the Locations in New Mexico was partially or totally prohibited from November 16, 2020 until at least November 30, 2020.

83. In Pennsylvania, on March 19, 2020, Governor Wolf issued an Executive Order which was a Stay-At-Home Order that closed all non-life sustaining businesses (the “Pennsylvania Order”). Plaintiffs’ car wash Locations did not qualify as life sustaining businesses. As such, Plaintiffs’ Pennsylvania Locations were required to close and access to the Locations in Pennsylvania was partially or totally prohibited from March 23, 2020 until at least April 23, 2020.

84. In Tennessee, on March 30, 2020, Governor Lee issued Executive Order 22 which was a Safer-At-Home Order that closed all non-essential businesses (the “Tennessee Order”). Plaintiffs’ car wash Locations did not qualify as essential businesses. As such, Plaintiffs’ Tennessee Locations were required to close and access to the Locations in Tennessee was partially or totally prohibited from April 1, 2020 until at least April 21, 2020. Mister Car Wash’s Tennessee locations were also required to close in response to separate orders issued by different counties and cities in Tennessee at different times in March and April 2020 and, as a result, access to those Locations were partially or totally prohibited for over 30 days following the issuance of such order(s).

85. In Texas, on March 31, 2020, Governor Abbot issued Executive Order 14 that closed all non-essential businesses (the “Texas Order”). Plaintiffs’ car wash Locations did not qualify as essential businesses. As such, Plaintiffs’ Texas Locations were required to close and access to the Locations in Texas was partially or totally prohibited from March 31, 2020 until at least April 18, 2020. Mister Car Wash’s Texas locations were also required to close in response to separate orders issued by different counties and cities in Texas at different times in March and April 2020 and, as a result, access to those Locations were partially or totally prohibited for over 30 days following the issuance of such order(s).

86. In Utah, on March 27, 2020, Governor Herbert issued a “Stay Safe, Stay Home” directive (the “Utah Order”). The Utah Order required Utahans to stay home. As such, access to Plaintiffs’ Utah Locations was partially prohibited from March 27, 2020 until at least April 27, 2020. Mister Car Wash’s Utah locations were also required to close in response to separate orders issued by different counties and cities in locations at different times in March and April 2020 and, as a result, access to those Locations were partially or totally prohibited for over 30 days following the issuance of such order(s).

87. In Washington, on March 23, 2020, Governor Inslee issued Proclamation 20-25 a proclamation closing all non-essential businesses (the “Washington Order”). Plaintiffs’ car wash Locations did not qualify as essential businesses. As such, Plaintiffs’ Washington Locations were required to close and access to the Locations in Locations were partially or totally prohibited from March 23, 2020 until at least April 23, 2020. Mister Car Wash’s Washington locations were also required to close in response to separate orders issued by different counties

and cities in locations at different times in March and April 2020 and, as a result, access to those Locations were partially or totally prohibited for over 30 days following the issuance of such order(s).

88. In Wisconsin, on March 24, 2020, Governor Evers issued Proclamation 20-25 a proclamation closing all non-essential businesses and Andrea Pal, Secretary-Designee of the Wisconsin Department of Health Services issued Emergency Order #12 – Safer at Home Order (collectively, the “Wisconsin Order”). Plaintiffs’ car wash Locations did not qualify as essential businesses. As such, Plaintiffs’ Wisconsin Locations were required to close and access to the Locations were partially or totally prohibited from March 25, 2020 until at least April 25, 2020. Mister Car Wash’s Wisconsin locations were also required to close in response to separate orders issued by different counties and cities in locations at different times in March and April 2020 and, as a result, access to those Locations were partially or totally prohibited for over 30 days following the issuance of such order(s).

89. After these various orders were issued, Mister Car Wash sought to keep its locations open, and actively petitioned state, county, municipal and law enforcement authorities for permission to at least partial reopen its car wash Locations.

90. None of these efforts were successful until May 2020 at the earliest. For example:

- a. Mister Car Wash reached out to the chief counsel for Governor Jay Inslee regarding the re-opening possibility of re-opening its exterior-only,

contact-less automated car washes in the State of Washington, only to be told that access to even those operations was prohibited.

- b. Mister Car Wash reached out to the Prosecuting Attorney for Kent County, Michigan regarding the possibility of re-opening its exterior-only, contact-less automated car washes in Kent County, and were told that access to those operations was no longer prohibited starting May 1, 2020.
- c. Mister Car Wash reached out to the City Manager for Springfield, Missouri regarding the possibility of re-opening its exterior-only, contact-less automated car washes in Springfield, only to be told that access to even those operations was prohibited until May 4, 2020.
- d. Mister Car Wash reached out to the Prosecuting Attorney for Montcalm County, Michigan regarding the possibility of re-opening its exterior-only, contact-less automated car washes in Montcalm County, and eventually was told that access to those operations would be permitted starting only on May 6, 2020 – but only on the condition that only customers in the Unlimited Wash Club program that pay with RIFD tags were permitted, and not customers paying with cash or credit card.
- e. Mister Car Wash reached out to the police departments in Tracy and Lodi, California and the San Joaquin County Public Health Department in an effort to get permission to re-open the Locations in Tracy and Lodi, and

were told that access to those operations were prohibited until May 10, 2020.

- f. Mister Car Wash reached out to the Health Officer for the Ingham County, Michigan Health Department regarding the possibility of re-opening its exterior-only contact-less automated car washes in Ingham County and was told on May 14, 2020 that access to those operations was no longer prohibited.

91. Indeed, various county, municipal and law enforcement authorities actively intervened to make sure that access was prohibited to Mister Car Wash's Locations. For example:

- a. On or about March 24, 2020, the police came to Location #458 in Grand Rapids, Michigan and told the manager that it needed to be closed.
- b. On or about March 24, 2020, the Mount Pleasant Police Department called and informed Mister Car Wash that its Locations in Mount Pleasant, Michigan needed to be closed.
- c. On or about April 26, 2020, police came to Location #916 in Lodi, California and informed the manager that car washes did not qualify as essential businesses and needed to be closed.

- d. On or about November 18, 2020, an officer from the Albuquerque Police Department came to Location #393 in Albuquerque, New Mexico and told the manager that car washes do not constitute essential businesses, and issued a Notice of Violation of Executive Order 2020-004, New Mexico Department of Health Public Orders, and/or Albuquerque's Declaration of a Local State of Emergency (copy attached as Ex. C).

92. Each of the state, county and municipal orders referenced above were caused in part by the physical loss or damage from COVID-19 in each such jurisdiction, which damage occurred within five miles of each of Plaintiffs' Locations.

**E. Mister Car Wash's Covered Business Interruption and Other Losses**

93. The "Order of Civil or Military Authority" provision covers Mister Car Wash's business interruption losses here.

94. The different state, county and municipal orders referred to above were caused in part by physical loss or damage from COVID-19 at property within five miles of the Locations.

95. Such state, county and municipal orders prohibited partial or total access to the Locations.

96. Such state, county and municipal orders interrupted business at the Locations and Mister Car Wash sustained tens of millions of dollars in business interruption and extra expense losses as a result.

97. Mister Car Wash's losses were caused by and arose out of multiple events, separate from one another in both space and time, that constitute separate "occurrences" under the Policies.

98. Losses relating to an order of civil authority issued prior to March 31, 2020 are covered under the 2019 Policy, whereas losses relating to an order of civil authority issued after March 31, 2020 are covered under the 2020 Policy.

99. The "Attraction Property" provision covers certain of Mister Car Wash's business interruption losses here.

100. Mister Car Wash intentionally purchases and builds its car washes in locations near to other properties – such as shopping centers, malls, fitness centers and restaurants – that attract business to the car wash Locations.

101. There has been physical loss or damage from COVID-19 to numerous such "attraction properties" located within one mile of various Locations.

102. The damage at such "attraction properties" reduced the traffic and business at Mister Car Wash's Locations once they were permitted to reopen following the various state, county and municipal orders that prohibited access to the Locations.

103. Mister Car Wash has sustained millions of dollars in business interruption losses as a result of the physical loss or damage to such "attraction properties."

104. The “Communicable Disease Response” provision and the “Interruption by Communicable Disease” provision cover Mister Car Wash’s losses here.

105. COVID-19 was present at all of the Locations, and at least 651 infected persons were confirmed to be present at no less than 281 of the Locations.

106. There were numerous orders by governmental authorities that limited, restricted or prohibited access to the Locations due to COVID-19.

107. In addition, there were instances where decisions by an officer at Mister Car Wash limited, restricted or prohibited access to the Locations due to COVID-19.

108. Mister Car Wash has incurred costs to clean up and disinfect COVID-19 from the premises at Locations where there was the actual presence of COVID-19 – which costs are covered under the “Communicable Disease Response” provision in the Policies.

109. Mister Car Wash has also suffered business interruption losses at Locations where there was the actual presence of COVID-19 – which costs are covered under the “Interruption by Communicable Disease” provision in the Policies.

110. Such losses were suffered during at least April, May, June, and November 2020, during which time Mister Car Wash was acting with due diligence and dispatch to restore the business at its Locations to the condition that would have existed had no physical loss or damage insured by the Policies occurred.

111. The Policies include an exclusion that bars coverage for loss or damage due to a “discharge, dispersal, seepage, migration, release or escape of CONTAMINANTS.” *See* Ex. A, at ¶VI.C.5. This exclusion does not limit coverage for the Claim.

112. Under New York law, insurance companies are required to use unambiguous language in their policies when drafting exclusions to coverage. If an insurance policy provision – particularly an exclusion – is subject to more than one reasonable interpretation, it is construed in the way that favors coverage for the policyholder.

113. The phrase “discharge, dispersal, seepage, migration, release or escape” that Swiss Re used in its exclusion is commonly known to refer to environmental pollution.

114. With respect to substances such as pathogens, disease-causing agents or viruses, Swiss Re’s use of the phrase “discharge, dispersal, seepage, migration, release or escape” reasonably is understood to refer to situations where such substances are confined in some sort of container – such as a vial of anthrax or medical waste in a biohazard transport cooler – but through an accident<sup>12</sup> are discharged, released or escape, etc. from their container.

115. The phrase “discharge, dispersal, seepage, migration, release or escape” does not describe the natural spread of a contagious or infectious disease in a pandemic, and it certainly does not describe such things unambiguously.

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<sup>12</sup> It is noteworthy that the “*unlawful* . . . release, discharge, dispersal or disposal” of a “bacteriological, viral, radioactive or similar agents or matter” is separately excluded. *See* Exhibit A, at ¶VI.C.6.d (emphasis added).

116. The damage from COVID-19 is due to the naturally occurring spread of the disease, and is not the result of any “discharge, dispersal, seepage, migration, release, or escape” of any pollutant or contaminant.

117. If Swiss Re wanted to exclude loss or damage caused by a pandemic, it would use words that describe the natural transmission of a communicable disease – not the “discharge, dispersal, seepage, migration, release or escape” of a pathogen.

118. Far from stating that losses from a pandemic are excluded, the Policies inform an ordinary reader that losses from communicable disease are covered, including particularly broad coverage under the Communicable Disease Response and Interruption by Communicable Disease provisions for situations where Mister Car Wash *itself* decides to shut down its *own* business due to the presence of “communicable disease.” See Exhibit A, at ¶IV.B.3 and ¶V.H.8.

119. The exclusion for “contaminants” as worded in the Policies is ambiguous with respect to coverage for loss and damage from a pandemic or communicable disease.

120. Upon information and belief, during the period from about February 15, 2019 to the present, one or more insurance regulators, including but not limited to the regulator in Louisiana, prohibited insurance companies from including “virus” or similar terms in the definition of “contaminants” for purposes of property insurance policy exclusions – thereby broadening the coverage provided under policy forms that Swiss Re filed with or were approved or accepted by such regulators.

121. Pursuant to the Liberalization provision of the Policies (*see* Exhibit A, at ¶IX.H), the broadened coverage required by such regulators inures to the benefit of Mister Car Wash as though such broadened coverage had been included in the Policies.

**D. Mister Car Wash's Insurance Claim**

122. On April 9, 2020, Plaintiffs, through their insurance broker, provided notice to Defendants that Plaintiffs were submitting a claim in connection with losses at all locations stemming from COVID-19 (the "Claim").

123. On June 1, 2020, Plaintiffs wrote Swiss Re to inquire about Defendant's coverage positions, having not heard anything from Swiss Re since an April 15, 2020 phone call with the independent adjuster.

124. On June 9, 2020, Plaintiffs provided a signed and sworn proof of loss to Swiss Re, dated June 9, 2020.

125. On June 10, 2020, Jeff Nonhof, Executive General Adjuster at Engle Martin & Associates and the assigned loss adjuster for all claims made under each of the Policies, requested on behalf of Defendants further information and detail regarding the background of the Claim.

126. On September 22, 2020, Plaintiffs provided a completed questionnaire with supporting documents to Engle regarding loss at all locations.

127. On October 9, 2020, Plaintiffs provided a second notarized proof of loss, reflecting known losses up to October 5, 2020.

128. On October 22, 2020, Defendants, through Engle, rejected Plaintiffs' proof of loss, reiterated their prior request for information related to the Claim, and reserved their rights as to all coverage determinations.

129. Defendants have failed to make any payment to Plaintiffs as required under the Policies.

**AS AND FOR A FIRST CAUSE OF ACTION**  
(Declaratory Judgment Against Swiss Re)

130. Mister Car Wash repeats and realleges the allegations set forth in paragraphs 1 through 129 as if fully set forth herein.

131. The Policies constitute valid contracts of insurance between Mister Car Wash and Swiss Re.

132. Swiss Re sold the Policies to Mister Car Wash.

133. Mister Car Wash paid all insurance premiums due under the Policies.

134. Mister Car Wash has complied with all conditions and satisfied all obligations to the extent that they have not been waived or abrogated by Swiss Re's conduct, omissions, actions or breaches.

135. Mister Car Wash is entitled to the coverage benefits of the Policies.

136. The Policies were in effect during the time that the damage, Alabama Order, Arizona Order, California Order, Colorado Order, Florida Order, Georgia Order, Idaho Order, Illinois Order, Maryland Order, Michigan Order, Minnesota Order, Mississippi Order, Missouri Order, New Mexico Order, Pennsylvania Order, Tennessee Order, Texas Order, Utah Order, Washington Order, and Wisconsin Order, and business interruption losses at issue occurred.

137. Mister Car Wash has incurred business interruption losses that are covered under the terms of the Policies, including, *inter alia* the Civil Authority, Attraction Property and Interruption by Communicable Disease coverages.

138. Mister Car Wash also has incurred losses that are covered under the Policies' Extra Expense, Preservation of Property and Communicable Disease Response coverages.

139. There is no exclusion, condition, definition, or other provision in the Policies that excludes or eliminates coverage for Mister Car Wash's losses.

140. There is no doctrine at law or in equity that excludes or eliminates coverage for Mister Car Wash's losses.

141. Despite the fact that the Policies cover Mister Car Wash's Claim, Swiss Re has refused or failed to honor its contractual obligation to indemnify Mister Car Wash for its covered losses.

142. An actual and justiciable controversy has arisen between Mister Car Wash and Swiss Re as to Swiss Re's obligation to indemnify Mister Car Wash for the actual losses sustained by Mister Car Wash and covered under the Policies.

143. By reason of the foregoing, an actual, substantial, and justiciable controversy exists between Mister Car Wash and Swiss Re regarding Mister Car Wash's covered business interruption and other losses, and a judicial declaration is necessary and appropriate so that the parties may ascertain their respective rights and duties.

144. Mister Car Wash seeks a judicial declaration by the Court, pursuant to CPLR §3001, that Swiss Re has a duty to indemnify Mister Car Wash under the Policies for Mister Car Wash's business interruption and other losses.

**AS AND FOR A SECOND CAUSE OF ACTION**  
(Breach of Contract Against Swiss Re)

145. Mister Car Wash repeats and realleges the allegations set forth in paragraphs 1 through 144 as if fully set forth herein.

146. Plaintiff and Swiss Re entered into an agreement whereby Plaintiff purchased insurance for which it paid a premium and Swiss Re agreed to insure Plaintiff pursuant to the terms of the Policies.

147. The Policies are valid and enforceable contracts between Plaintiff and Swiss Re.

148. The policies were in effect at all times during which Plaintiff suffered business interruption losses.

149. Pursuant to the Policies, Swiss Re promised to provide business income, civil authority, attraction property, preservation of property, extra expense and communicable disease coverage.

150. The losses that Plaintiff has sustained triggers the provisions of the Policies that provided coverage for losses at issue in the Claim.

151. Plaintiff provided timely notice of its claim and has complied with all conditions and satisfied all obligations to the extent they have not been waived or abrogated by Swiss Re.

152. Swiss Re's denial of insurance and refusal to honor its contractual obligations pursuant to the Policies constitutes a breach of the insurance contracts.

153. As a direct and proximate result of Swiss Re's breach, Plaintiff has suffered and continues to suffer damages, including costs and attorneys' fees associated with this action.

**PRAYER FOR RELIEF**

WHEREFORE, Mister Car Wash pray for judgment as follows:

- a. Enter declaratory judgment on Count I in favor of Mister Car Wash and against Swiss Re, including a declaration that the Policies cover the Claim; and
- b. With respect to the Second cause of Action, a judgment in Plaintiffs' favor, compensatory damages for its covered losses, pre- and post- judgment interest thereon, and attorneys' fees and costs in an amount to be determined; and

c. For such other and further relief, including attorneys' fees, costs, disbursements, and expenses incurred for this action, in favor of Plaintiffs and against Swiss Re, as the Court deems just and proper under the circumstance.

Dated: New York, New York  
March 15, 2021

ANDERSON KILL P.C.

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