

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

SCHLEICHER AND STEBBINS HOTELS, LLC;
RENSPA PLACE LLC; CHELSEA GATEWAY
PROPERTY LLC; OS SUDBURY LLC;
MONSIGNOR HOTEL LLC; SXC ALEWIFE
HOTEL LLC; LAWRENCEVILLE, LLC; SECOND
AVENUE HOTEL LESSEE LLC; SECOND
AVENUE HOTEL OWNER LLC; MEDFORD
STATION HOTEL LLC; WDC CONCORD HOTEL
LLC; BROADWAY HOTEL LLC; FOX INN LLC;
MELNEA HOTEL, LLC; NATICK HOTEL
LESSEE LLC; SUPERIOR DRIVE HOTEL
OWNER LLC; ARLINGTON STREET QUINCY
HOTEL LLC; ALBANY STREET HOTEL LESSEE
LLC; ALBANY STREET HOTEL LLC;
CLEVELAND CIRCLE HOTEL LESSEE LLC;
CLEVELAND CIRCLE HOTEL OWNER LLC;
WORCESTER TRUMBULL STREET HOTEL LLC;
ASSEMBLY HOTEL OPERATOR LLC;
ASSEMBLY ROW HOTEL LLC; PARADE
RESIDENCE HOTEL LLC; PORTWALK HI LLC;
ROUTE 120 HOTEL LLC; VAUGHAN STREET
HOTEL LLC; FSG BRIDGEWATER HOTEL LLC,

Plaintiffs

-against-

STARR SURPLUS LINES INSURANCE
COMPANY; CERTAIN UNDERWRITERS AT
LLOYD'S, LONDON SUBSCRIBING TO POLICY
NUMBER B1263EW0040519; EVEREST
INDEMNITY INSURANCE COMPANY;
HALLMARK SPECIALTY INSURANCE
COMPANY; EVANSTON INSURANCE
COMPANY; AXIS SURPLUS INSURANCE
COMPANY; SCOTTSDALE INSURANCE
COMPANY; MITSUI SUMITOMO INSURANCE
COMPANY OF AMERICA,

Defendants.

217-2020-CV-00309

Docket No. _____

**COMPLAINT AND DEMAND
FOR TRIAL BY JURY**

Plaintiffs Schleicher and Stebbins Hotels, LLC, Renspa Place LLC, Chelsea Gateway Property LLC, OS Sudbury LLC, Monsignor Hotel LLC, SXC Alewife Hotel LLC, Lawrenceville, LLC, Second Avenue Hotel Lessee LLC, Second Avenue Hotel Owner LLC, Medford Station Hotel LLC, WDC Concord Hotel LLC, Broadway Hotel LLC, Fox Inn LLC, Melnea Hotel, LLC, Natick Hotel Lessee LLC, Superior Drive Hotel Owner LLC, Arlington Street Quincy Hotel LLC, Albany Street Hotel Lessee LLC, Albany Street Hotel LLC, Cleveland Circle Hotel Lessee LLC, Cleveland Circle Hotel Owner LLC, Worcester Trumbull Street Hotel LLC, Assembly Hotel Operator LLC, Assembly Row Hotel LLC, Parade Residence Hotel LLC, Portwalk HI LLC, Route 120 Hotel LLC, Vaughan Street Hotel LLC, and FSG Bridgewater Hotel LLC (collectively, “Plaintiffs”), bring this action for declaratory judgment against Defendants Starr Surplus Lines Insurance Company, Certain Underwriters at Lloyd’s, London Subscribing to Policy Number B1263EW0040519, Everest Indemnity Insurance Company, Hallmark Specialty Insurance Company, Evanston Insurance Company, Axis Surplus Insurance Company, Scottsdale Insurance Company, and Mitsui Sumitomo Insurance Company of America (collectively, “Defendants”), demanding a trial by jury, and allege as follows:

INTRODUCTION

1. The transmission of the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), commonly known as the coronavirus, has caused a pandemic affecting millions of people around the world. Plaintiffs’ business has suffered enormously as a result.

2. Plaintiffs own and operate twenty-three hotel properties (the “Hotels”) located in New Hampshire, Massachusetts, and New Jersey.

3. The property damage and orders of civil authority associated with the coronavirus have caused Plaintiffs to sustain tens of millions of dollars in business income

losses. These losses are covered under the insurance policies that Plaintiffs purchased from Defendants.

4. Plaintiffs paid over \$950,000 in premiums to Defendants for property insurance policies that provide \$150,000,000 in coverage for the Hotels – including business interruption coverage – during the policy period from November 1, 2019 to November 1, 2020 (the “Policies”).

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

6. The risks associated with viruses and pandemics have been known to the insurance industry for a century and have been well known to Defendants in recent decades during which we all have witnessed outbreaks and pandemics involving viruses such as SARS, MERS, H1N1, and Zika.

7. Because these risks are well known, there are exclusions in common usage in the insurance industry that specifically reference losses caused by viruses and pandemics. However, none of the Defendants included any such exclusion as part of the Policies they sold to Plaintiffs.

8. The Policies include coverage for business interruption losses, as well as several broad “Extensions of Time Element Coverage” that cover business interruption losses like the Hotels are suffering in the wake of the coronavirus outbreak.

9. These extensions of coverage include, *inter alia*:

- a. “Contingent Business Interruption” coverage for losses when loss or damage to property away from the Hotels – including to property at “Attraction properties”

that attract customers to the Hotels – prevents potential customers from receiving the Hotels’ goods and services; and

- b. “Civil Authority” coverage for losses when, as a result of a peril insured against, access to real or personal property is impaired or hindered by order of civil authority, irrespective of whether property at a Hotel has been damaged.

10. The terms of the Policies, coupled with the absence of any applicable exclusion (despite commonly used exclusions for viruses and pandemics), establish that the Policies provide insurance coverage for Plaintiffs’ business interruption losses from the coronavirus pandemic.

11. Defendants have submitted a timely claim and on May 1, 2020, requested an advance payment under the Policies.

12. Defendants have not made an advance payment to Plaintiffs. With one exception, no Defendant has even acknowledged Plaintiffs’ demand for payment at any point over the six weeks since that request was first made.

13. Plaintiffs bring this lawsuit for a declaration that the Policies cover Plaintiffs’ business interruption losses from the coronavirus pandemic.

THE PARTIES

14. Plaintiff Schleicher and Stebbins Hotels, LLC has its principal place of business at 1359 Hooksett Road, Hooksett, New Hampshire 03106, and is organized under the laws of the State of New Hampshire. The members of Schleicher and Stebbins Hotels, LLC reside in New Hampshire and Florida.

15. Plaintiff Renspa Place LLC has its principal place of business at 28 Patriot Place, Foxborough, Massachusetts 02035, and is organized under the laws of the State of New

Hampshire. The members of Renspa Place LLC reside in New Hampshire, Massachusetts, and Florida.

16. Plaintiff Chelsea Gateway Property LLC has its principal place of business at 200 Maple Street, Chelsea, Massachusetts 02150, and is organized under the laws of the State of Delaware. The members of Chelsea Gateway Property LLC reside in New Hampshire, Massachusetts, California, Vermont, and Florida.

17. Plaintiff OS Sudbury LLC has its principal place of business at 738 Boston Post Road, Sudbury, Massachusetts 01776, and is organized under the laws of the State of New Hampshire. The members of OS Sudbury LLC reside in New Hampshire, Massachusetts, and Florida.

18. Plaintiff Monsignor Hotel LLC has its principal place of business at 215 Monsignor O'Brien Highway, Cambridge, Massachusetts 02141, and is organized under the laws of the State of Delaware. The members of Monsignor Hotel LLC reside in New Hampshire, Massachusetts, California, Vermont, and Florida.

19. Plaintiff SXC Alewife Hotel LLC has its principal place of business at 10 Acorn Park Drive, Cambridge, Massachusetts 02140, and is organized under the laws of the State of Delaware. The members of SXC Alewife Hotel LLC reside in New Hampshire, Massachusetts, California, Vermont, and Florida.

20. Plaintiff Lawrenceville, LLC has its principal place of business at 145 Beech Street, Chelsea, Massachusetts 02150, and is organized under the laws of the State of Delaware. The members of Lawrenceville, LLC reside in New Hampshire, Massachusetts, California, Vermont, and Florida.

21. Plaintiff Second Avenue Hotel Lessee LLC has its principal place of business at 250 Second Avenue, Waltham, Massachusetts 02451, and is organized under the laws of the State of Delaware. The members of Second Avenue Hotel Lessee LLC reside in various states, including New Hampshire, Massachusetts, Vermont, Florida, New York, New Jersey, and Illinois.

22. Plaintiff Second Avenue Hotel Owner LLC has its principal place of business at 250 Second Avenue, Waltham, Massachusetts 02451, and is organized under the laws of the State of Delaware. The members of Second Avenue Hotel Owner LLC reside in various states, including New Hampshire, Massachusetts, Vermont, Florida, New York, New Jersey, and Illinois.

23. Plaintiff Medford Station Hotel LLC has its principal place of business at 95 Station Landing, Medford, Massachusetts 02155, and is organized under the laws of the State of Delaware. The members of Medford Station Hotel LLC reside in New Hampshire, Massachusetts, California, Vermont, and Florida.

24. Plaintiff WDC Concord Hotel LLC has its principal place of business at 320 Baker Avenue, Concord, Massachusetts 01742, and is organized under the laws of the State of Delaware. The members of WDC Concord Hotel LLC reside in New Hampshire, Massachusetts, Florida, California, Arizona, Connecticut, Maryland, New Jersey, Texas, and South Carolina.

25. Plaintiff Broadway Hotel LLC has its principal place of business at 1012-1018 Broadway, Chelsea, Massachusetts 02150, and is organized under the laws of the State of New Hampshire. The members of Broadway Hotel LLC reside in New Hampshire, Massachusetts, California, Vermont, and Florida.

26. Plaintiff Fox Inn LLC has its principal place of business at 27 Patriot Place, Foxborough, Massachusetts 02035, and is organized under the laws of the State of New Hampshire. The members of Fox Inn LLC reside in New Hampshire, Massachusetts, and Florida.

27. Plaintiff Melnea Hotel, LLC has its principal place of business at 2001 Washington Street, Boston, Massachusetts 02119, and is organized under the laws of the State of Delaware. The members of Melnea Hotel, LLC reside in New Hampshire, Massachusetts, Vermont, Tennessee, and Florida.

28. Plaintiff Natick Hotel Lessee LLC has its principal place of business at 1 Superior Drive, Natick, Massachusetts 01760, and is organized under the laws of the State of Delaware. The members of Natick Hotel Lessee LLC reside in various states, including New Hampshire, Massachusetts, Vermont, Florida, New York, New Jersey, and Illinois.

29. Plaintiff Superior Drive Hotel Owner LLC has its principal place of business at 1 Superior Drive, Natick, Massachusetts 01760, and is organized under the laws of the State of Delaware. The members of Superior Drive Hotel Owner LLC reside in various states, including New Hampshire, Massachusetts, Vermont, Florida, New York, New Jersey, and Illinois.

30. Plaintiff Arlington Street Quincy Hotel LLC has its principal place of business at 1 Richard Stratton Way, Quincy, Massachusetts 02171, and is organized under the laws of the State of New Hampshire. The members of Arlington Street Quincy Hotel reside in New Hampshire, Massachusetts, and Florida.

31. Plaintiff Albany Street Hotel Lessee LLC has its principal place of business at 225 Albany Street, Boston, Massachusetts 02118, and is organized under the laws of

the State of Delaware. The members of Albany Street Hotel Lessee LLC reside in various states, including New Hampshire, Massachusetts, Vermont, Florida, New York, and Illinois.

32. Plaintiff Albany Street Hotel LLC has its principal place of business at 225 Albany Street, Boston, Massachusetts 02118, and is organized under the laws of the State of Delaware. The members of Albany Street Hotel LLC reside in various states, including New Hampshire, Massachusetts, Vermont, Florida, New York, and Illinois.

33. Plaintiff Cleveland Circle Hotel Lessee LLC has its principal place of business at 395-399 Chestnut Hill Avenue, Boston, Massachusetts 02135, and is organized under the laws of the State of Delaware. The members of Cleveland Circle Hotel Lessee LLC reside in various states, including New Hampshire, Massachusetts, Vermont, Florida, New York, and Illinois.

34. Plaintiff Cleveland Circle Hotel Owner LLC has its principal place of business at 395-399 Chestnut Hill Avenue, Boston, Massachusetts 02135, and is organized under the laws of the State of Delaware. The members of Cleveland Circle Hotel Owner LLC reside in various states, including New Hampshire, Massachusetts, Vermont, Florida, New York, and Illinois.

35. Plaintiff Worcester Trumbull Street Hotel LLC has its principal place of business at 125 Front Street, Worcester, Massachusetts 01608, and is organized under the laws of the State of New Hampshire. The members of Worcester Trumbull Street Hotel LLC reside in New Hampshire, Massachusetts, and Vermont.

36. Plaintiff Assembly Hotel Operator LLC has its principal place of business at 360 Foley Street, Somerville, Massachusetts 02145, and is organized under the laws of the

State of Delaware. The members of Assembly Hotel Operator LLC reside in New Hampshire, Massachusetts, Vermont, Florida, and Maryland.

37. Plaintiff Assembly Row Hotel LLC has its principal place of business at 360 Foley Street, Somerville, Massachusetts 02145, and is organized under the laws of the State of Delaware. The members of Assembly Row Hotel LLC reside in New Hampshire, Massachusetts, Vermont, Florida, and Maryland.

38. Plaintiff Parade Residence Hotel LLC has its principal place of business at 100 Deer Street, Portsmouth, New Hampshire 03801, and is organized under the laws of the State of New Hampshire. The members of Parade Residence Hotel LLC reside in New Hampshire and Massachusetts.

39. Plaintiff Portwalk HI LLC has its principal place of business at 23 Portwalk Place, Portsmouth, New Hampshire 03801, and is organized under the laws of the State of New Hampshire. The members of Portwalk HI LLC reside in New Hampshire and Massachusetts.

40. Plaintiff Route 120 Hotel LLC has its principal place of business at 35 Labombard Road, Lebanon, New Hampshire 03766, and is organized under the laws of the State of New Hampshire. The members of Route 120 Hotel LLC reside in New Hampshire and Florida.

41. Plaintiff Vaughan Street Hotel LLC has its principal place of business at 299 Vaughan Street, Portsmouth, New Hampshire 03801 and is organized under the laws of the State of New Hampshire. The members of Vaughan Street Hotel LLC reside in New Hampshire and Massachusetts.

42. Plaintiff FSG Bridgewater Hotel LLC has its principal place of business at 1277 U.S. Route 22 West, Bridgewater, New Jersey 08807 and is organized under the laws of the State of Delaware. The members of FSG Bridgewater Hotel LLC reside in New Hampshire, Massachusetts, New York, Connecticut, and California.

43. Upon information and belief, defendant Starr Surplus Lines Insurance Company (“Starr”) is a Texas corporation with its principal place of business at 399 Park Avenue, New York, New York 10022. At all relevant times, Starr was doing business in New Hampshire. Starr sold policy number SLSTPTY11234919 to Plaintiffs for the period November 1, 2019 to November 1, 2020 (the “Starr Policy”). A copy of the Starr Policy is attached hereto as Exhibit 1 and incorporated herein by reference.

44. Upon information and belief, defendant Certain Underwriters at Lloyd’s, London Subscribing to Policy Number B1263EW0040519 is comprised of individuals or entities that are or were underwriting members of Lloyd’s of London or London Market Companies (“Lloyd’s”). Upon information and belief, Lloyd’s has its principal place of business at One Lime Street, London, EC3M 7HA United Kingdom. Lloyd’s sold policy no. B1263EW0040519 to Plaintiffs for the period November 1, 2019 to November 1, 2020 (the “Lloyd’s Policy”). Upon information and belief, one or more of the subscribers to the Lloyd’s Policy are residents of Massachusetts, New Jersey, New York, Illinois and/or California. At all relevant times, Lloyd’s was doing business in New Hampshire. A copy of the Lloyd’s Policy is attached hereto as Exhibit 2 and incorporated herein by reference.

45. Upon information and belief, defendant Everest Indemnity Insurance Company (“Everest”) is a Delaware corporation with its principal place of business at 477 Martinsville Road, Liberty Corner, New Jersey 07938. At all relevant times, Everest was doing

business in New Hampshire. Everest sold policy number CA3P006446-191 to Plaintiffs for the period November 1, 2019 to November 1, 2020 (the “Everest Policy”). A copy of the Everest Policy is attached hereto as Exhibit 3 and incorporated herein by reference.

46. Upon information and belief, defendant Hallmark Specialty Insurance Company (“Hallmark”) is an Oklahoma corporation with its principal place of business at Two Lincoln Centre Lyndon B. Johnson Freeway, Suite 1100, Dallas, Texas 75240. At all relevant times, Hallmark was doing business in New Hampshire. Hallmark sold policy number 73PRX19A36E to Plaintiffs for the period November 1, 2019 to November 1, 2020 (the “Hallmark Policy”). A copy of the Hallmark Policy is attached hereto as Exhibit 4 and incorporated herein by reference.

47. Upon information and belief, defendant Evanston Insurance Company (“Evanston”) is an Illinois corporation with its principal place of business at Ten Parkway North, Deerfield, Illinois 60015. At all relevant times, Evanston was doing business in New Hampshire. Evanston sold policy number MKLV11XP007697 to Plaintiffs for the period November 1, 2019 to November 1, 2020 (the “Evanston Policy”). A copy of the Evanston Policy is attached hereto as Exhibit 5 and incorporated herein by reference.

48. Upon information and belief, defendant Axis Surplus Insurance Company (“Axis”) is an Illinois corporation with its principal place of business at 11680 Great Oaks Way, Alpharetta, Georgia 30022. At all relevant times, Axis was doing business in New Hampshire. Axis sold policy number EAF642409-19 to Plaintiffs for the period November 1, 2019 to November 1, 2020 (the “Axis Policy”). A copy of the Axis Policy is attached hereto as Exhibit 6 and incorporated herein by reference.

49. Upon information and belief, defendant Scottsdale Insurance Company (“Scottsdale”) is an Ohio corporation with its principal place of business at 8877 North Gainey Center Drive, Scottsdale, Arizona 85258. At all relevant times, Scottsdale was doing business in New Hampshire. Scottsdale sold policy number BXS0001443 to Plaintiffs for the period November 1, 2019 to November 1, 2020 (the “Scottsdale Policy”). A copy of the Scottsdale Policy is attached hereto as Exhibit 7 and incorporated herein by reference.

50. Upon information and belief, defendant Mitsui Sumitomo Insurance Company of America (“Mitsui”) is a New York corporation with its principal place of business at 15 Independence Boulevard, Warren, New Jersey 07059. At all relevant times, Mitsui was doing business in New Hampshire. Mitsui sold policy number EXP7000731 to Plaintiffs for the period November 1, 2019 to November 1, 2020 (the “Mitsui Policy”). A copy of the Mitsui Policy is attached hereto as Exhibit 8 and incorporated herein by reference.

JURISDICTION AND VENUE

51. This Court has subject matter jurisdiction over this civil matter pursuant to RSA 491:7.

52. This Court has personal jurisdiction over Defendants because they are doing business in the State of New Hampshire. Upon information and belief, certain Defendants are licensed to transact in the business of insurance in the State of New Hampshire.

53. Upon information and belief, each of the Defendants are transacting the business of insurance in the State of New Hampshire and the basis of this lawsuit arises out of such conduct.

54. In their respective Policies, each of the Defendants has agreed that they “will submit to the jurisdiction of any court of competent jurisdiction within the United States

and will comply with all requirements necessary to give such jurisdiction. All matters arising hereunder shall be determined in accordance with the law and practice of such court.” See Exs. 1-8 at ¶ 70.

55. Pursuant to RSA § 507:9, venue is proper in this court because Plaintiffs maintain offices or places of business in Hookset, New Hampshire, which is located in Merrimack County.

FACTUAL BACKGROUND

56. The purpose and nature of business interruption insurance is to indemnify policyholders like Plaintiffs against losses arising from an inability to continue normal business operations due – as is the case here – to loss or damage sustained as a result of a peril insured against. In other words, the insurance promises to preserve the continuity of the policyholder’s earnings when a covered loss occurs.

57. Now that the most pressing and debilitating business interruption loss has befallen Plaintiffs and the Hotels due to the coronavirus pandemic, Defendants wrongfully and self-servingly have sought to avoid their obligations and promises under the Policies.

A. Plaintiffs’ Insurance Program

58. Defendants sold Plaintiffs “all risk” insurance policies covering the policy period from November 1, 2019 to November 1, 2020.

59. When they sold the Policies to Plaintiffs, Defendants promised to provide, *inter alia*, the following types of business interruption coverages if sustained by Plaintiffs:

- a. “Contingent Business Interruption” coverage for losses when loss or damage to property away from the Hotels or to an Attraction

property prevents potential customers from receiving the Hotels' goods and services; and

- b. "Civil Authority" coverage for losses when, as a result of a peril insured against, access to real or personal property is impaired or hindered by order of civil authority, irrespective of whether property at a Hotel has been damaged.

60. To date, Plaintiffs have paid all premiums for the Policies, and have satisfied all relevant and applicable conditions precedent to obtaining payments owed under the Policies to the extent that they have not been waived or abrogated by Defendants' conduct, omissions, actions or breaches.

61. The Policies provide up to \$150,000,000 in combined limits, with each Defendant responsible for paying a specified share of that amount, depending on the terms of its particular Policy. *See* Exs. 1-8 at Declarations.

B. Relevant Insurance Policy Terms

62. Defendants sold Plaintiffs "all risk" insurance policies. The Policies describe the perils insured against as follows: "This policy insures against risks of direct physical loss of or damage to damage to property described herein...except as hereinafter excluded." *See* Policies at ¶ 28.

63. The Policies provide insurance coverage for property owned, used, leased or intended for use by Plaintiffs, as well as for business interruption losses that result "from the complete or partial interruption of business conducted by the Insured including all interdependent loss of earnings between or among companies owned or operated by the Insured

caused by loss, damage, or destruction by any of the perils covered herein during the term of this policy to real and personal property as covered herein.” *See* Policies at ¶ 10.

64. In addition, the Policies contain “Extensions of Time Element Coverage.” *See* Policies at ¶ 21.

65. At least two of these “Extensions of Time Element Coverage” provide coverage for Plaintiffs’ business interruption losses at issue here:

- a. The Policies provide Contingent Business Interruption coverage as follows: “This Policy . . . insures against ACTUAL LOSS SUSTAINED by the Insured resulting from loss or damage from the perils insured against, to: b) property that directly prevents a supplier (of any tier) of goods and/or services to the Insured from rendering their goods and/or services, or property that prevents a receiver (of any tier) of goods and/or services from receiving the Insured’s goods and/or services; Coverage includes loss or damage to real and personal property located at Attraction properties, defined as properties not operated by the insured, which attract potential customers to the vicinity of the Insured’s locations.” (the “CBI Coverage”). *See* Policies at ¶ 21(b).
- b. The Policies provide Civil Authority coverage as follows: “This Policy . . . insures against ACTUAL LOSS SUSTAINED by the Insured resulting from loss or damage from the perils insured against, to: d) the actual loss sustained for a period not to exceed ninety (90) consecutive days when, as a result of a peril insured

against, access to real or personal property is impaired or hindered by order of civil or military authority irrespective of whether the property of the Insured shall have been damaged. *See* Policies at ¶ 21(d).

66. The Policies also provide other coverages that may cover Plaintiffs' losses, such as ingress/egress coverage and loss of attraction coverage. *See* Policies at ¶¶ 12, 21(e).

67. Viruses such as the coronavirus are a peril insured against under the Policies.

68. The Policies provide “all-risk” coverage and there is no exclusion for the risks or perils of pandemic, virus,¹ or communicable disease.

69. The absence of a virus or pandemic exclusion in the Policies is telling. The Defendants did not exclude coverage for such perils when they sold Plaintiffs the Policies, despite the common use of such exclusions in the insurance industry following the outbreaks of SARS, MERS, H1N1, and Zika. Defendants cannot add any such exclusion or exclusionary interpretation now that Plaintiffs have suffered losses from the coronavirus pandemic

¹ There is mention of the word “virus” in the “Pollutants and Contaminants Exclusion” added by endorsement to the Axis Policy, but that exclusion applies to standard industrial pollution risks – not the risk of a pandemic – and does not apply here. The endorsement to the Axis Policy excludes “[l]oss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of pollutants or contaminants, however caused;” Ex. 6 at Endorsement 4 ¶ A(1). The endorsement to the Axis Policy states “Pollutants or contaminants include, but are not limited to those materials that can cause or threaten damage to human health or human welfare or cause or threaten damage, deterioration, loss of value, marketability or loss of use to property. Pollutants or contaminants include, but are not limited to bacteria, fungi, mold, mildew, virus or hazardous substances as listed in the Federal Water Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency or any other governing authority.” *Id.*

C. The Damage from the Coronavirus

70. The coronavirus causes loss or damage to property.

71. The coronavirus causes direct physical loss of or damage to property.

72. The coronavirus causes a distinct and demonstrable alteration to impacted property.

73. When the coronavirus impacts property, it renders the property dangerous and potentially fatal.

74. Property impacted by coronavirus is, in practical effect, unusable for the purpose of generating business income.

75. Businesses generally buy insurance for their property and business income to insure 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 virus – the loss or damage from any of these causes is the same.

76. A virus certainly causes “loss or damage” even though it is invisible to the naked eye. Property impacted by the coronavirus 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 virus constitutes loss or damage to property, as well as direct physical loss of or damage to property.

77. Defendants know that viruses cause loss or damage, and they knew it when they sold the Policies to Plaintiffs.

78. Defendants acknowledged as much by including an endorsement on the Policies that “insures physical loss or damage to insured property by mold, mildew or fungus.”

See Policies at Endorsement 1 ¶ A. The same endorsement states the Policies do not insure “any loss, damage, claim, cost, expense . . . directly or indirectly arising out of . . . spores or other microorganism of any type[.]” *Id.* at ¶ B.

79. Defendants expressly acknowledge in the Policies they sold to Plaintiffs that relatively imperceptible things invisible to the naked eye, such as spores or microorganisms cause loss or damage.

80. The coronavirus is not a microorganism because it is not a living thing. Viruses lack many key characteristics of living things, including the ability to: (1) maintain homeostasis; (2) reproduce on their own; and (3) grow.

81. The coronavirus 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.

82. Human contact with such surfaces is known to transmit the virus, making property impacted by the virus very dangerous and potentially fatal.

83. The World Health Organization (“WHO”) explains that the disease caused by coronavirus infection, 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...”²

² “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>.

84. 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.”³

85. A team of researchers from UCLA, Princeton University, the National Institute of Allergy and Infectious Diseases, and the Centers for Disease Control and Prevention (“CDC”) studied the persistence of coronavirus on various surfaces and materials. The researchers reported in the April 16, 2020 edition of the *New England Journal of Medicine* that the virus persisted on plastic and stainless steel surfaces for up to seventy-two hours in laboratory studies.⁴

86. Scientists also have studied the persistence of coronavirus on surfaces in cruise ships with documented outbreaks of COVID-19. One such study, reported by the CDC on March 23, 2020, found that the coronavirus was present in the cabins of a Diamond Princess cruise ship seventeen days after it had been vacated, but before it had been disinfected.⁵

87. There have been over 278,000 confirmed cases of COVID-19 in New Hampshire, Massachusetts, and New Jersey, and the number of cases continues to grow.

88. The number of confirmed cases of COVID-19 nationwide is over 2,085,000 and growing.

³ *Id.*

⁴ Neeltje van Doremalen, *et al.*, [Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1](https://www.nejm.org/doi/full/10.1056/NEJMc2004973), N. ENGL. J. MED. (March 17, 2020), available at <https://www.nejm.org/doi/full/10.1056/NEJMc2004973>.

⁵ Leah F. Moriarty, *et al.*, [Public Health Responses to COVID-19 Outbreaks on Cruise Ships — Worldwide, February–March 2020](https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.htm), CDC Morbidity and Mortality Weekly Report (Mar. 27, 2020), available at <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.htm>.

89. 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.

90. Accordingly, the loss and damage to property from coronavirus is ubiquitous and widespread across the United States.

D. Orders of Civil Authorities in Connection with the Coronavirus Pandemic

91. There have been hundreds, if not thousands, of orders of civil authority across the United States as a result of the coronavirus outbreak, including orders by federal, 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; and restricting or limiting entry into the United States (the “Orders”).

92. Between March 9-13, 2020, the federal government and the states in which the Hotels are located declared states of emergency due to the coronavirus pandemic:

- a. On March 9, 2020, following confirmed cases of COVID-19 in the State of New Jersey, Governor Philip D. Murphy declared a state of emergency. *See* Ex. 9.
- b. On March 10, 2020, following confirmed cases of COVID-19 in the Commonwealth of Massachusetts, Governor Charlie Baker declared a state of emergency. *See* Ex. 10.

- c. On March 13, 2020, following confirmed cases of COVID-19 in the State of New Hampshire, Governor Christopher T. Sununu declared a state of emergency. *See* Ex. 11.
 - d. On March 13, 2020, the President of the United States proclaimed a national emergency. *See* Ex. 12.
93. In the State of New Hampshire:
- a. Governor Sununu issued an emergency order on March 26, 2020 closing all non-essential businesses and requiring all residents to stay at home except with very limited exceptions. *See* Ex. 13. The order was in force through May 31, 2020. *See* Ex. 14 at ¶¶ 6, 14;
 - b. Plaintiffs, as “lodging providers,” were “restricted to providing lodging for vulnerable populations and essential workers only” as of April 6, 2020. *See* Ex. 15 at ¶ 1. Four of Plaintiffs’ Hotels are subject to this order, which remained in force at least through May 31, 2020. *See* Ex. 14 at ¶ 11.
 - c. Starting June 5, 2020, hotels were permitted to accept overnight reservations from in-state residents and from out-of-state visitors who satisfy New Hampshire’s fourteen-day quarantine requirement. *See* Ex. 14 at Ex. C ¶ M. Hotels must limit capacity by as much as 50%. *Id.*
94. In the Commonwealth of Massachusetts:
- d. Governor Baker issued an order on March 23, 2020 closing all non-essential businesses and requiring all residents to stay at home

except with very limited exceptions. *See* Ex. 16. The order was extended through May 18, 2020, when Massachusetts began a “Phase 1” reopening. *See* Ex. 17;

- e. Hotel employees and operations were deemed non-essential with the exception of “Workers at hotels, motels, inns, and other lodgings providing overnight accommodation, but only to the degree those lodgings are offered or provided to accommodate the COVID-19 Essential Workforce, other workers responding to the COVID-19 public health emergency, and vulnerable populations.” *See* Ex. 18 at 28. Nineteen of Plaintiffs’ Hotels were subject to this Order.
- f. Governor Baker issued an order on June 1, 2020 clarifying the progression of the Commonwealth’s phased workplace re-opening plan. *See* Ex. 19. On June 6, 2020, Governor Baker announced that “Phase 2” of reopening Massachusetts would begin on June 8, 2020. Phase 2 permits hotels to accept all guests, lifting the previous restriction that guests must be either essential workers or members of vulnerable populations, but “[b]allrooms, meeting rooms, function halls, and all other indoor or outdoor event facilities must remain closed,” and hotel operators “are not permitted to host weddings, business events, or other organized gatherings of any kind.” *See* Ex. 20. “Phase 2” guidance includes “leaving guest rooms vacant for 24 hours as part of cleaning

protocol to allow for deep cleaning, disinfectant and cleaners to dry, and reasonable air exchange.” *Id.*

95. In the State of New Jersey, Governor Murphy issued an Order on March 21, 2020 closing all non-essential businesses and ordering “All New Jersey residents shall remain home or at their place of residence unless they are” performing a limited set of activities, like buying groceries or seeking medical attention. *See* Ex. 21 at ¶ 2. Hotels constitute a non-essential business under the Order. *See id.* ¶ 6. One of Plaintiffs’ Hotels was subject to this Order.

96. State, local, and municipal authorities throughout the country have specifically recognized that the Orders were issued in part because of the damage coronavirus causes to property. For example:

- a. On March 7, 2020, the Governor of New York issued Executive Order No. 202 declaring a State of Emergency based on his authority to act to “to protect state and local property, and to provide such other assistance as is necessary to protect public health, welfare, and safety.” Ex. 22. That Order was extended and amended on March 22, 2020 to close in-office operations at non-essential businesses;
- b. On March 16, 2020, the Mayor of New York City issued an emergency executive order declaring a state of emergency, stating: “this order is given because of the propensity of the virus to spread person to person and also because the virus physically is causing property loss and damage[.]” Ex. 23 (emphasis added);

- c. On March 16, 2020, the Mayor of the City of New Orleans issued an emergency order suspending non-emergency gatherings and closing certain categories of businesses, stating “there is reason to believe that COVID-19 may be spread amongst the population by various means of exposure, including the propensity to spread person to person and the propensity to attach to surfaces for prolonged periods of time, thereby spreading from surface to person and causing property loss and damage in certain circumstances[.]” Ex. 24 (emphasis added). That Order canceled all private and public gatherings and mandated the closure of gyms, entertainment venues, shopping malls, and eat-in dining;
- d. On March 19, 2020, the Mayor of the City of Los Angeles issued a shutdown order, explaining “This Order is given because, among other reasons, the COVID-19 virus can spread easily from person to person and it is physically causing property loss or damage due to its tendency to attach to surfaces for prolonged periods of time.” Ex. 25 (emphasis added). The Order advised that “City residents must isolate themselves in their residences, subject to certain exceptions[.]”;
- e. On April 1, 2020, in a supplement to a mayoral proclamation, the Mayor of the City of San Francisco extended coronavirus-related orders, including the stay-at-home order “requiring most

people to remain in their homes subject to certain exceptions including obtaining essential goods such as food and necessary supplies, and requiring the closure of nonessential businesses.”

The supplemental Order declared “This order and the previous orders issued during this emergency have all been issued because of the propensity of the virus to spread person to person and also because the virus physically is causing property loss or damage due to its proclivity to attach to surfaces for prolonged periods of time[.]” Ex. 26 (emphasis added);

- f. On April 6, 2020, the Governor of Colorado extended that state’s shutdown order, acknowledging “COVID-19 also physically contributes to property loss, contamination, and damage due to its propensity to attach to surfaces for prolonged periods of time. Ex. 27 (emphasis added). The Governor “direct[ed] all Coloradans to stay at home, unless necessary to provide, support, perform, or operate Necessary Activities, Minimum Basic Operations, Critical Government Functions, Necessary Travel or Critical Businesses as such terms are defined. . . .”; and
- g. On April 23, 2020, a Dallas County Judge issued an amended “Safer at Home Order” that states, “this Emergency Order is necessary because of the propensity of the virus to spread person to person and also because the virus is physically causing property damage due to its proclivity to attach to surfaces for prolonged

periods of time All individuals currently living within Dallas County are ordered to shelter at their place of residence [.]” Ex. 28 (emphasis added).

97. The Orders were issued as a result of a peril insured against under the Policies.

98. The Orders were issued at least in part because of the distinct and demonstrable alteration of property caused by coronavirus.

99. The Orders impaired or hindered access to real and personal property, including but not limited to the Hotels.

E. Plaintiffs’ Business Interruption Losses

100. Plaintiffs have suffered actual business interruption losses insured under the CBI Coverage.

101. Plaintiffs have suffered business interruption losses because of loss or damage to property away from the Hotels that wholly or partially has prevented, and still is preventing, potential customers from receiving the Hotels’ goods or services.

102. For example, the widespread, nationwide damage caused by the coronavirus to property of the type insured under the Policies (*e.g.*, buildings and furniture including surfaces of all kinds on such property), and the dangerous condition of such damaged property, prevents customers and potential customers from travelling to and staying at the Hotels or using the Hotels for any purpose.

103. The widespread, nationwide damage by coronavirus to property located between the places where customers live and the Hotels, including at airports and other

transportation hubs, prevents customers and potential customers from travelling to and staying at the Hotels or using the Hotels for any purpose.

104. Simply put, the fact that contact with such damaged property could be fatal to such customers and potential customers prevents them from receiving the Hotels' goods and services.

105. Plaintiffs have suffered business interruption losses insured under the Attraction property provision of the CBI coverage.

106. Plaintiffs have suffered business interruption losses because of loss or damage to real or personal property located in the vicinity of the Hotels that attracts business to the Hotels.

107. The coronavirus has caused physical loss or damage to property, such as: offices and business districts in Boston, Portsmouth, and Concord; Boston entertainment attractions such as the Boston Opera House, the New England Aquarium, Gillette Stadium, and Fenway Park; and educational institutions such as Harvard University, MIT, Boston College, Boston University, Northeastern University, and Tufts University.

108. These properties attract potential customers from across the country and around the world to the Hotels, and there has been an actual loss sustained by Plaintiffs as a result of loss or damage to those attraction properties.

109. Plaintiffs have suffered business interruption losses insured under the Civil Authority Coverage.

110. Plaintiffs have suffered business interruption losses because, as a result of a peril insured against, access to real or personal property (including but not limited to the Hotels) has been impaired or hindered by orders of civil authority.

111. For example, the ability of customers and potential customers to travel from their homes to the Hotels has been impaired by orders that require them to shelter in place or prohibit them from going to the Hotels or to non-essential businesses in the vicinity of the Hotels that have been ordered to close.

112. In New Hampshire and Massachusetts, where all but one of Plaintiffs' Hotels are located, the Orders restricted Plaintiffs from rendering their goods and services to anyone except very limited population group until June 5 and June 8, respectively. *See* Exs. 13-18. Plaintiffs' New Hampshire and Massachusetts Hotels continue to operate with restrictions on capacity and service. *See* Exs. 19-20.

113. These restrictions imposed by the Orders have impaired or hindered access to the Hotels and other real and personal property in the vicinity of the Hotels, and there has been an actual loss sustained by Plaintiffs as a result.

114. Plaintiffs also may have suffered business interruption losses insured other under coverages in the Policies, including, but not limited to, ingress/egress coverage or loss of attraction coverage.

115. In March 2020, Plaintiffs sustained business interruption losses estimated to be in excess of \$7,600,000.

116. Since April 2020, Plaintiffs have sustained, and continue to sustain, business interruption losses estimated to be in excess of \$16,300,000 per month.

117. It is anticipated that Plaintiffs' business interruption losses will continue for an extended period of time after the Orders are lifted and the existing and continuing damage is rectified. It is likely that it will take a significant amount of time to restore Plaintiffs' business to the condition that would have existed had no loss occurred.

F. Plaintiffs' Insurance Claim

118. In or about March 2020, Plaintiffs, through their insurance broker, provided notice to Defendants that Plaintiffs were submitting a claim in connection with losses stemming from the coronavirus, and requested an advance payment (the "Claim").

119. On April 13, 2020, Jeff Hellman, Vice President of McLarens and the designated 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 and attached a questionnaire to be completed by Plaintiffs for each location involved.

120. Plaintiffs, through their broker, provided a completed questionnaire to McLarens on April 21, 2020 regarding loss at all Hotels.

121. On April 21, 2020, McLarens requested additional information about the Claim.

122. On May 1, 2020, Plaintiffs responded and supplemented their response to the questionnaire. Plaintiffs also asked "whether an advance payment can be made, as our losses are substantial and continue to grow."

123. On May 11, 2020, McLarens sent a letter to Plaintiffs on behalf of Starr advising that Starr was proceeding "under a full Reservation of Rights." Starr did not address or acknowledge Plaintiffs' request for an advance payment.

124. On May 19, 2020, Plaintiffs wrote to McLarens to inquire about Defendants' coverage positions, which have not been provided to date, and a response to Plaintiffs' request for an advance payment. Plaintiffs advised that "an advance payment is urgently needed to offset our hotels' substantial and ongoing losses" and renewed their request for an advance payment.

125. In response, on May 19, 2020, McLarens asked Plaintiffs to answer questions that Plaintiffs already had answered, as well as questions about steps Plaintiffs took to clean the Hotels. McLarens did not acknowledge or address Plaintiffs' request for an advance payment.

126. On May 19, 2020, Plaintiffs directed McLarens to their previous responses and explained that McLarens' additional inquiries were not relevant to the Claim, which does not presently seek coverage for the cost of cleaning the Hotels. Plaintiffs further stated, "Rather, our critical losses are covered under the Extensions of Time Element Coverage in the insurance policies that S&S purchased. It feels like the insurance companies are giving us the run around at a time when we badly need their support. Please have the insurance companies provide their coverage positions and response about a partial payment as soon as possible."

127. On June 16, 2020, McLarens sent Plaintiffs a letter that again failed to acknowledge or address Plaintiffs' request for an advance payment but, instead, re-hashed a number of the same questions that Plaintiffs previously answered, and added a few others that were not even directed at the policy provisions that are the focus of Plaintiffs' claim.

128. On June 16, 2020, McLarens sent a letter to Plaintiffs on behalf of Everest and Lloyd's advising that those two insurance companies were proceeding "under a full Reservation of Rights." Neither Everest nor Lloyd's addressed or acknowledged Plaintiffs' request for an advance payment.

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

130. Indeed, nearly a month has passed since the Defendants received responses to their requests for information, and none of the Defendants have provided any substantive response to Plaintiffs' Claim.

AS AND FOR A FIRST CAUSE OF ACTION

(Declaratory Judgment Against All Defendants)

131. Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 through 130 as if fully set forth herein.

132. The Policies constitute valid contracts of insurance between Plaintiffs and each of the Defendants.

133. Defendants sold the Policies to Plaintiffs.

134. Plaintiffs paid all insurance premiums due under the Policies.

135. Plaintiffs have complied with all conditions and satisfied all obligations to the extent that they have not been waived or abrogated by Defendants' conduct, omissions, actions or breaches.

136. Plaintiffs are entitled to the coverage benefits of the Policies.

137. The Policies were in effect during the time that the damage, Orders, and business interruption losses at issue occurred.

138. Plaintiffs have suffered business interruption losses that are covered under the terms of the Policies, including, *inter alia* the CBI Coverage and the Civil Authority coverage.

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

140. There is no doctrine at law or in equity that excludes or eliminates coverage for Plaintiffs' losses.

141. Despite the fact that the Policies cover Plaintiffs' Claim, Defendants have refused or failed to honor their contractual obligation to indemnify Plaintiffs for its covered losses.

142. An actual and justiciable controversy has arisen between Plaintiffs and Defendants as to Defendants' obligation to indemnify Plaintiffs for the actual losses sustained by Plaintiffs and covered under the Policies.

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

144. Plaintiffs seek a judicial declaration by the Court, pursuant to RSA § 491:22, that Defendants have a duty to indemnify Plaintiffs under the Policies for Plaintiffs' business interruption losses, including under the CBI coverage and the Civil Authority coverage.

145. Plaintiffs are entitled to court costs and reasonable attorneys' fees incurred in bringing this action to determine coverage under the Policies, pursuant to RSA § 491:22-b.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows:

- a. Enter declaratory judgment on Count I in favor of Plaintiffs and against Defendants, including a declaration that the Policies each Defendant sold cover the Claim; and
- b. Enter judgment on all Counts awarding Plaintiffs fees, costs, and expenses incurred in connection with the Claim, including court costs and attorneys' fees pursuant to RSA § 491:22 and otherwise, and such other relief as this Court may deem appropriate.

Dated: June 19, 2020

By their Attorneys

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