

because the amount in controversy satisfies the jurisdictional limits of this Court, and all parties are subject to personal jurisdiction in Texas.

3. Jurisdiction for the attorneys' fees requested by the Plaintiff herein is conferred upon this Court by Texas Civil Practice and Remedies Code Section 37.009. Jurisdiction to award the declaratory relief requested herein is conferred upon this Court by Texas Civil Practice and Remedies Code Section 37.004.

4. Venue is proper in Denton County pursuant to Texas Civil Practices and Remedies Code Sections 15.002(a) and 15.032, because the cause of action arose in Denton County, because a substantial part of the events or omissions giving rise to the claim occurred in Denton County, because loss occurred at Plaintiff Selery Fulfillment's business in Denton County, and because Plaintiff Selery Fulfillment's principal place of business is located in Denton County.

III. PARTIES

5. Plaintiff, Selery Fulfillment, Inc. ("SFI"), is a corporation organized under the laws of the State of Delaware with its principal place of business in the State of Texas, at 1809 West Frankford Road, Suite 160, Carrollton, Texas 75007. Plaintiff Selery Fulfillment, Inc. is authorized to do business in the State of Texas.

6. Defendant, Colony Insurance Company, is a corporation organized under the laws of Virginia, with its principal place of business at 8720 Stony Point Parkway, Suite 400, Richmond, Virginia 23235. Citation may be served on defendant by serving the Commissioner of Insurance for the State of Texas, at 333 Guadalupe, Austin, Texas 78701, Travis County, Texas. As shown by Exhibit A attached hereto and incorporated herein by reference, Colony Insurance Company has designated the Commissioner of the Texas Department of Insurance as its designee for acceptance of service of the citation and Petition in this case. In turn as required by Texas Insurance

Code Section 804.106, and as stated in Exhibit A, the Commissioner is to forward the citation and Petition by way of the United States Postal Service to General Counsel, Colony Insurance Company, P.O. Box 469011, San Antonio, Texas 78246.

7. Defendant Burns & Wilcox of Texas, Inc. n/k/a B&W Insurance Group, L.P., a Texas Limited Partnership, d/b/a “Burns & Wilcox, Ltd. (Arlington)” (“Burns & Wilcox”) is organized under the laws of the State of Texas, with its principal Texas office at 2301 E. Lamar Blvd., 5th Floor, Arlington, Texas 76006, and may be served through its registered agent for service of process at Corporation Service Company d/b/a CSC-Lawyers Incorporating Service Company, 211 E. 7th Street, Suite 620, Austin, Texas 78701.

8. At all times herein, Defendants acted by and through their duly authorized agents and servants, each acting within the course and scope of his employment.

IV. FACTS

A. Plaintiff Selery Fulfillment Obtains Insurance Coverage for Its Business from Defendant Colony Insurance Company and Defendant Burns & Wilcox

9. Plaintiff SFI provides services for eCommerce businesses through warehousing and personalized order fulfillment. SFI provides personalized packaging, multi-channel order fulfillment and warehousing by using a unique one-stop-shop eCommerce logistics provider.

10. SFI allows its customers to focus on business by removing the inconvenience and costs of warehouse space, supplies, and shipping, saving customers time and money by integrating systems. Services include electronic data interchange, kitting, shipping and receiving, and warehouse and fulfillment.

11. Colony issued commercial policy number 101 CP 0161431-00 to SFI for the policy period of November 21, 2019 to November 21, 2020, including Business Income (Extra Expense) Coverage Form (the “Policy”) for the property located at 1809 Frankford Road, Carrollton, Texas

75007 (“Insured Premises”) which is attached hereto as Exhibit A. SFI has performed all of its obligations under the Policy including faithfully paying policy premiums.

B. The Coronavirus 2019 Global Pandemic Causes Damage, Including in Denton County.

12. The Coronavirus disease was first detected toward the end of 2019, emerging in Wuhan, China. The World Health Organization proposed the nomenclature COVID-19, standing for coronavirus disease 2019.

13. The Coronavirus disease was first detected toward the end of 2019, emerging in Wuhan, China. The World Health Organization proposed the nomenclature COVID-19, standing for coronavirus disease 2019.¹

14. On January 30, 2020, the World Health Organization declared the virus a public health emergency of international concern. In February 2020, coronavirus deaths began to be reported outside of China. Throughout February 2020, Coronavirus infections are reported in a growing number of locations around the world, including in the Philippines, Japan, Europe, South Korea, Iran, Latin America, Sub-Saharan Africa, and the United States.

15. On March 11, 2020, the World Health Organization characterized the Coronavirus (COVID-19) as a pandemic. On March 13, 2020, a national emergency was declared in the United States of America. On March 15, 2020, the United States Centers for Disease Control and Prevention advised no gatherings of 50 or more people in the United States. The next day, the President advised citizens to avoid groups of more than 10.

¹ As used in this Petition, the term “Coronavirus” refers to the virus termed as Coronavirus disease 2019 (COVID-19), including without limitation the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), and the term is used broadly, and references the global pandemic associated with the virus first detected in December 2019 in Wuhan, China.

16. The Coronavirus has caused thousands of deaths throughout the United States, with the death toll increasing every day, and the numbers of reported cases growing exponentially. The economy has been devastated by business interruptions in Denton County, the State of Texas, the United States, and worldwide.

17. Coronavirus cases in Texas spiked in March 2020, and a growing number of municipalities issued quarantine directives. The numbers of reported Coronavirus cases have spread throughout Texas Counties, curtailing business, social, and economic activities throughout the State. Correspondingly, the entire nation experienced spikes in infections and deaths, with a growing number of citizens subjected to quarantine orders and business shutdowns.

18. The scientific community recognizes the Coronavirus as a cause of real physical loss and damage.

19. The Coronavirus is physically impacting public and private property, and physical spaces in communities around the world.

20. The global pandemic is exacerbated by the fact that the potentially deadly virus physically infects and stays on the surface of objects or materials for weeks. The duration of the virus' lethal staying power, and the conditions upon which the virus can continue to propagate and infect people, are known facts under continued scrutiny by the scientific community. The virus can physically infect and stay on surfaces for weeks, up to twenty-eight days under some estimates. Moreover, because of the ongoing Coronavirus pandemic, which is raging in Denton County, a significant component of the public health crisis is the risk of continued contamination of the surface of objects and materials which could propagate infections. Therefore, the Coronavirus has caused damage, including damage to property, as a result of the staying power of the virus and the communicability of disease from exposure to the surface of objects and materials.

21. For example, China, Italy, France, and Spain have implemented the cleaning and fumigating of public areas prior to allowing them to re-open publicly due to the intrusion of microbials.

22. The physical contamination of surfaces with communicable Coronavirus is a well-recognized cause of physical damage and a reason that civil authorities have issued quarantine orders.

C. The Civil Authorities Closed Plaintiff's Business, Causing a Cessation of Business Activity.

23. On March 19, 2020, Texas Governor Greg Abbott issued Executive Order No. GA-08 relating to COVID-19 preparedness and mitigation, which prohibited certain business activities in order to contain the Coronavirus.

24. Also on March 19, 2020, John W. Hellerstedt, M.D., the Commissioner of the Texas Department of State Health Services, in accordance with Section 81.082(d) of the Texas Health and Safety Code, declared a state of public health disaster for the entire State of Texas for the first time since 1901.

25. In March and April 2020, the Denton County Commissioners Court issued disaster declarations and executive orders, commanding that individuals STAY AT HOME, as a result of the Coronavirus. Pursuant to Texas Government Code Section 418.108, Denton County Judge Andy Eads issued the first Executive Order on March 13, 2020, due to the Coronavirus. The County Commissioners issued a renewal of a disaster declaration on March 17, 2020, in Court Order 20-020; the first amendment was issued by County Judge through Executive Order on March 18, 2020; and, a second amendment was issued by County Judge through Executive Order on March 22, 2020. On March 24, 2020, Denton County Judge Andy Eads issued Executive Order AE-20-03-24, amending previous orders. After further continuation, the disaster declaration was

continued through at least April 30, 2020. One of the Denton County civil authority orders is attached hereto as Exhibit B.

26. By executive order of Denton County, all individuals were ordered to STAY AT HOME at their current place of residence. By executive order of Denton County, all businesses (with exceptions inapplicable to Selery Fulfillment) are required to cease all activities at facilities located in Denton County, which includes the insured premises. Therefore, the civil authority in Denton County ordered a cessation of business at Selery Fulfillment.

27. On March 13, 2020, Carrollton City Mayor Kevin Falconer, acting in accordance with authority granted to him under the City Charter and under Section 418.108(a) of the Texas Government Code, declared a local state of disaster for the City of Carrollton due to concerns related to the Coronavirus. In Resolution No. 4373, the City Council continued such declaration and authorized additional measures for the protection of the public on March 19, 2020. The disaster declaration by the City of Carrollton was continued, and the ordained restrictions were continued, through at least April 30, 2020. The City of Carrollton ordered that individuals stay in their place of residence and ordered the closure of businesses, with exceptions that did not allow Selery Fulfillment to avoid cessation of its business. Therefore, the civil authority in the City of Carrollton ordered a cessation of business at Selery Fulfillment.

28. A cause of civil authorities' closure of businesses, including Plaintiff's, is the contamination of property outside of the insured premises with the Coronavirus.

D. The Policy Has No Virus, Organic Pathogen, or Other Exclusion Applicable to the Coronavirus and the Civil Authority's Response to Same.

29. The policy is an all risk policy that covers all risks unless specifically excluded.

30. The policy does not provide any exclusion due to losses, business or property, from a virus, global pathogen, or global pandemic.

31. The policy only excludes losses due to pathogens in association with acts of terrorism. By expressly stating that terrorist-caused pathogens are excluded from coverage while simultaneously omitting a statement that would exclude a virus or exclude a global pandemic, the policy covers damage, losses, and costs and expenses incurred as a result of the Coronavirus.

32. The policy's pollution exclusion only applies to irritants or contaminants, identified in the policy as smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. By expressly stating that irritants or contaminants ("smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste") are defined as "pollutants" while simultaneously not defining a virus or global pandemic as subject to exclusion under the policy, the policy covers damage, losses, and costs and expenses incurred as a result of the Coronavirus.

E. The Policy Covers Plaintiff's Damage and Losses Sustained and Costs and Expenses Incurred.

33. The damage and loss sustained by SFI as a result of the Coronavirus are covered by the policy (Exhibit A) issued by Defendants to Plaintiff, and no exclusions or defenses alleviate Defendants' obligation to Plaintiff under the policy.

34. Contamination, and potential contamination, of the insured premises by the Coronavirus constitutes a direct physical loss needing remediation to clean the surfaces of, and the surfaces of objects at, the establishment.

35. The policy promises to "pay for direct physical loss of or damage to Covered Property at the premises." Exhibit A, CP00100607, Page 1 of 15.

36. SFI has sustained direct physical loss and/or damage to property arising from and/or related to the Coronavirus, Coronavirus contamination, the threat of Coronavirus contamination, and/or the Civil Authority response related to the Coronavirus.

37. The policy promises to “pay for the actual loss of Business Income . . . sustain[ed] due to the necessary ‘suspension’ of your ‘operations’” (Exhibit A, CP00300607, Page 1 of 9).

38. The policy promises to pay for additional coverages, including Civil Authority coverage for business income and extra expenses. Exhibit A, CP00300607, Page 2 of 9.

39. Selery Fulfillment has sustained a cessation of business as a result of the Coronavirus.

40. Selery Fulfillment has sustained loss of income and incurred expenses as a result of civil authorities prohibiting access to the insured premises.

41. The commercial, business, and property losses and damages, business interruption, income losses sustained, and costs and expenses incurred, as a result of the Coronavirus and the civil authority response to the Coronavirus, are covered by the policy. Defendants owe Plaintiff compensation for Selery Fulfillment’s damages, losses, costs, and expenses arising from and related to the Coronavirus, Coronavirus contamination, the threat of Coronavirus contamination, and/or the Civil Authority response related to the Coronavirus.

F. Defendants Denied Plaintiff’s Claim.

42. In compliance with the prerequisites for coverage, including the notice prerequisites, SFI submitted a claim for coverage for the damage and losses sustained and costs and expenses incurred as a result of the Coronavirus, as more fully discussed herein, fulfilling all notice provisions in the policy.

43. After Plaintiff submitted a claim to Colony for its loss of income and extra expenses, Colony summarily denied the claim on June 5, 2020, without conducting any investigation into Plaintiff’s claim, in blatant violation of its duties under the Policy and under the Texas Insurance Code. *See Exhibit B*, Letter of Denial dated June 5, 2020.

44. Colony's mishandling of Plaintiff's claim has caused a delay in Plaintiff's ability to remediate the property and continue operation of its business, which resulted and continues to result in additional loss of income and financial ruin.

V. CAUSES OF ACTION

A. Breach of Contract

45. Plaintiff repeats and realleges each and every allegation of the Complaint as if set forth fully in this cause of action.

46. Plaintiff entered into a contract with Colony for insurance coverage, including coverage for Business Income, Extra Expense and Civil Authority.

47. Plaintiff suffered property damage and loss of business income and extra expenses covered by the Policy.

48. Colony breached its contract with Plaintiff by denying coverage and denying Plaintiff's claim.

49. Plaintiff has been damaged by the breach, at a minimum, in the amount of the unpaid insurance proceeds.

50. All conditions precedents that are material to coverage for Plaintiff's claim have been performed.

B. Violation of the Texas Insurance Code §541.060

51. Plaintiff repeats and realleges each and every allegation of the Complaint as if set forth fully in this cause of action.

52. Colony misrepresented a material fact and policy provision relating to the coverage at issue in violation of Tex. Ins. Code §541.060(a)(1). Namely, despite its knowledge that the

SFI's property was contaminated by the virus and SFI sustained business income loss as a result, Colony stated that there was no covered loss to the Insured Premises.

53. Colony failed at all material times to effectuate a prompt, fair and equitable settlement of Plaintiff's claim, after its liability had become reasonably clear, in violation of Tex. Ins. Code § 541.060(a)(2)(4). Colony's liability became reasonably clear when it had notice of the widespread contamination of property by the coronavirus and issuance of executive orders prohibiting certain business activities. Instead of promptly investigating and paying SFI's claim, Colony summarily denied the claim.

54. Colony violated Tex. Ins. Code §541.060(a)(7) by refusing to pay SFI's claim without conducting a reasonable investigation or any analysis with respect to the claim. Colony has conducted no investigation as to SFI's business income loss before it denied the claim.

55. Colony's violations were done knowingly.

56. Plaintiff is entitled to actual damages as well as any and all consequential damages, statutory penalties, and punitive damages as provided by law.

C. Breach of the Duty of Good Faith and Fair Dealing

57. Plaintiff repeats and realleges each and every allegation of the Complaint as if set forth fully in this cause of action.

58. Colony owes Plaintiff a duty of good faith and fair dealing in connection with the investigation and resolution of claims under the Policy.

59. Such duty obligated Colony to not deny liability to Plaintiff when its liability under the policy was reasonably clear.

60. Colony's liability was reasonably clear when it had notice of the widespread contamination of property by the coronavirus and issuance of executive orders prohibiting certain business activities.

61. Colony violated and continues to violate its duty of good faith and fair dealing by denying liability to Plaintiff under the Policy and continuing to refuse to pay Plaintiff the sums due and owing to Plaintiff under the policy.

62. Colony's acts and omissions constituting a breach of the duty of good faith and fair dealing were and continue to be committed with actual awareness that they are wrongful and that they are inflicting harm on Plaintiff. Colony's violation of the duty of good faith and fair dealing is grossly negligent, malicious, and or fraudulent. Colony's violation of the duty of good faith and fair dealing, therefore, warrants and authorizes the imposition of punitive or exemplary damages.

63. Plaintiff has suffered and will continue to suffer actual damages as a result of Colony's breach of the duty of good faith and fair dealing.

D. Declaratory Judgment Action

64. Plaintiff repeats and realleges each and every allegation of the Complaint as if set forth fully in this cause of action.

65. Pursuant to Texas Civil Practice and Remedies Code Sections 37.001, et seq., the Court may declare rights, status, and legal relations whether or not further relief is or could be claimed, and before or after breach of contract.

66. Plaintiff SFI seeks a judgment declaring that the Policy provides coverage to SFI for: (1) the damage to the Insured Premises by the Coronavirus; (2) business income loss and extra expenses resulting from the interruption of SFI's operation due to the damage to the Insured Premises by the Coronavirus; and (3) the business income loss and extra expenses SFI sustained

as result of SFI's inability to access and use the Insured Premises due to executive orders and other actions taken by civil authorities.

67. Plaintiff also seeks a declaratory judgment that it has fulfilled any and all preconditions, notices, and duties owed to Defendant under the Policy.

E. COSTS UNDER CIVIL PRACTICE AND REMEDIES CODE SECTION CHAPTER 37 AND 38

68. Plaintiff repeats and realleges each and every allegation of the Complaint as if set forth fully in this cause of action.

69. Plaintiff is entitled to recover costs and reasonable and necessary attorney fees that are equitable and just under Texas Civil Practice and Remedies Code Section 37.009, because this is a suit for declaratory relief. Plaintiff is also entitled to recover its costs and reasonable attorney's fees under Texas Civil Practice and Remedies Code Section 38.001 and all applicable provisions of the Texas Insurance Code.

VI. JURY DEMAND

70. Plaintiff SFI demands a jury trial and tenders the appropriate fee with this petition.

VII. CONDITIONS PRECEDENT

71. All conditions precedent to Plaintiff's claim for relief have been performed or have occurred.

72. Plaintiff seeks the following damages:

- a. Actual damages for the full amount of property loss, business income loss and extra expenses sustained by SFI as a result of the Coronavirus and actions taken by civil authorities;
- b. Actual damages of all amounts owed under the contract;
- c. Treble damages under Texas law;

- d. Attorneys' fees and costs pursuant to Texas Civil Practice and Remedies Code Sections 37.009 and 38.001, Texas Insurance Code Section 542.60, and Texas Insurance Code Chapter 542A;
- e. Penalties as provided by Sections 542.058(a) and 542.060(a) of the Texas Insurance Code;
- f. Actual damages and consequential damages caused by the Defendants wrongful conducts, including but not limited to the benefits wrongfully withheld and attorneys' fees and court costs.
- g. Exemplary damages; and
- h. Pre- and post-judgment interest to the extent permitted by law.

VIII. REQUEST FOR DISCLOSURE

73. Under Texas Rule of Civil Procedure 194, Plaintiff Selery Fulfillment requests that Defendants disclose, within 50 days of the service of this request, the information and/or material described in Rule 194.2.

IX. PRAYER

74. For these reasons Plaintiff Selery Fulfillment, Inc., asks that Defendant Colony Insurance Company be cited to appear and answer, and that the Court render judgment: (1) awarding Plaintiff actual damages as requested herein, attorneys fees, exemplary damages, consequential damages, pre-judgment and post-judgment interest and court costs; and (2) declaring that the policy issued by Defendant provides coverage for Plaintiff's property loss as a result of the Coronavirus, and the business income loss and extra expenses Plaintiff sustained due to the property loss and the actions taken by civil authorities as requested herein.

Respectfully submitted,

/s/ Matthew McCarley

Matthew McCarley

State Bar Number 24041426

S. Ann Saucer

State Bar Number 00797885

Misty A. Farris

State Bar Number 00796532

5473 Blair Rd.

Dallas, Texas 75231

Telephone: (214) 890-0711

Facsimile: (214) 890-0712

mmccarley@fnlawfirm.com

asaucer@fnlawfirm.com

mfarris@fnlawfirm.com

ATTORNEYS FOR PLAINTIFF SELERY
FULFILLMENT, INC.