

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

SPIRIT REALTY CAPITAL, INC.,

Plaintiff,

v.

WESTPORT INSURANCE CORPORATION,

Defendant.

**CIVIL ACTION NO.:**

**JURY TRIAL DEMANDED**

**COMPLAINT**

Plaintiff Spirit Realty Capital, Inc. (“Plaintiff” or “Spirit”), by and through its undersigned counsel, hereby submits its Complaint against Westport Insurance Corporation (“Defendant” or “Westport”) as follows:

**THE NATURE OF THIS ACTION**

1. This breach of contract and declaratory judgment action concerns Spirit’s pursuit of—and Westport’s failure to provide—insurance coverage for its significant covered losses arising from the COVID-19 pandemic.

2. Spirit and/or its subsidiaries own commercial real estate in most of the largest cities in the United States. Over the last several months, Spirit has suffered significant economic losses, and incurred significant expenses, as a result of the COVID-19 pandemic and resulting government closure orders, including losses resulting from its commercial tenants’ inability to pay their rents.

3. Spirit purchased Insurance Policy No. NAP 2002787 00 (the “Policy,” attached hereto as **Exhibit A**) from Westport to protect itself and its business from such losses and expenses. In exchange for substantial premiums paid, the Policy provides up to \$400 million in

coverage to Spirit for property damage, as well as all manner of business interruption losses Spirit could experience. The Policy provides coverage for Spirit's loss of rental income, and also includes coverage for many other risks, including:

- Loss caused by restriction of access to property, including specifically if caused by an order issued by a civil authority;
- Loss caused by loss or damage to property near Spirit's insured locations that attracts business to Spirit's properties;
- Loss caused by interruption directly resulting from the prevention of direct ingress to or direct egress from, and to, insured locations;
- Loss caused by the actual not suspected presence of communicable disease; and
- Extra expenses incurred to continue business as nearly normally as practicable.

4. Spirit has incurred losses and expenses triggering each of these coverages and expected its losses and expenses to be covered by the Policy. These economic losses, including lost rental income, have resulted from the COVID-19 pandemic, government orders necessitated by the pandemic, and the physical damage, business disruption, and loss of physical and economic functionality of property caused by the confirmed presence and spread of COVID-19.

5. Based on the information available, Spirit expects to suffer no less than \$11 million in lost rental income, as well as other losses and expenses falling within the coverages of the Policy. Depending on how long the pandemic and government restrictions on Spirit's properties last, these insured losses could increase substantially.

6. Spirit timely submitted a claim to Westport for coverage under the Policy for its covered losses. In response, without conducting a reasonable investigation or considering evidence supporting coverage, Westport wrongfully denied Spirit's claim in full, thereby

breaching its obligations under the Policy. Westport's breach of the Policy and wrongful denial of coverage have deprived Spirit of revenue and support crucial for its business.

7. By this Complaint, Spirit seeks damages for breach of contract against Westport for its failure to honor its obligation under the Policy, and all other damages caused by Westport's unlawful breach. Spirit also seeks a judgment declaring the scope of Westport's obligation to pay Spirit's losses under the Policy.

#### **THE PARTIES**

8. Spirit is a Maryland corporation, whose principal place of business is located at 2727 N. Harwood, Suite 300, Dallas, Texas 75201.

9. Upon information and belief, Westport is a corporation organized and existing under the laws of Missouri, with its principal place of business in Connecticut. Westport is licensed and authorized to conduct insurance business in the State of New York.

#### **JURISDICTION AND VENUE**

10. This Court has jurisdiction over this matter under 28 U.S.C. § 1332 as there is complete diversity of citizenship between the parties and the amount in controversy exceeds \$75,000.

11. Upon information and belief, Westport has, at all relevant times, conducted business in this judicial district, including engaging in the business of selling insurance and investigating claims dealing with policyholders, property, or activities located in this judicial district. Part of the risks at issue in this litigation are located within this judicial district.

12. Venue is proper in this District pursuant to 28 U.S.C. § 1391.

13. Venue is also proper in this District because the Policy states that Spirit and Westport "irrevocably submit to the exclusive jurisdiction of the Courts of the State of New

York, and to the extent permitted by law, the parties expressly waive all rights to challenge or otherwise limit such jurisdiction.” Policy at Section IX(F)(2).

## **FACTUAL BACKGROUND APPLICABLE TO COVERAGE CLAIMS**

### **A. Spirit’s Business**

14. Spirit is a premier triple net-lease real estate investment trust (REIT) that holds an ownership interest in close to 2,000 commercial properties across forty-eight (48) states. Spirit is one of the largest publicly traded REITs in the country. Through various lease agreements and other leasehold agreements, Spirit leases and/or rents its properties to commercial tenants.

15. Spirit’s commercial tenants include restaurants, movie theaters, convenience stores, car washes, automotive repair shops, fitness centers/gyms, supermarkets, pharmacies, and several other big-box retail chains, chain restaurants, and smaller stores.

16. Although Spirit owns the real property on which its tenants operate their businesses, Spirit does not operate or control its tenants’ businesses. Instead, Spirit utilizes disciplined strategies to invest in high-quality, single-tenant real estate with long-term triple-net leases.

17. Spirit’s business and its business model rely on rental income obtained from the tenants of its leased properties. Spirit’s business and its business model have been adversely impacted by the ongoing crisis caused by the COVID-19 pandemic.

### **B. The COVID-19 Pandemic**

18. COVID-19 is a highly transmissible, rapidly spreading, and lethal respiratory disease. COVID-19 can be transmitted in several ways, including by human-to-human contact, airborne viral particles in ambient air, and touching surfaces or objects.

19. COVID-19 spreads easily from person to person and person to surface or object. Research has shown that COVID-19 primarily is spread by small, physical droplets expelled from the nose or mouth when an infected person talks, yells, sings, coughs, or sneezes. A person who sneezes can release a cloud of COVID-19-containing droplets that can span as far as 23 to 27 feet. The CDC has stated that COVID-19 is most likely to spread when people are within six feet of each other, but has also recognized that COVID-19 may spread from an infected person who is more than six feet away or who has left a given space. Further, according to the CDC, longer exposure time likely increases exposure risk to COVID-19.

20. Pre-symptomatic and asymptomatic individuals can also transmit COVID-19. At least 44% of all infections occur from people without any symptoms. According to the World Health Organization (the “WHO”), the incubation period for COVID-19, *i.e.*, the time between exposure to COVID-19 and symptom onset, can be up to 14 days. Other studies suggest that the period may be up to 21 days or longer.

21. Before infected individuals exhibit symptoms, *i.e.*, the so-called “pre-symptomatic” period, they are most contagious, as their viral loads will likely be very high, and they may not know they have become carriers. In addition, studies from the CDC and others estimate that between 40% to 70% of infected individuals may never become symptomatic (referred to as “asymptomatic” carriers). Pre-symptomatic and asymptomatic carriers are likely unaware that they are spreading COVID-19 by merely touching objects and surfaces, or by expelling droplets into the air. The National Academy of Sciences has found that the majority of transmission is attributable to people who are not showing symptoms, either because they are pre-symptomatic or asymptomatic.

22. The CDC and the WHO also have both recognized the ability of COVID-19 to attach to objects and surfaces, “such as tables, doorknobs, and handrails.” According to the CDC and the WHO, a person may become infected by touching these surfaces or objects that have COVID-19 on them, and then touching his or her mouth, eyes, or nose. In addition, when an uninfected person touches a surface containing COVID-19, the uninfected person may transmit COVID-19 to another person, by touching and infecting a second surface, which is subsequently touched by that other person. The CDC has thus recommended certain physical and structural remedial measures for businesses to put into place in order to limit transmission and continued surface alteration.

23. Numerous scientific studies likewise have reported that COVID-19 can survive and persist on surfaces and buildings after infected persons are present at a given location. Studies have found that COVID-19 remains active and dangerous on common surfaces, including plastic, stainless steel, glass, wood, ceramics, rubber, and even money. All of these materials are present at Spirit’s insured locations and subject to touch by thousands of people across the country.

**C. National, State, and Local Governmental Reaction Further Impacting Spirit**

24. To protect the public and in an effort to mitigate COVID-19’s spread and damage to property, state and local governments across the United States issued orders affecting citizens and businesses.

25. With few exceptions, these orders mandated closure to the public or curtailment of operations of certain businesses deemed “non-essential” or aspects of businesses deemed non-essential, including those businesses that operated pursuant to lease agreements at Spirit’s insured locations. The orders required business to put in place certain physical and structural

remedial measures in order to limit transmission and continued surface alteration as a result of the pandemic.

26. For example, on March 16, 2020, New York, a state where Spirit holds insured property, issued an order declaring a disaster for the entire state. The order made clear that it was issued because of COVID-19's propensity "to spread person to person" and because COVID-19 is "*causing property loss and damage.*" (emphasis added).

27. Likewise, on March 16, 2020, the Mayor of New York City, a city where Spirit holds insured property, issued its own emergency order, in part to prevent COVID-19 from "*causing property loss and damage.*" (emphasis added). The order also required all restaurants, bars, and cafes in New York City to close until further notice.

28. On March 19, 2020, California, another state where Spirit holds insured property, issued an order mandating the closure of all businesses that were not deemed "Essential Critical Infrastructure" and that could not operate through remote-only operations.

29. On March 19, 2020, Arizona, a state where Spirit holds insured property, issued an order requiring the closure of all bars and on-site dining in counties with confirmed cases of COVID-19. On March 30, 2020, the Governor of Arizona issued another order imposing, among other restrictions in an effort to halt the spread of COVID-19, certain restrictions upon businesses, like most of Spirit's properties, that were not deemed essential.

30. On March 20, 2020, Illinois, a state where Spirit holds insured property, issued a statewide stay-at-home order that required all non-essential business and operations to cease. This order made clear that COVID-19 had a "*propensity to physically impact surfaces and personal property.*" (emphasis added).

31. On March 20, 2020, and again on April 29, 2020, Nevada, a state where Spirit holds insured property, issued emergency orders requiring, among other things, the closure of certain businesses because the ability of COVID-19 “to survive on surfaces for indeterminate periods of time renders some property unusable and *contributes to . . . damage, and property loss . . .*” (emphasis added).

32. On March 21, 2020, New Jersey, a state where Spirit holds insured property, issued an order directing all residents to stay at home unless for certain essential activities, and specifically closing “[t]he brick-and-mortar premises of all non-essential businesses.”

33. On March 31, 2020, Texas, a state where Spirit holds insured property, ordered all state residents to refrain from in-person contact with other persons, except when performing essential services. By requiring individuals who did not participate in essential services to refrain from in-person contact with other persons, the Texas order effectively imposed closure and cessation of operations involving inter-personal interaction of all businesses not deemed essential services.

34. The foregoing orders are just a few examples of the scores of government orders impacting Spirit’s properties and the businesses operating in those properties. Each state where Spirit holds property has issued a government order affecting its insured location, often causing the closure of the businesses operated by Spirits’ tenants.

35. A motivating factor behind all of the government orders was to protect persons and property from either direct physical loss or damage to property, or the loss of physical or economic functionality of such property caused by COVID-19.



**D. COVID-19 Causes Direct Physical Loss or Damage**

36. Virologists, scientists, and researchers all have confirmed that COVID-19 lives and is active on physical surfaces and in the air. The persistent presence of the deadly, live COVID-19 on surfaces and in the air damages buildings and properties rendering them damaged, lost, unsafe, unfit, and uninhabitable for occupancy or use.

37. The scientific community has confirmed that COVID-19 can alter the conditions of properties and buildings such that the premises are physically damaged and no longer safe and habitable for normal use. In this regard, COVID-19 causes either direct physical loss of or damage to buildings and properties or a loss of physical and economic functionality for these properties.

38. These adverse impacts result because COVID-19 has a corporeal existence and is contained in respiratory droplets. Once expelled from infected individuals, these droplets land on, attach, and adhere to surfaces and objects and physically change these once-safe surfaces to “fomites.” Fomites are objects, previously safe to touch, that now serve as a vehicle and mechanism for transmissions of COVID-19. Fomites physically change the air, airspaces, property, and property surfaces upon entering the air and becoming a part of the property and surfaces. This physical alteration and change makes physical contact with those previously safe, inert surfaces (*e.g.*, walls, handrails, desks) unsafe and potentially deadly. This represents a physical change in the affected surface or material, causing tangible and severe property loss and damage. The properties are unusable, dangerous and unsafe and cannot be used unless and until the COVID-19-related conditions are fully rectified.

39. Medical and scientific research also has established that COVID-19 spreads through indoor airborne transmission. When individuals carrying COVID-19 breathe, talk,

cough, or sneeze, they expel aerosolized droplet nuclei that remain in the air, and accumulate in buildings, and, like dangerous fumes, make the premises unsafe and affirmatively dangerous. According to the experts, buildings and properties accumulate the airborne COVID-19 indoors, which plays a significant role in community transmission. As a result, COVID-19 causes physical loss or damage, or a loss of physical or economic functionality, to properties and buildings by altering the physical condition of air in buildings from safe and breathable, to unsafe and dangerous.

40. Airborne viral particles are known to have spread into a facility's heating and ventilation ("HVAC") system, leading to transmission of COVID-19 from person to person. The Environmental Protection Agency ("EPA") has recommended that facilities make improvements to their ventilation and HVAC systems by, for example, increasing ventilation with outdoor air and air filtration. Accordingly, COVID-19 causes either direct physical loss of or damage to property (or both) by, among other things, destroying, distorting, corrupting, attaching to, and physically altering property, including its surfaces, and by rendering property unusable, uninhabitable, unfit for intended function, dangerous and unsafe.

41. Fomites, droplets, droplet nuclei, and aerosols containing COVID-19 are not theoretical, informational, or incorporeal, but rather are dangerous physical objects that have a tangible existence. Their presence within a property causes direct physical loss or damage to property, or a loss of physical or economic functionality, by necessitating remedial measures that include without limitation repairing or replacing air filtration systems, remodeling and reconfiguring physical spaces, removal of fomites by certified technicians, and other measures. The presence of COVID-19 within an insured property also causes direct physical loss or damage to properties, or a loss of physical or economic functionality, by transforming property

from usable and safe into property that is unsatisfactory for use, uninhabitable, unfit for its intended function, and extremely dangerous and potentially deadly for humans.

42. The presence of COVID-19 on property similarly creates the imminent threat of further damage to that property or to nearby property. Individuals who come into contact, for example, with respiratory droplets at one location in the property, by touching a doorknob or a handrail, will carry those droplets on their hands and deposit them elsewhere in the property, causing additional damage and loss. Property impacted by COVID-19 is just as dangerous as property impacted by fire or fumes or vapors (if not more), and all such damaged property is equally incapable of producing revenues.

43. The losses to property or its functionality described above have occurred at Spirit's insured properties covered under the Policy. Spirit has had confirmed cases of COVID-19 at its headquarters and other insured locations, and has been forced to take action to secure and preserve the property and its business operations from further loss or damage, and to protect its employees and tenants from further illness.

#### **E. COVID-19's Impact on Spirit's Properties**

44. As discussed herein, COVID-19 has impacted Spirit and its insured properties.

45. For example, many of the brick-and-mortar business premises that Spirit owns and rents have documented the confirmed presence of COVID-19. The chart below details *a few* of Spirit's insured locations where the presence of COVID-19 has been confirmed via data made publicly available by New Mexico's Environmental Department ("NMED"):

No.	Tenant	Tenant Address
1	Apple New Mexico, LLC (Applebee's)	4246 Cerrillos Road, Santa Fe, NM 87505

2	Apple New Mexico, LLC (Applebee's)	1560 W Maloney Ave, Gallup, NM 87305
3	Defined Fitness, Inc.	4930 McLeod Rd NE, Albuquerque, NM 87109
4	Defined Fitness, Inc.	1700 E 20th St, Farmington, NM 87401
5	Best Buy Co, Inc.	2280 E Lohman Ave, Las Cruces, NM 88001
6	Cajun Global LLC (Church's Chicken)	1141 South Main, Roswell, NM 88203
7	Cajun Global LLC (Church's Chicken)	2100 Broadway Blvd SE, Albuquerque, NM 87102

46. Other of Spirit's insured properties in other states have similarly experienced the confirmed presence of COVID-19. In addition, Spirit's own employees who work at its headquarters in Dallas, Texas, have also contracted COVID-19 during the pandemic.

47. While Spirit has yet to ascertain the full scope of COVID-19's presence on its properties, almost all of Spirit's insured locations have been impacted. The United States has suffered almost 30 million confirmed cases of COVID-19. This total includes confirmed COVID-19 cases from each of the forty-eight (48) states where Spirit holds property.

48. For example, according to the Los Angeles County director of health services, one (1) in eighty (80) persons were infected with COVID-19 as of December 16, 2020 in Los Angeles, California. Spirit has covered property in Los Angeles, including a large food distribution center, two (2) movie theaters, and a fitness center – all of which are susceptible to physical loss or damage caused by COVID-19 and, in most cases, were required to close or otherwise impacted by government orders.

49. Similarly, according to public statements by Colorado’s governor, one (1) in forty-nine (49) Coloradans were contagious with COVID-19 as of November 20, 2020. Spirit also holds several covered properties in Colorado including a children’s day care center, a fitness center, and seven (7) chain restaurants – all of the type of business operations that are of the kind that is susceptible to physical loss or damage caused by COVID-19, and in most cases, were required to close for business. Indeed, many of these chain-tenants themselves have filed lawsuits in courts around the country alleging confirmed cases of COVID-19 at their locations. For example, Cinemark USA Inc. (“Cinemark”), a tenant of Spirit, recently filed a coverage action in Texas alleging that COVID-19 was present at most, if not all, of its locations. *See Cinemark Holdings Inc. et al. v. Factory Mutual Insurance Company*, Case No. 471-06122-2020 in the District Court of Collin County, Texas.

50. As a result of the COVID-19 pandemic, and the physical, structural, airborne, and other effects it has generated, including government closure orders, Spirit’s tenants’ revenues have been impacted and several of Spirit’s tenants have not paid rent owed under their rental agreements. As such, Spirit’s tenants have requested abatements, deferments, or other accommodations.

51. As of the filing of this Complaint, Spirit has estimated that it has lost in excess of \$11 million in rental income alone. These losses are ongoing and could increase substantially depending on the length and ultimate severity of the outbreak and the government response.

#### **F. The Westport Policy**

52. In the relevant timeframe, Westport sold Spirit its “All Risks” policy (Ex. A) covering Spirit “and any subsidiary, and Spirit Realty Capital, Inc. & Spirit MTA interest in any partnership or joint venture in which Spirit Realty Capital, Inc. & Spirit MTA has management

control, ownership, or is obligated to insure, as now constituted or hereafter is acquired” for the period September 1, 2018 through November 1, 2020. *See* Ex. A at Section I(C); Endorsement 16.

53. The Policy covers Spirit’s own headquarters as well as the properties listed in the Policy’s Schedule of Locations. The Policy provides a maximum limit of liability of \$400 million, with various sub-limits and time limits. *Id.* at Section II(B). Claims are subject to varying deductibles, and as relevant here, \$25,000 per occurrence. *Id.* at Section III(A).

54. The policy defines “occurrence” as “the 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.” *Id.* at Section X(W).

**1. The Policy’s Property Damage Coverage**

55. The Policy broadly provides property damage coverage for all risks of physical loss or damage. Unless damage is clearly included within a listed sublimit, the full \$400 million limit of liability is available for Spirit’s damages. The Property Damage section contains several “Additional Coverages” potentially applicable to Spirit’s COVID-19 losses.

56. The Policy’s Property Damage section’s COMMUNICABLE DISEASE RESPONSE coverage provides:

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:

- a) cleanup, removal and disposal of the actual not suspected presence of COMMUNICABLE DISEASES from INSURED PROPERTY; and
- b) 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.

*Id.* at Section IV(B)(3).

57. The Policy defines INSURED LOCATION broadly as any building in the Policy's Schedule of Locations or any building "bounded by public streets, clear land space, open waterways or any combination thereof, with each public street, clear land space or open waterway measuring no less than fifty (50) feet wide." *Id.* at Section X(W), (P).

58. COMMUNICABLE DISEASE is defined by the Policy to mean any "disease which is . . . transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges . . . ." *Id.* at Section X(C).

59. The Policy also provides PROTECTION AND PRESERVATION OF PROPERTY coverage for all reasonable and necessary costs incurred for actions to temporarily protect or preserve property; provided such actions are necessary due to actual, or to prevent immediately impending, direct physical loss or damage to such property. *Id.* at Section IV(B)(24). This line of coverage is also provided under the Policy's Time Element section discussed further below. *Id.* at Section IV(H)(12).

60. The Property Damage section also has an additional coverage for EXPEDITING EXPENSES:

This Policy is extended to insure the reasonable and necessary expenses incurred by the Insured:

- 1) to pay for the temporary repair of direct physical damage insured by this POLICY to INSURED PROPERTY at INSURED LOCATION(S); and
- 2) to expedite the permanent repair or replacement of such INSURED PROPERTY.

*Id.* at Section IV(B)(13).

61. The Policy also provides coverage for “Professional Fees,” including fees from any “representatives . . . accountants, appraisers, auditors, consultants, or other such professionals” that Spirit hires to assist it in preparing a claim under this Policy. *Id.* at Section IV(B)(23).

## **2. The Policy’s Time Element Coverage**

62. In addition to the Policy’s coverage for Property Damage, the Policy’s Time Element section provides coverage for lost earnings or profits “directly resulting from direct physical loss or damage insured” by the Policy to Spirit’s property. *Id.* at Section V(A)(1).

63. The Time Element coverage also covers “expenses reasonably and necessarily incurred by the Insured to reduce the loss otherwise payable under this section” of the Policy. *Id.* at Section V(A)(4).

64. The Time Element section includes EXTRA EXPENSE coverage, defined as “extra expenses to temporarily continue as nearly normal as practicable the conduct of the Insured’s business.” *Id.* at Section V(F)(1).

65. For a commercial property owner such as Spirit, the Time Element section also includes RENTAL INSURANCE, covering:

- 1) the fair rental value of any portion of the INSURED LOCATION(S) occupied by the Insured that the Insured is unable to occupy following physical loss or damage insured by this Policy;



- 2) the income reasonably expected from rentals of unoccupied or unrented portions of INSURED LOCATION(S) available for rent at the time of physical loss or damage insured by this Policy; and
- 3) the rental income from the rented portions of INSURED LOCATION(S) according to bona fide leases, contracts or agreements in force at the time of physical loss or damage insured by this Policy to such real property.

All not to include non-continuing charges and expenses.

*Id.* at Section V(G).

66. The Time Element section provides an EXTENDED PERIOD OF LIABILITY that applies to RENTAL INSURANCE, covering the reduction of rental income “for such additional length of time . . . as would be required with the exercise of due diligence and dispatch to restore the Insured’s business to the condition that would have existed had no physical loss or damage insured by this Policy occurred.” *Id.* at Section V(H)(5).

67. The Time Element section also includes several other applicable coverage extensions, which include coverage for Spirit’s lost rents.

68. For example, the Policy extends to ORDER OF CIVIL OR MILITARY AUTHORITY and covers loss:

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 civil or military authority that prohibits partial or total access to the INSURED LOCATION(S); and
- b) the order referenced above is caused by direct physical loss or damage as insured by this Policy to property . . .

*Id.* at Section V(H)(11).

69. The CONTINGENT TIME ELEMENT coverage provides coverage to Spirit for loss directly resulting from “direct physical loss or damage” at any LOCATION(S) of “suppliers or customers,” provided that such physical loss or damage prevents:

- a) such suppliers from supplying foods or services directly or indirectly to the Insured;
- b) such customers from receiving goods or services directly or indirectly from the Insured;

provided that such LOCATION(S) of suppliers or customers are situated within the Policy Territory.

*Id.* at Section V(H)(3).

70. Additionally, the Time Element coverage for INGRESS/EGRESS provides coverage for loss:

Incurred by the Insured due to the necessary interruption of the Insured’s business, provided that:

- a) the interruption directly results from the prevention of direct ingress to or direct egress from INSURED LOCATION(S), whether or not INSURED PROPERTY at such INSURED LOCATION(S) is damaged; and
- b) the prevention above is caused by direct physical loss or damage as insured by this POLICY to any property. . .

*Id.* at Section V(H)(7).

71. The Policy also provides LOGISTICS EXTRA COST coverage for, in relevant part, “extra cost incurred by the Insured during the PERIOD OF LIABILITY due to the disruption of the normal movement of goods or materials: . . . 2) directly between an INSURED LOCATION(S) and a LOCATION(S) of a direct customer, supplier, contract manufacturer or contract service provider to the Insured,” as a result of physical loss or damage to property in the United States. *Id.* at Section V(H)(10).

72. The Time Element section also provides coverage for loss suffered by Spirit in connection with damage to ATTRACTION PROPERTY for loss:

Incurred by the Insured directly resulting from direct physical loss or damage as insured by this Policy to property of the type insured, but not owned or operated by the Insured, that directly attracts business to an INSURED LOCATION(S).

*Id.* at Section V(H)(1); Section II(D).

73. The Time Element section also provides coverage for LEASEHOLD INTEREST, which covers, in relevant part, “direct physical loss or damage insured by this Policy to INSURED LOCATION(S) at which the Insured leases space and pursuant to a written lease, if the lease agreement requires continuation of rent and if the property is wholly untenable or unusable due to such physical loss or damage.” *Id.* at Section V(H)(9); Section II(D).

74. The Policy provides PROTECTION AND PRESERVATION OF PROPERTY coverage for losses, including lost rents, incurred “for the temporary protection and preservation of property . . . provided such action is necessary to prevent immediately impending direct physical loss or damage” to insured property. *Id.* at Section IV(H)(12).

75. In addition to the above, the Time Element section includes 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.

*Id.* at Section V(H)(8).

76. Spirit has paid all premiums owed under the Policy to Westport for such coverages and protections.

**G. Spirit's Losses Are Covered Under the Policy**

77. As discussed in detail throughout, Spirit has experienced significant losses that trigger coverage under all of the foregoing Policy provisions.

78. To begin, Spirit's losses trigger coverage under the Policy's COMMUNICABLE DISEASE coverages. Policy at Sections IV(B)(3); V(H)(8). All of Spirit's insured properties sit in jurisdictions where state and local governments have issued orders regulating the actual and not suspected presence of COVID-19. All of Spirit's insured locations have experienced the actual presence of COVID-19 on-site sufficient to initiate coverage under the Policy. Spirit's own employees have tested positive for COVID-19 and employees and/or customers of Spirit's tenants have tested positive for COVID-19. These confirmed cases of COVID-19 have caused or contributed to Spirit's claimed losses.

79. Spirit's losses also trigger coverage under the Policy's PROTECTION AND PRESERVATION OF PROPERTY and EXPEDITING EXPENSES coverages. *Id.* at Sections IV(B)(24); IV(H)(12); IV(B)(13). Spirit has sustained actual losses to protect and preserve its properties from the presence of COVID-19, and to prevent or repair physical loss or damage. Such physical loss or damage also triggers coverage for ATTRACTION PROPERTY, to the extent any property that attracts business to an insured location, but is not owned by Spirit, experienced direct physical loss or damage due to COVID-19. *Id.* at Section V(H)(1); Section II(D).

80. Spirit has incurred costs to remediate its properties in order to correct the physical structural alteration that COVID-19 has caused to surfaces at its properties. In addition, in order to comply with certain governmental orders to prevent the spread of COVID-19, including in connection with the physical loss or damage it causes, Spirit has incurred expenses to institute prophylactic measures at its properties. Spirit would not have incurred these costs and expenses, but for experiencing the physical loss or damage caused by COVID-19 and resulting government orders.

81. Spirit's losses trigger coverage under the Policy's coverages for ORDER OF CIVIL OR MILITARY AUTHORITY and INGRESS/EGRESS. *Id.* at Sections V(H)(11); V(H)(7). As a result of the physical loss or damage caused by COVID-19, as discussed above, governments in all of the states where Spirit holds insured property have issued orders that prevent direct ingress to, or direct egress from, or partial or total access to, Spirit's insured locations.

82. Spirit is entitled to payments by Westport, including payments of Spirit's EXTRA EXPENSES it incurred to temporarily continue as nearly normally as practicable the conduct of its business. *Id.* at Section V(F)(1).

83. Spirit is entitled to payments under the Policy's RENTAL INSURANCE coverages because Spirit's tenants have been unable to occupy their properties or pay rents due to the direct physical loss or damage brought on by COVID-19 and resulting government orders. *Id.* at Sections V(G); V(H)(5). Specifically, Spirit's tenants advised it of their inability to pay rent owed under the terms of their commercial leases, and those tenants did not pay rent owed under those commercial leases. *Id.* Furthermore, Spirit is entitled to payments under the Policy's RENTAL INSURANCE coverages for income reasonably expected from rentals of

unoccupied or unrented locations due to the direct physical loss or damage brought on by COVID-19 and resulting government orders. *Id.*

84. Spirit has suffered at least \$11 million in lost rents that are owed under the Policy. Additionally, Spirit has suffered significant losses due to the actual presence of COVID-19, a communicable disease, at its insured properties. Spirit has also suffered significant extra expenses to preserve, protect, and repair its properties, including extra expenses for intense cleaning of property. To help calculate its losses, Spirit retained the professional services of Pyxis Group, LLC (“Pyxis”), a forensic accounting firm, and is owed at least \$129,293.50 for Pyxis’ work in helping prepare this claim because such fees are covered claims preparation fees under the Policy. *Id.* at Section IV(B)(23).

85. Because the COVID-19 pandemic is ongoing, Spirit’s losses are continuing.

#### **H. Spirit’s Insurance Claim to Westport and Westport’s Wrongful Denial of Coverage**

86. On March 26, 2020, Spirit provided timely notice to Westport of its anticipated lost rents under the Policy that were scheduled to be paid on April 1, 2020. Spirit also advised Westport that, due to the unprecedented scale of the COVID-19 pandemic, Spirit was unsure of its full spectrum of losses and asked that Westport open a claim file and assign an adjuster.

87. On April 15, 2020, Westport engaged Sedgwick Claims Management Services (“Sedgwick”) to investigate its claim and asked that Spirit provide further information regarding its claim directly to Sedgwick.

88. Throughout the summer and fall of 2020, Spirit worked with Sedgwick and Westport to provide each of them as much information as possible concerning its claim and losses. For example, Spirit retained Pyxis to help calculate its losses. Working with Spirit, Pyxis provided Sedgwick and Westport material regarding Spirit’s claim and losses, including a listing

of all of Spirit's affected properties, initial loss calculations, and copies of applicable government orders. On October 1, 2020, pursuant to a stipulated extension of time, Spirit timely submitted its initial proof of loss, supporting schedules, and other information demonstrating that its losses, as of that date, exceeded \$11 million, and confirmed that its losses were continuing.

89. Rather than consider any information Spirit and Pyxis provided, on October 28, 2020, Westport, through Sedgwick, denied Spirit's claim in full.

90. In response to Westport's full denial of coverage, Spirit provided Westport more information regarding its losses arising from the confirmed presence of COVID-19 at its insured properties, losses insured, at a minimum, under the Policy's Communicable Disease extensions. In fact, Spirit made clear that these losses exceeded the Policy's Communicable Disease sublimits, however, Westport has continued to deny all coverage for Spirit's claim. Westport has continued to deny coverage to Spirit for its Communicable Disease losses, despite paying such losses to other similarly situated insureds. For the avoidance of doubt, Spirit's claim for coverage is not limited to only the Communicable Disease extensions.

91. Spirit's bases for coverage include, but are not limited to:
- a) The costs and losses Spirit sustained due to the actual not suspected presence of communicable disease at covered locations.
  - b) Loss of rental income from occupied and unoccupied properties.
  - c) To the extent that the state or local executive orders of the type described herein affecting Spirit's properties constitute orders of civil authority restricting access to Spirit's properties due to physical loss or damage, Spirit is entitled to civil authority and/or ingress/egress coverage.
  - d) Loss or damage suffered by Spirit, its tenants and/or their customers or suppliers to pay for the temporary or permanent repair of direct physical damage to property.

92. Spirit has complied with all terms and conditions of the Policy. No policy exclusions apply to bar coverage for any portion of Spirit's claim.

93. As a result of Westport's wrongful denial of coverage in breach of the Policy, Spirit has suffered damage, in an amount to be determined at trial, but not less than \$11 million and will continue to suffer damage.

## COUNT I

### (BREACH OF CONTRACT AGAINST WESTPORT)

94. Spirit repeats and re-alleges all the allegations and statements from the preceding paragraphs as if the same were fully set forth herein.

95. The Policy is a valid contract between Spirit and Westport because Spirit and its subsidiaries are named insureds under the Policy.

96. Spirit has provided prompt notice of its losses to Westport, performed all obligations required of it under the Policy, and/or was ready, willing, and able to perform its obligations under the Policy at the time Westport denied coverage for Spirit's claim.

97. Under the terms of the Policy, Westport must pay up to \$400,000,000 for any loss covered under the Policy, subject only to sub-limits or waiting periods for specific coverages.

98. As described herein, Spirit has sustained, and is continuing to sustain, covered losses under the Policy.

99. Westport has not paid any amounts to Spirit in connection with its claim, and through its wrongful denial of coverage, Westport breached the Policy by failing to honor the Policy's express terms and by failing to pay all amounts due to Spirit for its claim.

100. As a direct and proximate result of Westport's breach of contract, Spirit has suffered damages in an amount to be determined at trial, but not less than \$75,000, plus consequential damages and pre- and post-judgment interest to the extent permitted by law.



**COUNT II**

**(DECLARATORY JUDGMENT)**

101. Spirit repeats and re-alleges all the allegations and statements from the preceding paragraphs as if the same were fully set forth herein.

102. Pursuant to the terms of the Policy, Westport is obligated to pay, up to the limit of liability or any applicable sublimit or time period, for property damage or time element losses covered under the Policy and not otherwise excluded from coverage.

103. As detailed herein, Spirit's costs and losses caused by COVID-19, direct physical loss or damage resulting therefrom, and/or government closure orders are covered under multiple coverages of the Policy and are not excluded.

104. Westport disputes its legal obligation to pay Spirit's claim.

105. Pursuant to 28 U.S.C. § 2201, Spirit is entitled to a declaration by this Court of Westport's obligations under the Policy.

106. An actionable and justiciable controversy exists between Spirit and Westport concerning the proper construction of the Policy, and the rights and obligations of the parties thereto, with respect to Spirit's claim for costs or losses arising out of the COVID-19 pandemic.

107. Pursuant to 28 U.S.C. § 2201, this Court should enter a declaratory judgment in favor of Spirit and against Westport, declaring that coverage is available for Spirit's claim up to the full limits or applicable sub-limits of the Policy, and, pursuant to 28 U.S.C. § 2202, any other relief this Court deems proper. Such a declaration would resolve the current controversy between Spirit and Westport.

**JURY DEMAND**

108. Spirit hereby demands a trial by jury on all causes of action or issues so triable.

**REQUEST FOR RELIEF**

WHEREFORE, Spirit prays for relief as follows:

- a) On the First Cause of Action, Spirit requests that the Court enter judgment against Westport, awarding Spirit damages in an amount to be determined at trial, but not less than \$75,000, plus consequential damages, attorneys' fees, and pre- and post-judgment interest to the extent permitted by law;
- b) On the Second Cause of Action, Spirit requests that the Court enter a declaratory judgment in favor of Spirit against Westport, declaring that Westport is required to pay Spirit, up to the applicable limits of the Policy, for claimed amounts under the Policy; and
- c) Additionally, Spirit requests all other relief as the Court deems just and proper.

Dated: March 16, 2021

REED SMITH LLP

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