

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT NEW JERSEY**

THE LEARNING EXPERIENCE CORP;
TLE AT CEDAR GROVE LLC;
TT OF WAYNE, LLC;
TLE AT EAST RUTHERFORD, LLC;
TLE AT HACKENSACK, LLC;
TLE AT PARAMUS, LLC; and
TT OF RAMSEY, LLC,

Plaintiffs,

Case No.:

v.

BERKSHIRE HATHAWAY SPECIALTY
INSURANCE COMPANY,
AMERICAN ASSOCIATION OF
INSURANCE SERVICES, INC., and
INSURANCE SERVICES OFFICE, INC.

Defendants.

COMPLAINT

Plaintiffs, The Learning Experience Corp. (“TLE Corp.”); TLE at Cedar Grove LLC; TT of Wayne, LLC; TLE at East Rutherford, LLC; TLE at Hackensack, LLC; TLE at Paramus, LLC¹; and TT of Ramsey, LLC (collectively, “Insureds”), file this Complaint for, *inter alia*, damages and declaratory judgment against Defendants, Berkshire Hathaway Specialty Insurance Company (“Berkshire” or “Insurer”), American Association of Insurance Services, Inc. (“AAIS”), and Insurance Services Office, Inc. (“ISO”, and together with Berkshire and AAIS, “Defendants”) and state as follows:

INTRODUCTION

¹ Due to a typographical error, TLE at Paramus, LLC is identified in the Named Insured Extension Schedule of the Policy (as that term is defined below) as TLE at Paramus-Midland, LLC. Plaintiffs have notified Defendant of the error.

1. This action arises out of Insureds' claim of insurance coverage under an *all risks* insurance policy sold by Insurer, resulting from government orders issued in New Jersey.

2. The SARS-CoV-2 virus, also known as the novel coronavirus and referred to in this Complaint as the "virus", causes the disease known as COVID-19.

3. COVID-19 is a global pandemic that reached North America by January, 2020 and New Jersey by March 4, 2020.

4. Due to the high rate of transmission by asymptomatic² people, and the relative longevity of the virus on indoor surfaces and in aerosols within indoor spaces, COVID-19 has resulted in a combination of events (namely, a pandemic and then broad-based governmental closure and slowdown³ orders in several states, including New Jersey) that has never before occurred in North America.⁴

5. There have been other epidemics and pandemics in North America during modern times, but none that resulted in broad based closure and slowdown orders.

6. In New Jersey those orders have caused a cessation, or at least a slowdown, of the Plaintiffs' business activities.

7. Such business interruption was not caused by the virus alone or the governmental orders alone, but rather, a combination of the two, in a multi-causal chain.

² As used in this Complaint, the word "asymptomatic" includes the word "pre-symptomatic".

³ By "slowdown orders" this Complaint means orders that have the direct effect of causing a slowdown in business operations, even if, technically speaking, the business itself is not required to close to the public entirely. Examples include orders that require or recommend that non-essential persons stay in their homes, orders limiting the size of groups and/or the capacity limits of certain indoor business premises, and orders allowing businesses to stay open only for certain purposes.

⁴ By "broad-based governmental closure and slowdown orders" this Complaint means closure or slowdown not only of places where there are large public gatherings, such as churches, theaters, and the like, but also, closure or slowdown orders (every day, and all day) for ordinary businesses of all types, even those that are not the site of large public gatherings. The 1918 Spanish Flu resulted in various types of shutdown and slowdown orders in some major American cities, but upon information and belief, with perhaps a few exceptions, these were closures or slowdowns of churches, theaters, and other places of large public gathering, and not of business of all types, across the board, every day and all day.

8. That chain of causation has resulted in direct physical loss of, and/or damage to, Plaintiffs' insured premises in New Jersey, resulting in substantial loss of business income.

9. The possibility of such multi-causal chain occurring is a risk of loss encompassed within the Plaintiff's *all-risk* business interruption insurance policy.

10. Furthermore, the applicable Policy language does not exclude coverage when the cause of loss is this type of multi-causal chain.

11. Plaintiffs sought coverage under the "Business Income" coverage in their Policy to cover their losses from the shutdown and slowdown of their businesses due to the government orders and the virus.

12. Despite the language in the Policy allowing for coverage for loss of functionality of covered property, Insurer has denied coverage for the losses suffered by Plaintiffs.

13. Plaintiffs assert said denial is made in error, bad faith and violates the terms of the Policy.

JURISDICTION AND VENUE

14. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 because one or more of the parties are citizens of different states and the amount in controversy exceeds \$75,000 exclusive of interest and costs.

15. This Court has personal jurisdiction over Defendant because Defendant engaged in substantial business activities in the State of New Jersey, and Defendant derived substantial revenue from such business in New Jersey, including contracting to provide the insurance to Plaintiff in New Jersey that is the subject of this case.

16. This Court has jurisdiction to grant declaratory relief under 28 U.S.C. § 2201 because an actual controversy exists between the parties as to their respective rights and

obligations under the Policy, as defined below, with respect to the loss of business caused by the combination of COVID-19 and the applicable governmental orders in response to the pandemic.

17. Venue is proper in this forum pursuant to 28 U.S.C. §1391(b)(2) because (a) a substantial part of the events and/or omissions giving rise to the claim occurred in this district and (b) the property that is the subject of the action is situated in this district.

18. Venue is also proper pursuant to 28 U.S.C. §1391(b)(3) because Defendant is subject to this Court's personal jurisdiction.

PARTIES

19. TLE Corp. is a corporation organized under the laws of the State of Delaware and registered to do business in the State of New Jersey, with a principal place of business at 210 Hillsboro Technology Drive, Deerfield Beach, Florida.

20. TLE Corp. is an owner and operator of approximately 42 TLE Centers, and TLE Corp.'s wholly-owned subsidiary, The Learning Experience Systems LLC ("TLE Systems") is a franchisor of over 200 TLE Centers, as defined below.

21. TLE at Cedar Grove LLC and TT of Wayne, LLC are each a limited liability company organized under the laws of the State of Delaware and registered to do business in the State of New Jersey, with a principal place of business at 210 Hillsboro Technology Drive, Deerfield Beach, Florida.

22. TLE at East Rutherford, LLC; TLE at Hackensack, LLC; and TLE at Paramus, LLC; and TT of Ramsey, LLC are each a limited liability company organized under the laws of the State of New Jersey with a principal place of business at 210 Hillsboro Technology Drive, Deerfield Beach, Florida.

23. TT of Wayne, LLC; TLE at East Rutherford, LLC; TLE at Hackensack, LLC; TLE at Paramus, LLC; and TT of Ramsey, LLC each owns and operates an individual TLE Center in (respectively) Cedar Grove, New Jersey; Wayne, New Jersey; East Rutherford, New Jersey; Hackensack, New Jersey, and Paramus, New Jersey. Each such TLE Center is an insured property.

24. TLE at Cedar Grove LLC owned and operated an individual TLE Center in Cedar Grove until May 12, 2020, at which time it sold the property. The claim regarding this location is for coverage until the date of the conveyance.

25. Berkshire is incorporated under the laws of Nebraska with a principal place of business at 1314 Douglas Street, Suite 1400, Omaha, Nebraska.

26. American Association of Insurance Services, Inc. is a Delaware non-profit corporation with a principle place of business at 701 Warrenville Road, Suite 100, Lisle, IL 60532. AAIS acts as an advisory organization, statistical agent, and information provider for a significant number of property and casualty insurance companies.

27. Insurance Services Office, Inc. is a Delaware corporation with a principal place of business at 545 Washington Boulevard FL 14-22, Jersey City, New Jersey. ISO collects statistical data, promulgates rating information, develops standard policy forms, and files information with state regulators on behalf of insurance companies that purchase its services.

28. Upon information and belief and at all relevant times hereto, Defendant was authorized to underwrite insurance policies covering risks in the State of New Jersey, and in fact regularly conducted such business in the State of New Jersey.

GENERAL ALLEGATIONS

Background on TLE

29. The Learning Experience Academy of Early Education® (“TLE”) is the trade name for certain child care centers (singly, a “TLE Center” and collectively the “TLE Centers”).

30. The TLE Centers are located in twenty two (22) states, provide early education and care to children ages six weeks to six years old, as well as providing after-school programming for elementary school-aged children in certain geographic markets.

31. Although most TLE Centers are owned and operated by franchisees, a substantial number, including all of the TLE Centers covered by the Policy, as defined below, are owned and operated by the Plaintiffs.

32. Plaintiffs are, respectively (i) TLE Corp., parent company of TLE Systems, the franchisor of such network, and (ii) the entities named in Paragraph 23 above, each of which is a wholly owned subsidiary of TLE Corp., and each of which operates an individual TLE Center in New Jersey.

33. There are more TLE Centers⁵ in New Jersey than in any other state.

The Policy

34. As part of a Comprehensive Package Insurance Policy (the “Policy”), Defendant issued Plaintiffs property insurance coverage protecting the Plaintiffs from *all risks* of direct physical loss of, and/or damage to, the insured TLE Centers in New Jersey (hereafter, the “Corporate NJ Centers”) unless specifically excluded, that might arise during the policy coverage period of January 1, 2020 through January 1, 2021. A true and correct copy of the Policy is attached hereto as Exhibit “A”.

35. Such coverage includes resulting loss of business income (i.e., so-called business interruption insurance).

⁵ Counting both those New Jersey TLE Centers owned by Plaintiffs, and those New Jersey TLE Centers owned by franchisees.

36. Plaintiffs sought coverage under the “Business Income” coverage in their Policy to cover their losses from the shutdown and slowdown of their businesses due to the government orders and COVID-19.

THE COVID-19 PANDEMIC

The Rapid and Deadly Spread of COVID-19

37. The first event in the multi-causal chain that lead to the Plaintiffs’ business losses is the rapid and deadly spread of COVID-19.

38. COVID-19, short for Coronavirus Disease-2019, is a highly contagious, uniquely resilient, and deadly disease caused by the virus known as the “novel coronavirus” or SARS-CoV-2.

39. COVID-19 has quickly raced across the world, including the United States.⁶

40. The virus is still circulating and causing devastating numbers of infections and deaths, and is likely to continue doing so until a vaccine is developed and administered to enough people to develop herd immunity.⁷

41. It is believed that the first instance of the disease being transmitted to humans was on or around December 2019.⁸

42. On March 4, 2020, the first case of COVID-19 was reported in New Jersey.⁹

⁶ By January 2020, COVID-19 had reached the United States (*See* The New England Journal of Medicine, <https://www.nejm.org/doi/full/10.1056/NEJMoa2001191>). As early as February 26, 2020, the Center for Disease Control and Prevention (“CDC”) advised that COVID-19 was spreading freely without the ability to trace the origin of new infections, also known as community transmission.

⁷ *See* The Mayo Clinic, Herd Immunity and COVID-19 (Coronavirus): What You Need to Know, available at <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/herd-immunity-and-coronavirus/art-20486808>. *See also* the Los Angeles Times, How will the COVID-19 Pandemic End? <https://www.latimes.com/science/story/2020-06-24/coronavirus-covid-19-pandemic-how-will-it-end>.

⁸ *See* <https://www.nejm.org/doi/full/10.1056/NEJMoa2001191>.

⁹ *See* <https://www.contagionlive.com/news/first-presumptive-positive-case-of-coivd19-in-new-jersey>.

43. On March 9, 2020 Governor Philip Murphy declared a state of emergency in New Jersey, noting that there were 11 presumed positive cases of COVID-19 in the state, with 24 additional “Persons Under Investigation” and that COVID-19 was likely to spread in New Jersey at a rate comparable to the rate of spread in other affected jurisdictions. *See* a true and correct copy of the Executive Order No. 103 attached hereto as Exhibit “B”.

44. On March 11, 2020 the President of the United States declared a national emergency. On the same day the World Health Organization (“WHO”) declared COVID-19 to be a pandemic with “alarming levels of spread and severity”.¹⁰

45. As of September 26, 2020, there are 7,072,879 confirmed cases of COVID-19 infection in America (204,446 in New Jersey), and there are 202,100 confirmed deaths from COVID-19 (16,097 in New Jersey), according to the Center for Systems Science and Engineering at Johns Hopkins University.¹¹

The Unique Nature of COVID-19

46. COVID-19 has a unique nature which has caused business premises across the State of New Jersey to become unusable because of the combination of (i) the threat to human health from the virus actually being inside such premises or at least the imminent threat of the release of the virus into and onto such premises from occupants, *inter alia*, coughing, sneezing, or just talking, and (ii) broad-based governmental shutdown and slowdown orders.

Asymptomatic Transmission

¹⁰ *See* <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

¹¹ *See* <https://coronavirus.jhu.edu/us-map> (last viewed September 26, 2020). These figures likely undercount the number of infections. *See* The New York Times, July 21, 2020, The C.D.C. says the number of people infected ‘far exceeds the number of reported cases’ in parts of the U.S., available at <https://www.nytimes.com/2020/07/21/world/coronavirus-covid-19.html?action=click&module=Top%20Stories&pgtype=Homepage#link-4924e68b>.

47. There is an extremely high level of COVID-19 transmission by asymptomatic people, possibly as much as 40-50% of all infections.¹²

48. Thus, even the healthiest looking person in the world could unknowingly have COVID-19 and transmit it to others.

49. Extremely high levels of transmission by asymptomatic people is the primary feature of COVID-19 that separates it from other viral outbreaks in modern history, including the outbreak of SARS in 2003.

50. An article in *The Lancet* states that “Isolation was effective for SARS because peak viral shedding occurred after patients were already quite ill with respiratory symptoms and could be easily identified. Although asymptomatic or mildly symptomatic patients have been reported for SARS, no known transmission occurred from these patients”.¹³

51. Other viral outbreaks in modern history, including the SARS outbreak, did not lead to any broad based governmental shutdown and slowdown orders in North America.

52. Because SARS did not have a high transmission rate by asymptomatic people, the governmental response was to quarantine specific, symptomatic individuals, and implement contact tracing.¹⁴ The government did not need to resort to broad based shutdowns and slowdowns.

¹² See Johns Hopkins ABX Guide, Coronavirus COVID-19 (SARS-CoV-2), by Paul G. Auwaeter, M.D., updates May 6, 2020, available at https://www.hopkinsguides.com/hopkins/view/Johns_Hopkins_ABX_Guide/540747/all/Coronavirus_COVID_19_SARS_CoV_2_. (“Viral shedding by asymptomatic people may represent 25–50% of total infections.”). See also CDC, Emerging Infectious Diseases Journal, Clusters of Coronavirus Disease in Communities, Japan, January–April 2020, regarding a Japanese study involving COVID-19 clusters in congregate settings, including without limitation day care centers, https://wwwnc.cdc.gov/eid/article/26/9/20-2272_article (“41%... of probable primary case-patients were presymptomatic or asymptomatic at the time of transmission”).

¹³ See Can we contain the COVID-19 outbreak with the same measures as for SARS?, *The Lancet, Infectious Diseases*, Personal View, Vol. 20, Issue 5, E102-E107, May 1, 2020, available at [https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(20\)30129-8](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(20)30129-8).

¹⁴ See Quarantine Criticism Spreads Faster than SARS in Toronto, *The Baltimore Sun* (The New York Times News Service), April 19, 2003. See also Can we contain the COVID-19 outbreak with the same measures as for SARS? *The Lancet Infectious Diseases* on-line journal, March 5, 2020 (in North America,

53. With COVID-19, scientific experts at first adopted this same type of “isolated outbreaks” response¹⁵ but it quickly became apparent that it would not work. Due to the high rate of asymptomatic infection and transmission, COVID-19 cannot be so easily identified and traced. As stated above, even the healthiest looking person in the world might be infected and transmit the virus.

Modes of Transmission

54. While the virus that causes COVID-19 may not be visible to the naked eye, it is a physical object which can, and does, transmit to the air, and to surfaces, and in both instances can cause humans to be infected.¹⁶

55. The virus can be released into the air either as respiratory droplets or an aerosolized cloud or anywhere along the spectrum in between, by sneezing, coughing, or even just talking.¹⁷

56. The virus can be transmitted to surfaces either by the airborne virus eventually, due to gravity, falling on surfaces, or by more direct transmission via bodily secretions including saliva, and hands that have picked up the virus.¹⁸

“SARS was eventually contained by means of syndromic surveillance, prompt isolation of patients, strict enforcement of quarantine of all contacts...” available at [https://www.thelancet.com/pdfs/journals/laninf/PIIS1473-3099\(20\)30129-8.pdf](https://www.thelancet.com/pdfs/journals/laninf/PIIS1473-3099(20)30129-8.pdf).

¹⁵ See <https://www.cdc.gov/mmwr/volumes/69/wr/mm6905e1.htm>. See also <https://www.who.int/publications/i/item/contact-tracing-in-the-context-of-covid-19>.

¹⁶ See Transmission of COVID-19 virus by droplets and aerosols: A critical review on the unresolved dichotomy, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7293495/>.

¹⁷ Id. See also 239 Experts With One Big Claim: The Coronavirus Is Airborne, published on July 4, 2020 in the New York Times, available at <https://www.nytimes.com/2020/07/04/health/239-experts-with-one-big-claim-the-coronavirus-is-airborne.html>. See also Transmission of COVID-19 virus by droplets and aerosols: A critical review on the unresolved dichotomy, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7293495/>.

¹⁸ See <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last viewed September 26, 2020); see also <https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations> (last viewed September 26, 2020).

57. The virus, once released by coughing, sneezing, or talking, can travel relatively far from the source of the release.¹⁹

58. Whether on surfaces or in the air, the virus can last for extended periods of time.²⁰

59. People can contract the airborne virus simply by breathing²¹, and can contract the virus from infected surfaces by touching those surfaces and then touching their eyes, nose or mouth.²²

Indoor Spaces Are Especially Dangerous for Transmission of COVID-19

60. The risk of COVID-19 transmission is particularly acute in indoor spaces, especially premises where people gather closely for extended periods of time.

¹⁹ See the National Institutes of Health study Airborne transmission of SARS-CoV-2: The world should face the reality, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7151430/> (“Such small droplets are free to travel in the air and carry their viral content meters and tens of meters from where they originated”). Even after landing surfaces, such the floor, the virus can attach itself to objects, such as shoes, and be carried to distant parts of the premises. See April 2020 study in the journal Emerging Infectious Diseases, <https://www.cidrap.umn.edu/news-perspective/2020/04/study-finds-evidence-covid-19-air-hospital-surfaces> (“The relatively high rate of positivity for floor samples in the ICU...70%... and general ward...15.4%...may have been due to gravity and air flow causing most respiratory droplets to fall to the ground and spread via clinicians' shoes, the authors surmised, noting a 100% positivity rate on the pharmacy floor, where no patients were housed and three samples were taken. Half of the swabs from the soles of clinicians' shoes tested positive, indicating that the virus may spread this way”). Further, even after such aerosols eventually land on a surface they can be re-released into the air if the applicable surface is disturbed. A study conducted in Wuhan indicates that staff movement, floor cleaning, and the removal of personal protective equipment could transmit the virus through the re- suspension of virus-contaminated aerosols. <https://www.biorxiv.org/content/10.1101/2020.03.08.982637v1>.

²⁰ According to a study published in *The New England Journal of Medicine*, COVID-19 remains stable and transmittable in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard and up to two to three days on plastic and stainless steel. See <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last accessed May 6, 2020). Another study, published in the *Journal of Hospital Infection*, found: “Human coronaviruses can remain infectious on inanimate surfaces at room temperature for up to 9 days. At a temperature of 30°C or more the duration of persistence is shorter.” See <https://www.inverse.com/science/coronavirus-4-studies-explain-how-covid-19-sticks-to-surfaces>.

²¹ See Transmission of COVID-19 virus by droplets and aerosols: A critical review on the unresolved dichotomy, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7293495/>.

²² See World Health Organization, Frequently Asked Questions (April 17, 2020 Q&A), How Does COVID-19 Spread?, available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses>.

61. Within indoor spaces the airborne virus does not dissipate and blow away with the wind.²³

62. Not only is there no wind to disperse the airborne virus, but, worse, within indoor environments air currents from air conditioning may cause the airborne virus to travel relatively long distances, and thus greatly broaden the zone of potential infection.²⁴

63. It is well known that the danger of infection greatly increases the closer to, and longer that, people are in proximity to an infected person.²⁵

64. Accordingly, the risk of transmitting COVID-19 is particularly high inside those types of premises where people gather closely for extended periods, including restaurants and child care centers (although see below in this Complaint regarding COVID-19 posing a much greater risk to staff in child care centers than to the children themselves).

65. Furthermore, restaurants, child care centers, and other similar types of indoor businesses have many commonly shared high touch surfaces.

66. In all types of business premises, bathrooms are particularly dangerous.²⁶

67. Indeed, the degree of danger of transmission indoors versus outdoors is stunningly dramatic, as evidenced by the following studies:

²³ Id.

²⁴ See CDC, Emerging Infectious Diseases, COVID-19 Outbreak Associated with Air Conditioning in Restaurant, Guangzhou, China, 2020 https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article.

²⁵ See Erin Bromage, Associate Professor of Biology at the University of Massachusetts at Dartmouth (lauded by The New York Times as providing “an impressively clear explanation of how the virus often spreads inside confined spaces, like restaurants, churches, workplaces and schools”) blog post The Risks – Know Them – Avoid Them, May 6 (updated May 20), 2020, in which he refers to his now famous formula Successful Infection = Exposure to Virus x Time, available at <https://www.erinbromage.com/post/the-risks-know-them-avoid-them>.

²⁶ Id. (“Bathrooms have a lot of high touch surfaces, door handles, faucets, stall doors. So fomite transfer risk in this environment can be high. We still do not know whether a person releases infectious material in feces or just fragmented virus, but we do know that toilet flushing does aerosolize many droplets. Treat public bathrooms with extra caution (surface and air), until we know more about the risk.”)

i. A study in Japan found that the odds that an infected person would transmit COVID-19 in a closed environment was *18.7 times greater* compared to an open-air environment, and that the nature of closed environments may promote superspreading events.²⁷

ii. In a study of *1,245 cases* that occurred across China from January 4 to February 11, *only two cases* were traced to contact with an infected person out of doors.²⁸ The study's authors concluded, not surprisingly, that this "confirms that sharing indoor space is a major SARS-CoV-2 infection risk".

68. There is a clear consensus among (i) scientists, including without limitation institutions such as the Centers for Disease Control ("CDC") and the National Institutes of Health, and (ii) various government officials as evidenced by the nature of their orders, that *the inherent nature of indoor spaces*, particularly those where people gather closely for long periods, creates a particularly high risk of COVID-19 transmission, such risk being much greater than outdoors.

i. From a letter joined by 239 scientists from around the globe and sent to the WHO: "This problem [of aerosolized airborne transmission] is especially acute in indoor or enclosed environments, particularly those that are crowded and have inadequate ventilation relative to the number of occupants and extended exposure periods"

29

²⁷ See Closed environments facilitate secondary transmission of coronavirus disease 2019 (COVID-19) <https://www.medrxiv.org/content/10.1101/2020.02.28.20029272v2>.

²⁸ See MedRxiv, Indoor transmission of SARS-CoV-2, <https://www.medrxiv.org/content/10.1101/2020.04.04.20053058v1>.

²⁹ See 239 Experts With One Big Claim: The Coronavirus Is Airborne, published on July 4, 2020 in the New York Times, available at <https://www.nytimes.com/2020/07/04/health/239-experts-with-one-big-claim-the-coronavirus-is-airborne.html>.

- ii. From the National Institutes of Health: the “indoor environment of public places” is “where the risk of infection is greatest, due to the possible buildup of the airborne virus-carrying droplets, the virus likely higher stability in indoor air, and a larger density of people.”³⁰
- iii. From the CDC, an article approving a warning about the “Three Cs”: closed spaces with poor ventilation, crowded places, and close-contact settings.³¹
- iv. From Joseph Allen, director of the Healthy Buildings program at Harvard T.H. Chan School of Public Health: “... super-spreader events appear to be happening exclusively indoors, where airborne transmission is more likely.”³²

69. The danger of indoor spaces, and the comparative safety of the outdoors, is also reflected in governmental decisions to (i) lift stay at home orders, at first, only for outdoor areas,³³ and (ii) allow restaurants to re-open, at first, only for outdoor service.³⁴

70. The recital language in some governmental orders expressly recognizes that indoor business premises, being enclosed spaces where people congregate, are dangerous environments where COVID-19 is more likely to be transmitted. For example, in Minnesota, Executive Order 20-04 stated that, while certain business premises that were essential must remain open, “certain

³⁰ See the National Institutes of Health study Airborne transmission of SARS-CoV-2: The world should face the reality, April 10, 2020 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7151430/>.

³¹ See Clusters of Coronavirus Disease in Communities, Japan, January–April 2020 https://wwwnc.cdc.gov/eid/article/26/9/20-2272_article.

³² See <https://www.washingtonpost.com/opinions/2020/05/26/key-stopping-covid-19-addressing-airborne-transmission/>.

³³ See March 14 Executive Order No. 143, issued by Governor Philip Murphy of New Jersey, allowing his stay at home order to be lifted for purposes of going to beaches, boardwalks, lakes and lakeshores. Executive Orders that followed soon thereafter lifted the stay at home order for additional outdoor recreational activities.

³⁴ See, e.g., northjersey.com, Finally! NJ restaurants are open for outdoor dining. Here's what you can expect <https://www.northjersey.com/story/life/food/2020/06/15/nj-outdoor-dining-now-restaurants-have-reopened/5334210002/>. Similarly, in California, Connecticut, Illinois, Massachusetts, New Mexico, New York, Pennsylvania, South Carolina, Virginia, and several other states, and also in England, Scotland and Wales, restaurants were only allowed to open for outdoors service at first.

other public accommodations” such as bars, restaurants, and the premises of non-essential businesses, must close because they are places where people “congregate” and thus “pose a threat to the public health by providing environments for the spread of COVID-19.”³⁵ A true and correct copy of the Minnesota Executive Order 20-04 is attached hereto as Exhibit “C”.

*COVID-19 Poses a Continuing Imminent Threat to Human Health
and Safety while Indoors*

71. Given that COVID-19 transmission appears to occur overwhelmingly *indoors*, especially in dense settings where people stay in close proximity for lengthy periods, the danger to human health in such settings is at least as great, if not greater, than the danger that would be posed in the same setting by invisible (to the naked eye) dangerous microscopic matter such as airborne asbestos.

72. Airborne asbestos presents a statistical danger (including the possibility of death) over a large number of people exposed for a long period time, but it is not a severe and immediate danger to any one particular person.³⁶

73. By contrast, COVID-19 presents a severe and immediate danger (including the possibility of death) to each particular person with whom the virus comes into contact.

74. It is estimated that asbestos kills approximately 100,000 people *worldwide* on an annual basis, and between 2,500 to 15,000 people *in the United States* each year.³⁷

³⁵ See <https://www.leg.state.mn.us/archive/execorders/20-04.pdf>.

³⁶ See, The American Cancer Society, *Risk Factors for Malignant Mesothelioma*, <https://www.cancer.org/cancer/malignant-mesothelioma/causes-risks-prevention/risk-factors.html>, discussing asbestos and mesothelioma (“People exposed at an early age, for a long time, and at higher levels are more likely to develop this cancer. Still, most people exposed to asbestos, even in large amounts, do not get mesothelioma. ... The time between the first asbestos exposure and diagnosis of mesothelioma is usually between 20 and 50 years”).

³⁷ Vox, How Many People are Killed by Asbestos? It’s More Difficult to Track than You Think, <https://www.vox.com/2015/6/30/8868963/asbestos-killed-us-death-rates>.

75. By contrast, COVID-19 killed at least 100,000 people in *the United States alone* within fewer than 90 days,³⁸ including 11,770 people killed *in just a single state, New Jersey*, during that brief time period.³⁹

76. Furthermore, this inherent, dangerous risk posed by such closed environments cannot be mitigated by testing or cleaning.

77. Current testing for COVID-19 is based on small swabs. Although such swabs could be used to test small, discrete, extremely high-touch areas within a particular business premises, such as door handles⁴⁰ it would take a small army of people to test all surfaces within business premises, or even all commonly touched areas.⁴¹

78. Upon information and belief, there is no currently known method (at least, not one that can practically and economically be conducted outside of a laboratory setting) to test for the aerosolization of the virus within business premises.

79. Even if it were possible to test business premises for the presence of the virus, a negative result would be meaningless, because there would be the continuing imminent threat of the release of the virus, either onto surfaces, or into an aerosolized cloud, as soon as people entered the premises following such testing.⁴²

³⁸ The New York Times, An Incalculable Loss, May 27, 2020.

³⁹ nj.com, N.J. coronavirus deaths rise to 11,770 with 161,545 total cases. Another 708 new positive test confirmed, June 3, 2020. <https://www.nj.com/coronavirus/2020/06/nj-coronavirus-deaths-rise-to-11770-with-161545-total-cases-another-708-new-positive-test-confirmed.html>.

⁴⁰ See, e.g., www.chaibio.com/coronavirus, which shows a “Q-tip” testing swab placed on a long, straight door handle.

⁴¹ Note that whether an employee or other person associated with a particular premises has tested positive for the virus does not determine whether there was, is, or could in future be, COVID-19 at the premises. Because of the high level of asymptomatic cases, many infected persons never get tested at all, and in any event, there is no way to know exactly where a person contracted the virus.

⁴² It should also be noted that: (i) throughout the Spring of 2020, and even to the present time, there has been a shortage of available testing (specifically, a shortage for testing for people themselves, never mind testing all surfaces of a business premises), (ii) the test results often take many days to come back, thus greatly reducing the practical value of testing as a preventive measure, and (iii) the tests produce a high number of false negatives.

80. Even if the premises were deeply, professionally cleaned, there would be the continuing imminent threat of the release of the virus as soon as people re-entered following the cleaning.

81. Even if the premises were closed for a long enough period to ensure that any virus within had died, there would be the continuing imminent threat of the release of the virus as soon as people re-entered.

82. Indoor spaces in New Jersey that shelter large numbers of people in close proximity for extended periods of time either in fact do, or, there is the continuing imminent threat⁴³ that they will, have the virus within them, on surfaces or in the air, thus presenting a risk of transmission that constitutes a public health hazard even greater than if such premises had airborne asbestos.⁴⁴

83. It is indisputable that such actual, and/or imminent threat of, contamination of the air, and surfaces, within business premises causes direct physical loss of the functionality of such premises (namely, loss of the premises' inherent function of safely sheltering occupants) as well as direct physical damage to such premises.

⁴³ This continuing imminent threat is from the actual people who enter the applicable premises from time to time, because, for business premises with many people, like child care centers, there is a high likelihood that one or more such persons is infected. The imminent threat therefore, is the very real and very immediate threat that such infected persons will release the virus into the premises by coughing, sneezing, or even just talking.

⁴⁴ Some might argue that COVID-19 does not implicate *property* insurance because the virus spreads by human to human transmission. However, that argument ignores the fact that (i) much of the transmission is from humans, to surfaces in business premises, and then to other humans, and (ii) as discussed above in this Complaint, even direct human to human transmission, in the form of infection by breathing in an airborne virus, is overwhelmingly more likely to occur inside of business premises, particular those premises where people gather in close proximity for extended periods of time. Thus, whereas the transmission of the virus might ultimately be from one human to another human, and whereas some transmission does, undoubtedly, occur in the outdoors, the scientific studies indicate that the key catalyst, or conduit, for the overwhelming amount of transmission is the physical attributes of busy indoor spaces. In this sense, it is really the physical attributes of busy indoor spaces that causes the (vast majority of) the transmission of COVID-19.

84. The closure of all non-essential business premises evidences an awareness on the part of local and state governments that COVID-19 causes loss of or damage to property.

85. Indeed, some governmental closure orders have been explicit about this.

86. For example, a New York City Executive Order entered on March 16, 2020 specifically acknowledged that: “[COVID-19] physically is causing property loss and damage.”⁴⁵ A true and correct copy of the New York City Executive Order is attached hereto as Exhibit “D”.

87. Similarly, in a March 16, 2020 proclamation, the City of New Orleans acknowledged COVID-19’s “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.”⁴⁶ A true and correct copy of the New Orleans proclamation is attached hereto as Exhibit “E”.

GOVERNMENT SHUTDOWN AND SLOWDOWN ORDERS

The Orders

88. The second event in the multi-causal chain that lead to the Plaintiffs’ business losses is the issuance of broad based governmental shutdown and slowdown orders, which resulted in either the cessation or slowdown of Plaintiffs’ business operations and activities in New Jersey.

89. The Governor of New Jersey used his broad, discretionary emergency powers⁴⁷ to issue several Executive Orders aimed at mitigating the effects of COVID-19 on the State of New Jersey.

⁴⁵ See <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-100.pdf>.

⁴⁶ See <https://nola.gov/mayor/executive-orders/emergency-declarations/03162020-mayoral-proclamation-to-promulgate-emergency-orders-during-the-state-of-emergency-due-to-co/>.

⁴⁷ In the event of a state emergency, the Governor of New Jersey has extremely broad discretionary powers under Article V of the State Constitution; the Disaster Control Act (N.J.S.A. App.A:9-33, et seq.); and the Emergency Health Powers Act (N.J.S.A. 26:13-1 et seq.). The Governor may effectuate such powers through, among other things, the issuance of Executive Orders. These Executive Orders are not previously

90. These were not prophylactic measures to deal with a disaster that was approaching but had not yet arrived. They were measures reacting to a disaster that had already arrived in New Jersey, and the goal of the orders was simply to *mitigate* the disaster by taking measures aimed at *slowing the rate* of the further spread of the virus.

91. On March 16, 2020, Governor Murphy issued Executive Order No. 104, described on the Official Website for the State of New Jersey as “Aggressive Social Distancing Measures to *Mitigate* Further Spread of COVID-19 in New Jersey”. (Emphasis added). A true and correct copy of Executive Order No. 104 is attached hereto as Exhibit “F”.

92. In that Executive Order the Governor stated that “social mitigation strategies for combatting COVID-19 requires every effort to *reduce the rate* of community spread of the disease...” See Exhibit “F” at 2. (Emphasis added).

93. The Executive Order noted the danger of enclosed premises where people “gather in close proximity”, as well as the danger of contracting the virus from “common surfaces” in such premises. *Id.*, at 3.

94. The Executive Order closed all public, private, and parochial preschool program premises. *Id.*, at 5.

95. On March 21, 2020, Governor Murphy issued Executive Order No. 107, directing the public to stay at home (subject to very limited exceptions), and noting that “restricting the physical presence of individuals in office environments and work sites is critical to preventing future spread of COVID-19” and directing that “brick-and-mortar premises of all non-essential

established ordinances or laws. Rather, they are legal directives which are highly discretionary, ad hoc, and often limited in duration. The purpose of such Executive Orders is to issue new legal requirements on a rapid basis, in light of the Governor’s decisions about the best way to combat the emergency as events and information quickly develop and change.

retail businesses must close to the public.” A true and correct copy of Executive Order No. 107 is attached hereto as Exhibit “G”.

96. On March 25, 2020, Governor Murphy issued Executive Order No. 110, which allowed child care centers to open only on an extremely limited basis, namely, to provide child care services to essential workers, and only if the applicable child care center applied for and obtained certification from the New Jersey Department of Children and Families, and abided by strict rules relating to social distancing, cleaning, and the like. A true and correct copy of Executive Order No. 110 is attached hereto as Exhibit “H”.

97. On June 9, 2020, the stay at home order was lifted, and on June 15, 2020 all child care centers were allowed to reopen. *See* Exhibit “I” at 5.

98. However, due to the continuing circulation of the virus the reopened child care centers remain subject to extensive social distancing and other virus-related restrictions and requirements enforced by the New Jersey Department of Children and Families.⁴⁸

99. These governmentally ordered shutdowns and slowdowns, including child care center restrictions through the New Jersey Department of Children and Families, have caused, and continue to cause, the cessation or slowdown of Plaintiffs’ business operations and activities.

⁴⁸ *See* New Jersey Department of Children and Families, Guidance for New Jersey Child Care Facilities On COVID-19 Related Health and Safety Requirements, available at <https://www.nj.gov/DCF/news/Final.CC.Health.and.Safety.Standards.pdf>. The restrictions include: limiting group sizes to ten (10) children and not allowing interactions between groups, including keeping groups at least 10 feet from one another and staggering the use of playgrounds, game rooms, and the like in shifts; staggering drop off and pick up in shifts; strictly limiting the sharing of supplies, food, toys and other items and requiring that children’s belongings be kept separate in individual storage bins or cubbies and sent home each day for washing; enhanced cleaning and sanitations requirements; fever screening; ensuring that children over two years of age keep face masks on; restrictions on meal preparation and serving; and many other restrictions and requirements.

100. These governmental requirements are mandatory. They must be obeyed.⁴⁹

101. The effect on the Plaintiffs' business is the same as it would be if a small fire had caused damage to all or a portion of the insured premises and, although the premises, or such affected portion, remained technically usable, the fire department, exercising discretionary powers, prohibited the use of the affected areas due to safety concerns.

102. Put another way, due to these governmental actions there has been direct physical loss of the full functionality of the insured properties for their insured purpose of operating as fully functioning child care centers, meaning centers open to all children, at full capacity.

***COVID-19 Did Not Automatically Trigger the Orders,
Nor the Orders' Particular Scope and Magnitude***

103. The above-described orders would not have been given if the COVID-19 pandemic did not occur.

104. The decision to issue governmental shutdown or slowdown orders, however, was entirely within the discretion of governmental officials.

105. Across the United States, and across the world, different governmental officials exercised such discretionary authority in widely varying ways.

106. It is clear therefore that COVID-19 did not automatically trigger particular governmental responses.

The Concept of Governmentally Mandated Social Distancing

⁴⁹ Violation of an Executive Order issued by the Governor pursuant to the Disaster Control Act and other applicable statutes could result in, among other things, imprisonment for a term not to exceed 6 months. See Exhibit "G", Executive Order No. 107, and NJ Rev Stat § App.A:9-49 (2013).

107. The orders were unprecedented in scope and magnitude. No prior event in American history, including prior epidemics and pandemics, resulted in such broad based shutdowns and slowdowns.

108. As stated above, other viral outbreaks in modern history, including the SARS outbreak, did not lead to any broad based governmental shutdown and slowdown orders in North America.

109. Indeed, the concept of potentially implementing broad based shutdowns and slowdowns was not seriously considered by the federal government until fairly recently, and even then, the decision to include such response as part of the range of available options almost did not occur.

110. As reported by the New York Times:⁵⁰

The concept of social distancing is now intimately familiar to almost everyone. But as it first made its way through the federal bureaucracy in 2006 and 2007, it was viewed as impractical, unnecessary and politically infeasible. “There were two words between ‘shut’ and ‘up’” initially, said Dr. Howard Markel, who directs the University of Michigan’s Center for the History of Medicine and who played a role in shaping the policy as a member of the Pentagon research team. “It was really ugly.”

One particularly vociferous critic was Dr. D.A. Henderson, who had been the leader of the international effort to eradicate smallpox and had been named by Mr. Bush to help oversee the nation’s biodefense efforts after the 2001 terrorist attacks.

Dr. Henderson was convinced that it made no sense to force schools to close or public gatherings to stop. Teenagers would escape their homes to hang out at the mall. School lunch programs would close, and impoverished children would not have enough to eat. Hospital staffs would have a hard time going to work if their children were at home.

⁵⁰ See The New York Times, The Untold Story of the Birth of Social Distancing, April 22, 2020, available at <https://www.nytimes.com/2020/04/22/us/politics/social-distancing-coronavirus.html>.

The measures embraced by Drs. Mecher and Hatchett would “result in significant disruption of the social functioning of communities and result in possibly serious economic problems,” Dr. Henderson wrote in his own academic paper responding to their ideas.

The answer, he insisted, was to tough it out: Let the pandemic spread, treat people who get sick and work quickly to develop a vaccine to prevent it from coming back.

111. Dr. Henderson’s opinions reflected broad scientific consensus at that time.

112. An August 15, 2007 study (available from the US National Library of Medicine at the National Institutes of Health) titled “Non-pharmaceutical public health interventions for pandemic influenza: an evaluation of the evidence base” analyzed the scientific literature regarding the efficacy of different potential responses to a potential future influenza-based pandemic. Under the heading of “Interventions whose use is not recommended” the study discussed “Mandatory social distancing measures” such as “workplace closures, limitations on location-based gatherings and events, and mandated travel restrictions”, or what the article called “community restrictions”.

113. The study stated:

The experts generally thought that community restrictions could be considered on a case-by-case basis, for example, cancellation of an event to which thousands would travel. However, efforts to forcibly limit public assembly or movement were seen as legally and ethically problematic, especially when there is limited scientific evidence supporting such restrictions. There are also important practical and logistical limitations to mandatory long-term community restrictions and compulsory quarantine, in addition to the problem of likely public opposition to such measures.

... consistent with other studies, we found that widespread government mandates to segregate individuals, including isolation, quarantine, sheltering, location-based community restrictions, and travel restrictions, are less likely than voluntary measures to be recommended, especially over the longer-term. Instead, less invasive voluntary efforts to reduce social contact, especially self-

isolation of the sick at home, self-quarantine of the exposed, and, when feasible, sheltering by the well ought to be widely supported.

114. As reported by The New York Times, it was largely through happenstance that the federal governmental ultimately adopted mandatory social distancing as one of the potential responses to an influenza-based pandemic.

115. That potential response, however, remained discretionary with applicable governmental leaders.

The Wide Range of Governmental Responses to COVID-19

116. The federal government instituted foreign travel restrictions in response to COVID-19, and initially recommended certain social distancing measures. However, the federal government did not mandate social distancing or broad based business closures and slowdowns.⁵¹

117. Many other government leaders did not use their discretionary power to mandate broad based closures and slowdowns, including, without limitation, the Governor of South Dakota, and the respective leaders of Brazil, Sweden, and various other nations, including, initially, Great Britain.

118. When the COVID-19 pandemic first began, some Governors in other States instituted mandatory broad based closures and slowdowns in a very limited fashion only, whether in terms of the scope, severity, or length of such orders.

119. The resurgence of COVID-19 in certain States has resulted in varying types of governmental responses.

⁵¹ On March 16, 2020 the federal government issued the President’s Coronavirus Guidelines for America, titled 30 Days to Slow the Spread. The guidance recommended, but did not mandate, that people avoid “social gatherings” of more than ten (10) people, but limited the recommendation that people not go to “work” (it is not clear if the guidance was suggesting a “work” / “social gathering” distinction) to those who “feel sick” or are able to work remotely. *See* https://www.whitehouse.gov/wp-content/uploads/2020/03/03_16.20_coronavirus-guidance_8.5x11_315 PM.pdf.

120. Debates about the trade-offs between safety, on the one side, and on the other side, values and concerns related to the economy, education, and individual liberty, are currently ongoing regarding whether to re-open schools in the fall, and whether to mandate mask wearing.

121. These debates are not just between liberals and conservatives, Democrats and Republicans. There are fierce debates about such trade-offs even within a single political party.⁵²

122. As discussed above, there was strong debate about such trade-offs approximately fifteen years ago among pandemic specialists, whose main goal is to protect public health.

123. What the existence of so many different governmental responses, and so many debates, reveals is that whatever one's opinion may be about the correct path forward, difficult trade-offs have to be made.

124. Moreover, particular in the early days of the pandemic, those trade-offs had to be made in light of imperfect information, as evidenced by the lack of understanding that aerosolization was one of the main modes of transmission and super-spreader events.⁵³

125. Given such hard trade-offs; the very broad discretion given to governmental leaders; and imperfect information, it is possible to imagine alternative outcomes that might have occurred in New Jersey.

126. For example, it is possible to imagine that, just as there is serious discussion of re-opening schools this fall even in the light of high infection rates, back in the Spring of 2020 governmental leaders might have exempted schools (and potentially, as a sub-set thereof, child care centers) from their broad based closure orders.

⁵² See, e.g., the New York Times, July 23, 2020, Red vs. Red in Texas, With Republicans Battling One Another After Mask Order, available at <https://www.nytimes.com/2020/07/23/us/coronavirus-texas-abbott-republicans.html?smid=em-share>.

⁵³ See <https://www.washingtonpost.com/opinions/2020/05/26/key-stopping-covid-19-addressing-airborne-transmission/>.

127. In that event, it is likely that the TLE Corporate NJ Centers would have been able to continue operating at close to full capacity.

128. Most small children with COVID-19 do not get very sick and many never experience any symptoms or illness,⁵⁴ and it appears that small children do not infect others at the same rate as adults.⁵⁵

129. The primary health impact of continued full operations would have fallen on the staff. It is possible that staff members would have quit rather than endanger themselves. But it is also possible that staff, particularly those who are younger in age, would have continued to perform their duties, just like nurses, bus drivers, grocery store clerks, and others did through the pandemic.

130. None of the foregoing is to suggest that New Jersey should not have followed the path that it did, only that an alternative path was possible and it is conceivable that the governmental orders might not have had the same scope and magnitude, at least with regard to child care centers.

131. It is true that the governmental shutdown and slowdown orders resulted in the direct physical loss of use, and in that sense direct physical loss of functionality, of the TLE Corporate NJ Centers, with resulting substantial and devastating loss of business income.⁵⁶

⁵⁴ See <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-in-babies-and-children/art-20484405>.

⁵⁵ See <https://www.smithsonianmag.com/science-nature/what-scientists-know-about-how-children-spread-covid-19-180975396/> (“A recent study from South Korea of 5,706 infected people and their 59,073 contacts found children under 10 transmitted less often to adults while those between the ages of 10 and 19 spread the virus as well as adults do.”). See also the New York Times, August 12, 2020, Opinion by Dr. Naomi Bardach, Kids Aren’t Big Covid-19 Spreaders. Really. Available at <https://www.nytimes.com/2020/08/12/opinion/coronavirus-schools-children.html?action=click&module=Opinion&pgtype=Homepage>.

⁵⁶ Most of the TLE Corporate NJ Centers remained partially open, as permitted by the governmental orders, but the centers were only allowed to accept children of essential workers. For these TLE Corporate NJ Centers that continued to (partially) operate, the cost of remaining open was far greater than the income from such partial operations, resulting in significant monetary loss. Due to this reason, some of the TLE Corporate New Jersey Centers did not remain open. Therefore, the right to stay partially open was really

132. However, the Plaintiffs had prudently protected themselves against such loss by purchasing business interruption insurance.

PLAINTIFFS' CLAIMS ARE COVERED UNDER THE POLICY

The Four Coverage Components under the Policy

133. The Policy provides business interruption insurance coverage when the following four coverage components (the "Four Coverage Components") are satisfied:

- i. **(Lost Income:)** there is a loss of business income and/or the incurring of extra expenses,⁵⁷
- ii. **(Triggering Events:)** triggered by (a) direct physical loss of or damage to insured property, (b) which is caused by or results from a Covered Cause of Loss,
- iii. **(No Exclusion:)** provided that such triggering events, and the type of resulting business loss,⁵⁸ are not subject to an exclusion from coverage,⁵⁹
- iv. **(Period of Coverage:)** and such coverage continues while there is a necessary cessation or slowdown of business activities, but does not continue later than the period

just an illusion. As a practical matter, the Governor's orders meant that centers either had to close, or incur significant monetary loss to keep operating.

⁵⁷ The Policy states that "Business Income means the: 1. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and 2. continuing normal operating expenses including payroll" and that "Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss." See Exhibit "A" at Bates No. 000113.

⁵⁸ Exclusions in property insurance policies are generally of at least two types: (i) exclusions relative to the triggering event which caused the applicable business loss, and (ii) exclusions that do not relate to the triggering event, but instead relate to the particular type of ensuing business loss. Examples of the latter often involve claims for business losses that are of a 'consequential damages' nature.

⁵⁹ Note that analysis of exclusions actually occurs at two points: the definition of Covered Causes of Loss refers to certain, specific exclusions in the Policy, but, even if those exclusions do not apply, and thus the triggering event is a Covered Cause of Loss, there are still other exclusions, elsewhere in this Policy, that might apply.

of restoration, which ends on the date that the premises is, or reasonably could have been, restored to full operational functionality.⁶⁰ These Four Coverage Components are discussed further below.

ISO Coverage Forms and Exclusions

134. All of the key⁶¹ coverage forms and exclusions in the Policy were drafted by ISO, a company that, among other things, provides pre-written policy forms to the insurance industry.

135. The Policy is heavily regulated by state law.

⁶⁰ As to this last point, relating to the duration of coverage once a triggering event has occurred, the Policy states: “We will pay for the actual loss of Business Income you sustain due to the necessary “suspension” of your “operations” during the “period of restoration.” “Suspension” is defined as “the *slowdown* or cessation of your business activities.” See Exhibit “A” at Bates No. 000121. (Emphasis added). The word “necessary” presumably means that the policyholder has not voluntarily slowed or ceased its operations, and is making diligent efforts to restore the premises to full functionality. “Operations” is defined as “Your business activities occurring at the described premises.” *Id.* at Bates No. 000121. The meaning of “period of restoration” is discussed below, in the part of this Complaint titled Extended Business Income Coverage, but in brief means the period between the triggering events occurring and the date that the premises is, or reasonably could have been, restored to full operational functionality. Thus, using the underlying meanings rather than the defined terms, the Policy covers the loss of business income and the incurring of extra expenses during the time, following the triggering events, that the policyholder has suffered a necessary cessation or slowdown of business activities, such period not to exceed the date upon which the premises is, or reasonably could have been, restored to full operational functionality.

⁶¹ Specifically, the Causes of Loss – Special Form, Business Income (and Extra Expense) Coverage Form, and the Exclusion of Loss Due to Virus or Bacteria, all of which are discussed below. The Dependent Property coverage, discussed below, is from the Property Enhancement Endorsement, which ostensibly is not an ISO form because it does not contain an ISO copyright mark. However, the Dependent Coverage provision in that endorsement is identical, or nearly identical, to language in ISO forms that provide Dependent Property coverage. It should also be noted that the definition of “Period of Restoration”, which is contained in the Business Income (and Extra Expense) Coverage Form, is superseded by the definition of “Period of Restoration” in the Business Income Limit of Insurance – Actual Loss Sustained Within 12 Months endorsement. That endorsement states that it “includes copyrighted material of Insurance Services Office, Inc., with its permission”, and indeed the definition there is identical to the one in the Business Income (and Extra Expense) Coverage Form except for the addition of a 12 month limitation (which limits the time period of coverage). Finally, it should be noted that the Civil Authority coverage, which is contained in the in the Business (and Extra Expense) Coverage Form, is superseded by the Civil Authority coverage provision in the Child Care Additional Coverages endorsement. That endorsement states that it “includes copyrighted material of Insurance Services Office, Inc., with its permission, and indeed the Civil Authority coverage there uses the same language as in the Business Income (and Extra Expense) Coverage Form but deletes two provisions therein.

136. All of the operative language in the Policy had to be, and was, approved by the New Jersey Department of Banking and Insurance (“NJ DOI”), and cannot be modified without the express consent of the NJ DOI.⁶²

137. Furthermore, upon information and belief the NJ DOI does not allow such language to be modified solely for particular prospective policyholders, as opposed to making modifications to such language on a programmatic basis, applicable to all further prospective policyholders.⁶³

138. Upon information and belief, all the property/business interruption insurance policies available to Plaintiffs in the insurance marketplace for the TLE Corporate NJ Centers, at commercially reasonable rates, contained such standard, take-it-or-leave-it ISO coverage forms and exclusions that could not be modified.⁶⁴

139. Therefore, the Plaintiffs were faced with the choice of either accepting the non-negotiable ISO property/business interruption coverage forms and exclusions, establishing a self-insurance program, or foregoing insurance altogether.

Lost Income

⁶² To be clear, Plaintiffs could negotiate for higher or lower coverage amounts, and could pay to add certain pre-written policy enhancement endorsements (also approved by, and non-modifiable without the consent of, the New Jersey Department of Banking and Insurance, and most of such enhancement endorsements either written by ISO or containing language substantially the same as ISO coverage forms) which would improve the coverage in specific and limited respects, but the Plaintiffs had no ability to negotiate any of the language within such endorsements.

⁶³ Even if, hypothetically, Plaintiffs had been able to negotiate the Policy language, Plaintiffs did not have the expertise, or the bargaining power, to engage in such negotiation.

⁶⁴ Although it is possible for policyholders to negotiate some language in certain custom written policies for so-called “surplus lines” of insurance involving special projects with especially high risk and specialized underwriting, that is not the case for normal, ordinary property/business interruption insurance, available at commercially reasonable rates, such as is provided by the Policy.

140. As for the first of the Four Coverage Components (i.e., Lost Income), the Plaintiffs have suffered a loss of business income and incurred extra expenses well in *excess of* Seventy Five Thousand Dollars (\$75,000.00).

Triggering Events

141. The key provision regarding the second of the Four Coverage Components (i.e. Triggering Events) is contained in the portion of the Policy titled *Business Income (and Extra Expense) Coverage Form* and states that coverage will be provided for lost business income (and extra expenses)....

..... caused by direct physical loss of or damage to property⁶⁵....
The loss or damage must be caused by or result from a Covered Cause of Loss.

See Exhibit “A”, Policy at Bates No. 000113. (This provision is hereafter referred to as the “Triggering Events Provision”).

*First Step in Analyzing the Triggering Events Provision:
Direct Physical Loss of or Damage to Property*

142. When analyzing the Triggering Events Provision the first step is to analyze the “physical” aspect of the provision (hereafter, the “Physical Test”), namely, whether there has been “direct physical loss of or damage to” the TLE Corporate NJ Centers.

143. The Policy does not expressly define the words “direct physical loss of or damage to property.”

144. Based on its plain language, “direct physical loss of or damage to property” is a disjunctive (i.e., two prong) test. There is coverage if there is direct physical “loss of... property” “or” “damage to property”.

⁶⁵ More specifically, *insured* property, meaning the TLE Corporate NJ Centers.

145. Regarding the “damage to property” prong of the Physical Test, the only portion of the Policy that defines “Property damage” is in the liability section.

146. There, “Property damage” is defined as being, among other things, “Physical injury to tangible property....” *See* Exhibit “A”, Policy at Bates No. 000299.

147. Having the virus on surfaces or in the air within insured premises, with resulting danger to human health and safety, is undoubtedly a form of physical injury to the premises.

148. It is a physical incident that directly and adversely affects the primary physical function of the premises, which is to safely shelter its occupants.

149. There is no language in the Policy that supports any limitation or requirement that “damage to property” entail visible physical *alteration* of the premises, and the Defendant was well aware that dangerous microscopic matter such as a virus or bacterium can cause “property damage” to insured premises.⁶⁶

150. Indeed, it is sufficient if the physical injury is merely *threatened* (in the context of this case, due to occupants in the premises coughing, sneezing, or talking).

⁶⁶ Evidence that the insurance industry was aware, at least as far back as 2006, that microscopic matter such a virus or bacterium could cause “property damage” to insured premises, is the following. When preparing the virus exclusion, ISO (together with AAIS) issued statements to state insurance regulators which included the following:

Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), *and business interruption (time element) losses*. Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual *property damage*. An allegation of property damage may be a point of disagreement in a particular case. (Emphasis added).

See Exhibit “J” at 5-6.

151. For example, the Policy excludes (for liability coverage purposes), the following, which demonstrates that “property damage” can mean actual, *or even just threatened*, contamination from a microorganism (both the virus, and bacteria, are microorganisms):

[The liability insurance coverage] does not apply to “property damage” which would not have occurred, in whole or in part, but for the actual, alleged or *threatened* inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any “fungi” or *bacteria* on or within a building or structure, including its contents. (Emphasis added).

See Exhibit “A”, Policy at Bates No. 000354.

152. This makes sense, because there can be danger to human health and safety both in the context of actual contamination by dangerous microscopic matter, and also, in the context of the imminent threat of such contamination.

153. Thus, the actual presence, or even just the imminent threat, of the virus in the premises constitutes “physical damage” to the TLE Corporate NJ Centers.

154. Furthermore, such physical damage caused the discretionary governmental shutdown or slowdown orders, and those orders caused a direct physical “loss of.... property”.

155. By direct physical “loss of.... property” the Policy means direct physical loss of use of property. For example, in the above-mentioned definition of “Property damage”, the policy also refers to damage in the form of “Loss of use of tangible property....” See Exhibit “A”, Policy at Bates No. 000299.

156. In the context of COVID-19 and the discretionary New Jersey governmental shutdown or slowdown orders, the “physical damage” prong of the Physical Test and the “loss of use” prong of that test have combined together.

157. The physical injury to the premises caused by the actual presence, or even just the imminent threat, of viral contamination and resulting danger to human health and safety (such

danger being even greater than that of airborne asbestos) has resulted in direct physical loss of use due to discretionary broad based governmental shutdown or slowdown orders.

158. The physicality of the cause, and the direct physical loss of use, are analogous to a small fire burning some of the premises, and, although the premises remains structurally sound and physically usable for its intended purpose, the fire department, exercising discretionary powers, prohibits access to all, or at least a portion, of the premises due to the actual or threatened danger to human safety, resulting in loss of business income.

159. In both instances (dangerous microscopic matter; and fire) the premises has lost its primary, physical function of safely sheltering people.

160. Moreover, in both instances, that loss of physical functionality results in a loss of use by discretionary order of the government, and that loss of use means that the premises cannot function for its insured purpose of being open to the public in order to generate income.

161. Thus, physical injury to the Premises causes one type of loss of functionality, and the government order causes the ultimate loss of functionality for the premises' insured purpose.

162. In both instances (dangerous microscopic matter; and fire), due to such loss of functionality there is a necessary suspension of the insured's business operations and resulting loss of business income.

*Second Step in Analyzing the Triggering Events Provision:
Caused by or Resulting from a Covered Cause of Loss*

163. When analyzing the Triggering Events Provision, the second step is to analyze whether such loss of functionality is "caused by or result[s] from a Covered Cause of Loss".

164. As discussed above, the loss of functionality and use was caused by a combination of the virus and the governmental actions.

165. Each of these causes is a Covered Cause of Loss.

166. The portion of the Policy titled “Causes of Loss – Special Form” states that:

Covered Causes of Loss means Risks of Direct Physical Loss unless the loss is:
1. Excluded in Section B., Exclusions; or
2. Limited in Section C., Limitations that follow.

See Exhibit “A”, Policy at Bates No. 000122.

167. “Risks of Direct Physical Loss” is not defined in the Policy.

168. Presumably “Direct Physical Loss” has the same meaning as “direct physical loss of or damage to property”, as provided above.

169. As for “Risks”, the meaning of that word is well known and understood in the insurance industry.

170. It means “all-risk” coverage. It is the broadest form of coverage available.⁶⁷

171. “All-risk” coverage encompasses not only more commonly known risks like fire, but also entirely unknown and novel risks that may arise which were not previously considered by the Plaintiffs, Defendant, or by the public at large.

172. “All-risk” includes both the virus and governmental closure and slowdown orders.

173. Further, the virus risk, and the risk of governmental closure and slowdown orders, are not excluded in Section B, Exclusions.

⁶⁷ Unlike “named perils” policies, where loss is covered only if resulting from specific, named risks, the Plaintiffs’ Policy covers *all* risks of loss except for those which are expressly and specifically excluded. *See* Exhibit “A” at Bates No. 000122.

174. As for governmental closure orders, that risk is not excluded in unambiguous and enforceable language within such Section B, Exclusions.

175. In any event, the Defendant has waived, and/or is estopped from asserting, any rights it might otherwise have with respect to such exclusions, as discussed further below.

176. As for the virus, there is (as discussed at length below) a virus exclusion in *another* portion of the Policy, *but not in the Section B, Exclusions portion to which the definition of Covered Causes of Loss clearly, specifically, and exclusively refers.*

177. Put another way, in order for the virus exclusion that is contained in another portion of the Policy to prevent the virus from being a Covered Cause of Loss, ISO and Berkshire should have either (i) put the virus exclusion in Section B, Exclusions, or (ii) modified the wording of the definition of Covered Causes of Loss in order to refer to exclusions *anywhere* in the Policy, not just those exclusions in Section B, Exclusions.

178. ISO and Berkshire did not do either of those things.

179. Consequently, for purposes of determining whether there is the possibility of coverage, the virus and the governmental closure orders are each a Covered Cause of Loss.

180. Further, many portions of the Policy make it clear that the words “caused by or result from” mean that coverage is denied even when there is a multi-causal chain, in which there appears both an excluded cause, and a covered cause (meaning, a cause that is a Covered Cause of Loss).

181. The key language from the business interruption portion of the Policy, quoted above, does not contain an anti-concurrent-causation clause.

182. The clear negative implication from the absence of an anti-concurrent-causation clause in the Triggering Events Provision is that a risk of loss (such as governmental closure orders)

will remain a Covered Cause of Loss even if that cause appears in a multi-causal chain in which one of the other causes is an excluded cause.

183. Therefore, even if the Policy had been written differently – namely, by defining Covered Causes of Loss as being all risks unless excluded by *any* exclusion provision in the Policy -- governmental closure orders would have remained a Covered Cause of Loss.

184. The Policy was not written differently, of course. Thus, it is clear that not only government closure orders but the virus, too, is a Covered Cause of Loss.

No Exclusion

185. The third of the Four Coverage Components concerns exclusions.

186. Exclusions under “Section B, Exclusions” (of the Special Form – Causes of Loss portion of the Policy) have been discussed above, in connection with the definition of Covered Cause of Loss.

187. The only exclusion mentioned in the denial letter, as discussed below, is ISO form CP 01 40 07 06, titled “Exclusion for Loss Due To Virus Or Bacteria? (hereafter the “Virus Exclusion”). It states, in relevant part:

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

See Exhibit “A”, Policy, at Bates No. 000242.

188. The Virus Exclusion is in direct conflict with the definition of Covered Causes of Loss because under that definition the virus is a Covered Cause of Loss, and the Policy clearly states that it will pay for losses caused by a Covered Cause of Loss.

189. Even assuming, *arguendo*, that the virus could be a Covered Cause of Loss, at least for purposes of establishing the possibility of coverage, and still be the basis for an exclusion that

could deny such possibility of coverage, the Virus Exclusion does not exclude coverage in the context of a multi-causal chain of events.

190. The key words in the Virus Exclusion are “caused by or resulting from”. *See* Exhibit “A”, Policy at Bates No. 000242.

191. Unlike in several other portions of the Policy, there is no anti-concurrent-causation clause in the Virus Exclusion.

192. As with the same type of “caused by or result[s] from” language in the Triggering Events Provision, the absence of an anti-concurrent-causation clause creates the clear negative implication that the “caused by or resulting from” language does not apply to a multi-causal chain where one of the causes (in the present case, the governmental closure orders) is not excluded.

193. It is not surprising that the Virus Exclusion does not contain an anti-concurrent-causation clause, because the Virus Exclusion was written in response to SARS, and in North America the SARS virus did not result in broad based governmental shutdown and slowdown orders.

194. As discussed above, because SARS did not have material levels of asymptomatic transmission, governments in North America were able to rely solely on testing, contact tracing, and the quarantining of specific individuals.

195. Apparently ISO and Berkshire did not anticipate the possibility of a unique virus that not only has very high levels of asymptomatic transmission, but can also be spread both by contamination of surfaces, and by contamination of indoor air in aerosolized clouds that can last for long periods of time.

196. Put another way, after SARS the insurance industry foresaw a future pandemic, but not this particular pandemic.

197. The insurance industry stands in good company. Many scientists and health organizations did not grasp the unique nature of COVID-19 even as the pandemic began and continued, as evidenced by the initial advice to the general public not to wear masks.

198. In the alternative, it is possible that ISO was more prescient than scientists and health organizations in anticipating a pandemic with such unique features, resulting in the unprecedented counter measure of governmentally imposed broad based shutdowns and slowdowns.

199. But if ISO had such foresight, and intended for the Virus Exclusion to apply in the event of such multi-causal event, then ISO failed to properly execute on that intention because it did not include an anti-concurrent-causation clause in the Virus Exclusion.

200. Consequently, the Virus Exclusion does not exclude coverage in the context of this multi-causal loss stemming from not only the virus, but also, the discretionary decision to implement unprecedented broad based shutdown and slowdown orders.

Defendant's Misrepresentations in the ISO Circular Regarding the Virus Exclusion

201. Not only does the Virus Exclusion not apply to this multi-causal loss, but also, the insurance industry in general, including the Defendant, should be prevented from even asserting that it applies, because the Virus Exclusion was approved by state insurance regulators based on misrepresentations by ISO and AAIS.

202. Specifically, in its "ISO Circular" dated July 6, 2006 and entitled "New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria," ISO represented to the state insurance regulators that:

While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face

claims in which there are efforts to expand coverage to create sources of recovery for such losses, contrary to policy intent.

See a true and correct copy of the ISO Circular at 6 attached hereto as Exhibit “J” (Emphasis added).

203. Similarly, AAIS, in its “Filing Memorandum” in support of the Virus Exclusion, represented:

Property policies have not been, nor were they intended to be, a source of recovery for loss, cost or expense caused by disease-causing agents. With the possibility of a pandemic, there is concern that claims may result in efforts to expand coverage to create recovery for loss where no coverage was originally intended . . .

See a true and correct copy of the Filing Memorandum at 1, attached hereto as Exhibit “K” (Emphasis added).

204. The striking similarity of these two representations shows that ISO and AAIS agreed to coordinate their messages to the state insurance regulators, which would ultimately be incorporated into the Policy of the Insureds and misrepresented to the Insureds through the Policy.

205. These representations were false.

206. As of the time such statements were made, the insurance industry, including Defendants, knew or should have known that property insurance could be triggered by a wide array of dangerous microscopic matter that could contaminate indoor premises, including, but not limited to, airborne asbestos and microorganisms such as bacteria.

207. The misrepresentations were aimed at convincing state insurance regulators that the Virus Exclusion was merely clarifying coverage, not reducing the scope of coverage.

208. That is to say, the misrepresentations were aimed at persuading such regulators that the Virus Exclusion did not take away coverage that would otherwise have been granted, but rather, was merely clarifying that there was no such coverage in the first place.

209. In fact, policyholders had the possibility of coverage based on then existing case law, and policyholders in states with favorable precedent on this issue had an extremely strong likelihood of coverage.

210. There is an enormous difference between asking a regulator to approve language that will have no effect on the possibility of coverage, and asking that regulator to approve language that will take away an extremely strong possibility of coverage.

211. If the insurance industry had been honest about the effect of the Virus Exclusion, then they would have needed to explain why they were reducing coverage without providing a reduction in premiums.

212. Such misrepresentations would likely have had little real world effect, rendering such statements something akin to harmless “white lies” were it not for COVID-19.

213. Upon information and belief, the number of property insurance claims based on viruses and other microorganisms before COVID-19 were an infinitesimally small portion of all property insurance claims.

214. Even if a pandemic like SARS had come around again, there likely would have been few property insurance (including business interruption) claims that resulted in significant payouts, because SARS did not result in broad-based shutdown and slowdown orders in North America.

215. However, COVID-19 has caused business interruption on a vast and devastating scale, at least in New Jersey, because in New Jersey the unique features of the virus have resulted in broad based discretionary governmental closure and slowdown orders.

216. In light of such historically unprecedented business interruption and loss, these misrepresentations threaten to result in millions and millions of dollars in losses to policyholders and corresponding millions and millions of dollars of ill-gotten gain to the insurance industry.

217. As for the misrepresentations that ISO made, the insurance industry (including Berkshire) has allowed ISO to be presented to state regulators as having apparent authority to represent the interests of the insurance industry.

218. ISO is commonly known to be the drafting (and regulatory approval) arm of the insurance industry, and the insurance industry, including Berkshire, ratifies ISO's actions through the adoption of ISO forms.

219. As for the misrepresentations made by AAIS, upon information and belief the insurance companies (including Berkshire) are the members of AAIS, and AAIS is the actual agent of such companies, at least for purposes of the state regulatory approval process.

220. Upon information and belief, AAIS, as the actual agent of the insurance industry, including Berkshire, worked in coordination with ISO regarding these filings and misrepresentations.

221. Furthermore, even disregarding that ISO and AAIS are, respectively, the apparent and actual agents of Berkshire, Berkshire knowingly capitalized on those misrepresentations by adopting an exclusion whose approval it knew was fraudulently induced, and making the same misrepresentations to the Insureds by virtue of the incorporation of the same into the Policy.

222. The ISO Circular and the AAIS "Filing Memorandum" are each a public filing, submitted to governmental agencies, about an extremely important topic for the insurance industry.

223. The insurance industry therefore knew, or should have known, about the representations being made in those public filings.

224. The insurance industry knows that it cannot include policy language that has not been approved by state regulators.

225. The insurance industry knows, or should know, that a fraudulently induced approval is tantamount to no approval.

226. Upon information and belief, the Berkshire did not take any steps to correct these misrepresentations.

227. Berkshire was not required to include the Virus Exclusion. It was a choice that Berkshire made.⁶⁸

228. At the very least, therefore, by including the Virus Exclusion in the Policy Berkshire voluntarily and knowingly capitalized on the misrepresentations of others, and in doing so adopted such misrepresentations as its own.

229. As demonstrated by all the foregoing, these misrepresentations to the state insurance regulators and to the Insureds in the Policy involved agreements (i) between ISO and AAIS, and (ii) between ISO and AAIS on the one hand, and the insurance industry in general, including Berkshire, on the other hand, to further a scheme of unlawful deception that has resulted in great losses for Plaintiffs.

230. In the alternative, even if Berkshire is completely innocent in all the foregoing matters, it cannot deny coverage based on an exclusion whose presence in the Policy is illegal and therefore must be deemed stricken from the Policy.

Period of Coverage

⁶⁸ Many complaints seeking business interruption coverage for COVID-19 have been filed by other plaintiffs against other insurance companies to date, and many of those policies do not contain the Virus Exclusion, thus demonstrating that insurers were not required to include the Virus Exclusion.

231. The fourth of the Four Coverage Components (i.e. Period of Coverage) concerns the necessary cessation or slowdown of the Plaintiffs' business operations/activities at the insured premises during the "period of restoration", meaning the period during which such premises have not been, nor with reasonable diligence could have been, restored.

232. Other portions of this Complaint have described the necessary cessation or slowdown of Plaintiffs' business operations/activities at the insured premises.

233. The definition of "period of restoration" is discussed below, in the Extended Business Income Coverage portion of this Complaint.

Additional Business Interruption Coverages

234. Plaintiffs stated in the claim clarification letter, which is discussed below, that they are seeking all business interruption coverages available under the Policy.

235. Such coverages include, as sub-components of the business income and extra expense coverage, the following:

Civil Authority

236. There is coverage under the title of "Civil Authority".⁶⁹ This coverage states:

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by the action of civil authority that prohibits access to the described premises.

See Exhibit "A", Policy at Bates No. 000114.

237. This Civil Authority provision is an independent basis for business interruption coverage.

⁶⁹ The Civil Authority coverage appears in the Business Income (and Extra Expense) Coverage Form, but it also appears, with provisions slightly more favorable to the Plaintiffs in terms of the time sub-limit and certain other attributes, in the Child Care Additional Coverage form. *See* Exhibit "A", Policy at Bates No. 000189.

238. That is, it can be triggered even when the standard business interruption coverage is not.

239. This Civil Authority coverage is similar to, but distinct from, the coverage that has been discussed prior to this point in the Complaint.

240. Civil Authority coverage is predicated on a governmental order, but it is a governmental order implemented due to property damage at premises “other than” the insured premises.

241. COVID-19 has caused property damage to all non-essential business premises in New Jersey where people gather closely for extended periods of time, including both the TLE Corporate NJ Centers and all other similar business premises in the state.

242. These other business premises are premises “other than” the TLE Corporate NJ Centers.⁷⁰

243. Since the governmental orders are based, in part, on property damage to premises “other than” the TLE Corporate NJ Centers, Plaintiffs are entitled to coverage under this Civil Authority provision.

244. Note that only the Civil Authority coverage imposes the “prohibits access to the described premises” requirement.

245. However, that requirement is satisfied because, while the governmental orders have not prevented access to the TLE Corporate NJ Centers for all child care purposes, those orders have prevented the full and complete access for which Plaintiffs obtained insurance.

⁷⁰ In the Civil Authority coverage provided under the Business Income (and Extra Expense) Coverage Form, such “other premises” must be located in a certain radius from the insured premises. However, by virtue of the Civil Authority coverage under the superseding Child Care Additional Coverage form, such radius is not less than the entire state of New Jersey.

246. Just as Plaintiffs would be entitled to coverage if only a portion of the premises were rendered unusable due to fire, Plaintiffs are entitled to coverage because governmental orders have not allowed access to the premises for all children (meaning children of both essential and non-essential workers) and, moreover, even to this day the governmental orders have the effect of denying access to the premises for the full capacity otherwise allowed by fire, building, and other code.

247. Assuming the Court agrees that Plaintiffs are entitled to coverage under both the Triggering Events Provision and under the Civil Authority provision, Plaintiffs would elect which coverage to apply, in order to prevent double recovery.

Dependent Property

248. The Policy contains a Property Enhancement Endorsement, pursuant to which there is coverage for Dependent Property. That endorsement states, in relevant part:

We shall pay for the actual loss of your business income caused by or resulting from Direct physical loss or damage by a Covered Cause of Loss to your dependent property. Dependent Property means property operated by others which you depend on to... Directly accept your products and services (Recipient Locations).

See Exhibit "A", Policy at Bates No. 000153.

249. This coverage is available to TLE Corp. (but not the other Plaintiffs).

250. Pursuant to a franchise agreement, TLE Corp.'s wholly owned subsidiary, TLE Systems, provides products and serves to its franchisees who own TLE Centers in New Jersey.

251. There are fifty-five (55) TLE Centers throughout New Jersey that are owned by franchisees.

252. Under the franchise arrangement, TLE Corp., through its wholly owned subsidiary TLE Systems, receives royalties from the franchisees, i.e., a percentage of the franchisees' gross revenues.

253. Remuneration from the franchisees due to these royalties constitutes a sizeable portion of TLE Corp.'s earnings from New Jersey.

254. Just like the TLE Corporate NJ Centers, all of the franchisee owned TLE Centers in New Jersey have experienced a cessation or slowdown of their business activities due to direct physical loss or damage from a Covered Cause of Loss.

255. Such cessations or slowdowns have caused TLE Corp. to lose a very large portion of this additional income stream.

Extended Business Income Coverage

256. The Business Income (and Extra Expense) Coverage Form also provides Extended Business Income coverage.

257. Extended Business Income coverage commences once the main business income coverage ends, and lasts for the period of time, not to exceed 30 days, that the by then fully open and operational premises ramps back up to its pre-damage levels of business income.

258. Specifically, this extended coverage begins once the "period of restoration" has ended.

259. The term "period of restoration" is defined in the Policy as the period that ends on the date when the insured premises is (or, if sooner, then the date when, with reasonable speed the

insured premises should have been) “repaired”.⁷¹ See Exhibit “A”, Policy at Bates Nos. 000111-000112.

260. The word repair means, among other things, “to put something that is damaged, broken, or not working correctly, back into good condition or make it work again.”⁷²

261. It is also worth noting that ISO apparently meant for “repair” to have the same meaning as “restoration”, since the term is “period of restoration”.

262. The word restore means, among other things, “to return something or someone to an earlier good condition or position” and “to bring back into use something that has been absent for a period of time.”⁷³

263. In the context of Covered Causes of Loss consisting of the combination of invisible (to the naked eye) dangerous microscopic matter, and governmental shutdown and slowdown orders, and in light of the definition of the words “repair” and “restore”, the “period of restoration” for the TLE Corporate NJ Centers will end on the date that those centers have regained their full functionality.

264. Specifically, TLE Corporate NJ Centers will have regained their full functionality (for the insured purpose of operating as child care centers open to the general public) when they can accept all children, at only pre-COVID-19 levels of governmental restriction and regulation, including, without limitation, the ability to operate at full capacity.

265. That date has not yet arrived, but the Plaintiffs claim the right to such coverage once it becomes possible to resume such full operations.

⁷¹ The exact language is “repaired, rebuilt, or replaced”, but as the “or” indicates this is a disjunctive test, and in the context of damage by invisible (to the naked eye) dangerous microscopic matter, the key word is “repaired”. See Exhibit “A”, Policy at Bates Nos. 000111-000112.

⁷² See <https://dictionary.cambridge.org/us/dictionary/english/repared>.

⁷³ See <https://dictionary.cambridge.org/us/dictionary/english/restore>.

DEFENDANT'S DENIAL LETTER

Misrepresentation in the Denial Letter

266. Defendant denied the claim in a manner that did not demonstrate good faith and fair dealing.

267. In its May 11, 2020 letter denying coverage, the Defendants stated that there is no coverage because, even if there was physical damage, that damage did not arise from a Covered Cause of Loss. A true and correct copy of Defendant's denial letter is attached hereto as Exhibit "L".

268. Specifically, the letter indicated that the Virus Exclusion prevented the virus from being a Covered Cause of Loss.

269. The denial letter stated:

However, in order for coverage to apply, damage must be caused by a Covered Cause of Loss. As discussed, virus and bacterium are excluded *under the Policy*, and *thus* are not Covered Causes of Loss.

See Exhibit "L" at 4. (Emphasis added).

270. Defendant knew, or should have known, that the definition of Covered Causes of Loss does not refer to exclusions "under the Policy", or words of similar import. As discussed above, if ISO and Berkshire wanted the Virus Exclusion to prevent the virus from being a Covered Cause of Loss, then they should have either put the Virus Exclusion in the Section B, Exclusions portion of the Special Form – Covered Causes of Loss part of the Policy, or they should have changed the definition of Covered Causes of Loss to refer to exclusions anywhere in the Policy, or, in slightly different language, "under the Policy".

271. As discussed above, ISO and Berkshire did not do that. Instead, the definition of Covered Causes of Loss refers only to the Section B, Exclusions provision set forth in the Special Form – Covered Causes of Loss part of the Policy.

272. As discussed above, that specific exclusion section does not contain the Virus Exclusion, or any other applicable exclusion relating to viruses.

273. Therefore, Defendants either intentionally, or at the very least recklessly, misrepresented, concealed and/or misled the Plaintiffs regarding the definition of one the most crucial terms in the Policy, namely, the definition of Covered Causes of Loss.

274. As with the ISO Circular to regulators regarding the Virus Exclusion and its effect on coverage, Defendants intentionally misled Plaintiffs in the denial letter to believe the damage was not a Covered Cause of Loss, knowing that in fact it was a Covered Cause of Loss, as that term is clearly and expressly defined in the Policy.

Failure to Engage in a Good Faith Investigation

275. Defendant Berkshire left open the possibility that Plaintiffs could submit further information for Defendant Berkshire’s evaluation, and the Plaintiffs did in fact send a claim clarification letter, but the Defendant never responded.⁷⁴

⁷⁴ The denial letter stated: “If you have any information that may take exception to our coverage provision concerning this matter, please forward it to us for further evaluation.” In accordance with such invitation, the Plaintiffs, through TLE Corp., sent Defendant a claim clarification letter, instructing Defendant to keep its file open and requesting a further letter from Defendant, responding to the points made in the claim clarification letter. Plaintiffs sent an executed copy of the claim clarification letter attached hereto as Exhibit “M”. The claim clarification letter raised several key points, including (i) the Plaintiffs were asserting that physical damage had occurred, and referred to the long line of cases which had held that dangerous microscopic matter could cause “physical damage” within the meaning of property/business interruption policies, and (ii) the Plaintiff’s loss was caused by a combination of the virus and the broad-based governmental orders.

276. Accordingly, Defendant never evidenced that it performed any such evaluation/investigation.

277. If Defendant Berkshire did in fact perform such evaluation/investigation, then it plainly did not do so in good faith, because such evaluation/investigation did not result in even a perfunctory response to Plaintiffs, much less a good faith, reasonably detailed response.

278. Undoubtedly Defendant Berkshire was inundated with claims, and, upon information and belief, the insurance industry had already made its position known through several forms of communication (either by the industry itself or its surrogates) accessible by the public.

279. Regardless, however, the insurer still owes Plaintiffs the same duty of good faith and fair dealing that it would have owed if Plaintiffs claim were the only such claim received, and the insurance industry had not already pre-judged that claim.

*Defendant Berkshire's Bases for Denial of Coverage Should be Limited to the
Policy Provisions Cited in its Denial Letter*

280. A good faith denial letter would set forth the insurer's key points for denial of coverage, based on the insurer's completion of its investigation.

281. Upon information and belief, many insurers, including Defendant Berkshire, often send so-called "reservation of rights" letters while their insurance coverage investigations are continuing, setting forth certain key points for potential eventual denial, but expressly providing that the investigation is ongoing and that a final letter will issue upon the completion of such investigation.

282. Defendant Berkshire sent a denial letter, not a reservation of rights letter.

283. The Defendant Berkshire's letter would be interpreted by any reasonable policyholder as a denial letter and not a mere reservation of rights letter.

284. The letter spoke with finality (e.g., “....based on our review of the Policy, we find no coverage....”) and did not indicate that the Defendant Berkshire intended to continue its investigations. *See* Exhibit “L”, at 1.

285. Accordingly, the Defendant Berkshire should have set forth all the key points for denial of coverage in the denial letter.

286. Insurer knows its own policies backwards and forwards and should have stated, in a denial letter, all applicable policy provisions that might apply.

287. If insurers are allowed to issue a final denial letter and then subsequently, at the time of a lawsuit, add new reasons for denial that are based on policy language not mentioned in the denial letter, it would be an invitation for insurers to engage in bad faith behavior.

288. Insurers will not have a strong motive to pursue a good faith, reasonably thorough and detailed analysis of how the provisions of the insurance policy relate to the facts of the claim if insurers can simply reserve their rights in the final denial letter, see if the pesky policyholder continues to push his, her or its claim, and then invest in a truly good faith review only if there is a lawsuit.

289. Accordingly, if, in the further course of this lawsuit, Defendant asserts key points for denial of coverage that are not in in the denial letter, then Defendant should be deemed to have waived the right to do so, and/or be estopped from doing so, unless such key points are based on new information not reasonably available at the time the denial letter was issued.

290. Indeed, the denial letter itself states this point. It says:

BHSIC expressly reserves all of its rights under the Policy, including the right to amend the above disclaimer to include any additional grounds for disclaimer of coverage, including but not limited to those set forth above, *if subsequent information indicates that such action is warranted.*

See Exhibit “L”, at 4 (Emphasis added).

291. At the time that the denial letter was issued, all information pertinent to this claim was known to Defendant.

Miscellaneous

292. Plaintiffs have retained the law firm of DarrowEverett, LLP to represent their interests and are required to pay a reasonable fee for its services.

293. All conditions precedent to the maintenance of this action have occurred, have been fulfilled or have otherwise been waived or excused.

**COUNT I
(Breach of Contract – Business Income and Extra Expense – Defendant Berkshire)**

294. Plaintiffs repeat and reallege the allegations in paragraph 1 through 293 above as if fully set forth herein.

295. The Policy constitutes a contract between Plaintiffs and the Insurer whereby Plaintiffs paid premiums to Berkshire in exchange for Berkshire’s promise to pay Plaintiffs for all claims covered by the Policy.

296. Plaintiffs paid for the Policy and otherwise performed all of their obligations owed under that Policy.

297. In denying coverage for Plaintiffs’ insurance claim as alleged above, Defendant breached the contract with respect to the main Business Income (and Extra Expense) coverage, the alternative Civil Authority coverage, and coverage for Dependent Property.

298. As a direct and proximate result of Defendant’s breach, Plaintiffs have suffered and continue to suffer damages.

**COUNT II
(Bad Faith – Defendant Berkshire)**

299. Plaintiffs repeat and reallege the allegations in paragraph 1 through 293 above as if fully set forth herein.

300. The Policy constitutes a contract between Plaintiffs and the Insurer whereby Plaintiffs paid premiums to Berkshire in exchange for Berkshire's promise to pay Plaintiffs for all claims covered by the Policy.

301. Plaintiffs paid for the Policy and otherwise performed all of their obligations owed under that Policy.

302. Berkshire had an affirmative duty to exercise reasonable care to disclose material, accurate and complete information to the Insureds, based upon the special relationship of trust and confidence and/or the duty of good faith and fair dealing.

303. In denying coverage for Plaintiffs' insurance claim as alleged above, and further, in mispresenting to the Insureds in the denial letter what constitutes a "Covered Cause of Loss" under the literal and plain meaning of the Policy, and in failing to make a good faith investigation of the claim, Berkshire acted in bad faith, in violation of the duty of good faith and fair dealing.

304. In addition, Berkshire's above-stated misrepresentations (through ISO and AAIS) to the state insurance regulators were further acts of bad faith in violation of the duty of good faith and fair dealing.

305. As a direct and proximate result of Berkshire's above actions, Plaintiffs have suffered and continue to suffer damages.

COUNT III
(Declaratory Relief – Business Income and Extra Expense – Defendant Berkshire)

306. Plaintiffs repeat and reallege the allegations in paragraph 1 through 293 above as if fully set forth herein.

307. Plaintiffs seek the Court's declaration of the parties' rights and duties under the policy pursuant to 28 U.S.C. § 2201.

308. A justiciable controversy exists between Plaintiffs and Berkshire about whether the Policy provides coverage for Plaintiffs' claim.

309. Accordingly, Plaintiffs seek a declaration from the Court that: (i) the Policy covers Plaintiffs' claims for losses and expenses resulting from the interruption of their businesses; (ii) no Policy exclusion applies to bar or limit coverage for Plaintiffs' claim, and (iii) Berkshire is responsible for timely and fully paying all such claims.

COUNT IV
(Declaratory Relief –Bad Faith – Defendant Berkshire)

310. Plaintiffs repeat and reallege the allegations in paragraph 1 through 293 above as if fully set forth herein.

311. Plaintiffs seek the Court's declaration of the parties' rights and duties under the policy pursuant to 28 U.S.C. § 2201.

312. A justiciable controversy exists between Plaintiffs and Berkshire about whether the Policy provides coverage for Plaintiffs' claims and whether Berkshire acted in bad faith in denying coverage.

313. Accordingly, Plaintiffs seek a declaration from the Court that Berkshire's denial of coverage was in bad faith.

COUNT V
(Negligent Misrepresentation – All Defendants)

314. Plaintiffs repeat and reallege the allegations in paragraph 1 through 293 above as if fully set forth herein.

315. As alleged above, ISO and AAIS, and through them Berkshire, made misrepresentations to the NJ DOI and the Insureds regarding the Virus Exclusion, aimed at convincing the state insurance regulators that the Virus Exclusion was merely clarifying coverage, not reducing the scope of coverage.

316. Defendants made such false representations with knowledge of the truth and/or reckless and/or negligent disregard and intent that the Insureds and/or the NJ DOI and other regulators would rely upon the statements thereof.

317. The Insureds and/or NJ DOI reasonably and justifiably relied upon one or more of such representations to their detriment as evidenced by the fact that the Virus Exclusion was approved by state insurance regulators based on misrepresentations by ISO and AAIS, and through them Berkshire, and that the Insureds entered into the Policy with Berkshire that contained the Virus Exclusion.

318. As a result of such negligent misrepresentations by Defendants, the Plaintiffs have been harmed in an amount to be proven at trial.
through them

319. As a result of such negligent misrepresentations and/or omissions and/or concealments by Defendants, Plaintiffs have incurred monetary damages, plus accrued interest, attorney's fees, and costs.

COUNT VI
(Fraud by Misrepresentation – All Defendants)

320. Plaintiffs repeat and reallege the allegations in paragraph 1 through 293 and 314-319 above as if fully set forth herein.

321. ISO and AAIS, and through them Berkshire, made misrepresentations to the NJ DOI and the Insureds regarding the Virus Exclusion, aimed at convincing the state insurance

regulators that the Virus Exclusion was merely clarifying coverage, not reducing the scope of coverage. Defendants made these statements with the knowledge that they were false and/or with reckless disregard for the truth.

322. Defendants made these statements with the intent to hinder, delay or defraud the Insureds and/or NJ DOI and other regulators, and with intent that the Insureds and/or NJ DOI would rely upon the statements in order to add further exclusions to the Policy, including the Virus Exclusion.

323. The Insureds and/or NJ DOI reasonably and justifiably relied upon one or more of such representations to their detriment as represented by the fact that the Virus Exclusion was approved by state insurance regulators based on a misrepresentations by ISO and AAIS, and through them Berkshire, and that the Insureds entered into the Policy with Berkshire that included the Virus Exclusion.

324. As a result of such false and/or misleading statements by ISO and AAIS and through them Berkshire, the Insureds have incurred monetary damages, plus accrued interest, attorney's fees, and costs.

COUNT VII
(Conspiracy – All Defendants)

325. Plaintiffs repeat and reallege paragraphs 1-293 and 314-324.

326. ISO and AAIS, and through them Berkshire, participated in a conspiracy to make false and/or misleading statements to the NJ DOI and the Insureds, including but not limited to regarding the purpose of the Virus Exclusion, aimed at convincing state insurance regulators that the Virus Exclusion was merely clarifying coverage, not reducing the scope of coverage.

327. ISO and AAIS, and through them Berkshire, made these statements with the knowledge that they were false and/or with reckless disregard for the truth.

328. ISO and AAIS, and through them Berkshire made these statements with the intent to hinder, delay or defraud the NJ DOI, other regulators and the Insureds, and with intent that NJ DOI and other regulators would rely upon the statements in order to approve the Virus Exclusion and make the misrepresentations to the Insureds in the Policy.

329. NJ DOI and/or the Insureds reasonably and justifiably relied upon one or more of such representations to their detriment as represented by the fact that the Virus Exclusion was approved by state insurance regulators based on a misrepresentations by ISO and AAIS, and through them Berkshire, and that the Insureds entered into the Policy with Berkshire that included the Virus Exclusion.

330. As a result of such false and/or misleading statements by ISO and AAIS and through them Berkshire, the Insureds have incurred monetary damages, plus accrued interest, attorney's fees, and costs.

WHEREFORE, the above-named Plaintiffs demand judgment against Defendants Berkshire Hathaway Specialty Insurance Company, American Association of Insurance Services, Inc., and Insurance Services Office, Inc. as follows:

1. Damages in an amount up to the Policy limit less a proper deductible;
2. Costs of suit;
3. Pre- and post-judgment interest at the maximum legal rate on all amounts owed under the Policy, accruing from the date upon which amounts should have been paid;
4. That this Court declare the rights, obligations and liabilities of the parties herein and specifically declare, as Plaintiffs contend, that the events and losses incurred as described in this Complaint are covered by the Policy;
5. Attorneys' fees;

6. Punitive damages;
7. Such other relief as the Court may deem just and proper.

JURY DEMAND

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiffs hereby demand trial by jury on all issues so triable.

Respectfully submitted,

DARROWEVERETT LLP

/s/ Joan Toro, Esq. _____

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*To be admitted *Pro Hac Vice*⁷⁵

Attorneys for Plaintiffs

⁷⁵ Motions for Admission *Pro Hac Vice* are being filed contemporaneously with this Complaint.