

RETURN DATE: OCTOBER 26, 2021 : SUPERIOR COURT  
WESTPORT CAPITAL PARTNERS LLC : J.D. OF STAMFORD/NORWALK  
V. : AT STAMFORD  
AMERICAN GUARANTEE AND LIABILITY  
INSURANCE COMPANY : SEPTEMBER 13, 2021

**COMPLAINT FOR DECLARATORY RELIEF  
AND DAMAGES FOR BREACH OF CONTRACT**

Plaintiff Westport Capital Partners LLC, by and through its undersigned counsel, and on behalf of itself and all other impacted insureds (collectively, “Plaintiff” or “Westport”), hereby makes this Complaint for declaratory relief and damages for breach of contract against its “All Risk” insurer, American Guarantee and Liability Insurance Company (“Defendant” or “American Guarantee”), that provided insurance coverage to Westport expressly designed to respond to the types of losses occasioned by pandemic conditions. This action is necessitated by American Guarantee’s failure to indemnify Plaintiff against millions of dollars in losses caused by the SARS-CoV-2 virus and the COVID-19 pandemic, despite coverage clearly available under the policy issued by Defendant to cover precisely these types of losses. For its complaint, Westport alleges as follows:

**INTRODUCTION**

1. Westport is a private real estate investment management company that operates and manages office, multi-family residential, hotel, retail, industrial and single-family residential development properties throughout the United States. Its properties span the United States, including marquis properties in Los Angeles, Portland, Denver and Orlando.

2. Upon information and belief, Defendant American Guarantee and Liability Insurance Company (American Guarantee) is a New York corporation with its principal place of business in Schaumburg, Illinois. American Guarantee provides insurance products and services throughout the United States, including in Connecticut and is approved by the State of Connecticut Insurance Department to sell insurance products in Connecticut through licensed agents.

3. Beginning in March of 2020, Plaintiff was forced to close or significantly curtail operations at many of the properties it operates and manages due to numerous occurrences involving direct physical loss and damage to property stemming from the COVID-19 pandemic and localized conditions relating to the SARS-CoV-2 virus. Across the United States and around the world, prospective patrons and tenants were under government orders to stay at home or “shelter in place,” preventing them from staying, shopping, working, and patronizing dining and beverage offerings at Westport-operated properties.

4. Despite Westport’s best efforts to navigate the pandemic, many of its properties have incurred direct physical loss of property and direct physical damage to property (including actual adverse physical alteration of covered property) caused by the SARS-CoV-2 virus and/or COVID-19, with direct loss and damage to property (including without limitation adverse physical alteration of property) happening both at insured locations and away from insured locations, as well as losses from resulting suspensions and/or interruptions of business activities.

5. More specifically, Plaintiff has incurred substantial losses caused by the actual presence at its properties and/or third-party locations, including, but not limited to, attractions near Westport’s properties, of the communicable disease (“COVID-19” or the “disease”) and/or the underlying virus, SARS-CoV-2.

6. Westport has incurred additional losses resulting from the *threat* posed to property and persons at its properties and/or third-party locations by the physical prevalence of the SARS-CoV-2 virus and COVID-19 in the communities in which Westport or its business partners (including, but not limited to, customers and suppliers) do business. The threat of the SARS-CoV-2 virus spreading to Westport and nearby non-Westport properties has rendered many of Plaintiff's properties, at least temporarily, unreasonably dangerous and/or unfit for their intended purposes until safe occupancy and operation can be assured through the undertaking of extraordinary remedial or preventative measures.

7. These threats also resulted in an unprecedented number of governmental orders requiring, at various times and in various locations, shutdowns, lockdowns, building closures, quarantines, travel restrictions, and operating restrictions, all of which substantially impacted, continue to impact, and will impact for the foreseeable future, the operations and activities of Westport, its patrons, and its business partners. All of the different orders that resulted in losses to Westport were caused by pandemic conditions, including direct physical damage to property (including adverse physical alteration of such property) of the type covered under its policy and within one mile of the affected covered locations.

8. The harms to Westport include direct physical loss and direct physical damage to its properties that have been adversely altered by the virus or that have been rendered unreasonably dangerous and/or unfit for their intended purpose; substantial time-element losses due to partial or complete property closures, government-ordered suspensions of travel and business activities, and other interruptions due to the actual and/or the threatened presence of the virus and/or resulting disease; substantial extra expenses, logistical costs and expediting costs to safely resume or

continue operations; substantial claims preparation costs; and other losses incurred across numerous Westport properties and locations throughout the United States.

9. The harms to Westport also include direct and indirect Time Element and business interruption losses resulting from direct physical loss of or damage to property of the type insured under its policy (including adverse physical alteration of such property) to locations of Westport's direct suppliers and customers, resulting in substantial loss of business to the various Westport properties for which coverage is sought, as well as Attraction location losses arising from direct physical loss of or damage to property (including adverse physical alteration of such property) of the kind covered under this policy at nearby locations that attract customers to Westport's properties.

10. The harms to Westport also include loss and extra expense resulting from business interruption due to the prevention of ingress and egress directly resulting from physical damage of the type insured under its policy (including adverse physical alteration of such property) to kinds of property not excluded by the Policy.

11. Westport is continuing to experience physical loss of or damage to its properties and interruption of its business as the pandemic continues. While Westport is continuing to assess the losses incurred by its businesses as of the date of this filing, the impact to date is believed to exceed \$12 million in direct physical loss of or damage to property and in lost business income that would not have occurred but for the pandemic.

12. Westport fortunately had the foresight to purchase broad insurance protection against the potentially catastrophic risks posed by events such as a pandemic. For premiums totaling more than \$1.6 million, Plaintiff procured broad "All Risks" coverage under the policy

issued by American Guarantee (the “Policy”), precisely to insure against the losses Westport has incurred and continues to incur.

13. The Policy, in the form delivered to Westport by American Guarantee, is incorporated herein by reference. The version of the Policy delivered to Westport by American Guarantee is subject to confirmation for accuracy and completeness during the discovery process (including, but not limited to, determination whether the Policy includes appropriate state-specific endorsements, whether it must be conformed to comply with applicable state-specific requirements, and whether it faithfully reflects the agreement between the parties as to the scope of coverage and exclusions). Westport reserves all rights in that regard.

14. The Policy provides coverage designed to address the principal economic consequence of pandemics: lockdowns, building closures, and other interruptions triggered by the threat that off-site prevalence of the virus will spread to uninfected properties that could become disease vectors if permitted to operate “as usual” during the pandemic. The Policy thus specifically addresses the principal economic harm arising from the highly unusual event of pandemic-caused interruptions to business, by providing coverage for losses resulting from the *threat* that the off-site virus will spread to insured Westport properties.

15. The Policy’s coverage for *threat*-based interruptions to business (as opposed to, or in addition to, interruptions resulting from the *actual or suspected* on-site presence of the SARS-CoV-2 virus) has been triggered here, as many Westport or nearby non-Westport properties experienced, for example, closures that were instituted as a response to the threat that local outbreaks of COVID-19 within one (1) mile of Plaintiff’s covered properties could spread to hotels, offices, and residential buildings, such as Westport’s and/or those of third parties.

16. Befitting the top dollar Westport paid for best-in-class insurance coverage, the Policy provides many other broad protections against a wide range of pandemic-related losses, including direct loss and damage to property and associated time-element loss, losses due to government-ordered shutdown, losses due to impaired ingress to or egress from Westport properties, business interruption losses, extra expenses and logistical costs to remain in business despite pandemic conditions, claims preparation costs, losses directly resulting from any communicable disease confirmed to be at Westport locations, and other forms of coverage.

17. Of particular value, the policy issued to Westport (which was typical of policies issued by American Guarantee to policyholders across the United States) did not include a specific “virus” exclusion. By way of background, the insurance industry responded to the 2004 SARS epidemic by adopting what was intended to be an absolute exclusion for any property losses related in any way to viruses. These nominally “absolute” virus exclusions appeared in many very similar forms, including the so-called 2006 ISO Virus Exclusion.

18. For competitive reasons, American Guarantee and other high-end property insurers rejected “absolute” virus exclusions. Instead, American Guarantee and others adopted a much reduced exclusion that barred coverage for virus-related losses only when they resulted from classic pollution-type events. American Guarantee was able to and did charge a higher premium to Westport and other policyholders, based on the availability of coverage for virus-related losses that did not result from classic pollution events.

19. In total, the Policy provides coverage of up to \$250 million per occurrence for precisely the types of losses incurred by Westport and at issue in this action.

20. Even though Westport’s past and ongoing losses fall within the Policy’s coverages, American Guarantee denied coverage to Plaintiff on or about March 18, 2021.

21. This denial caused Westport to conclude that an actual controversy exists between the Parties concerning Plaintiff's right to coverage for its COVID-19-related losses.

22. As a consequence of American Guarantee's failure to honor its coverage obligations under the Policy, and with the parties' tolling agreement expiring on September 14, 2021, Westport is now compelled to file this lawsuit for damages, declaratory relief, and other relief.

## **FACTUAL BACKGROUND**

### **A. WESTPORT**

23. Westport manages and operates properties across the United States, with properties in a number of locales, including California, Washington, Colorado, North Dakota, Florida, and Massachusetts. Many of the properties Westport manages and operates offer restaurants and other dining options for patrons.

24. Among the properties owned and/or operated by Westport that have incurred covered losses are (without limitation) (a) the Grove Resort and Spa, LLC (hereafter, the "Grove"), which is located at 14501 Grove Resort Avenue, Winter Garden, Florida; and (b) Bakken NW 58th Street, LLC (dba Ramada by Wyndham Williston Airport XWA, and hereafter, the "Williston Ramada"), located at 5813 Jefferson Lane, Williston, North Dakota.

25. The Grove is a 106-acre, unbranded resort located outside Orlando, Florida. The Grove includes over-sized two- and three-bedroom units distributed across an upscale, family-friendly resort that also features four restaurants, a seven-acre water park, three full-sized swimming pools, and numerous other amenities. The Grove is one of the closest non-Disney resorts to Walt Disney World, which allows the resort to capitalize on consistent demand from the theme parks and nearby attractions.

26. The Williston Ramada is a 240-room hotel that is the closest lodging to the recently opened \$270 million Williston Airport XWA. The Williston Ramada includes an on-site bar-casino and meeting rooms. The Williston area boasts a number of national parks, historic sites, sports complexes, and cultural venues.

27. The discussion of the Grove and the Williston Ramada is not intended to be an exclusive statement of the properties that have incurred covered losses for which relief is sought in this Complaint.

**B. THE POLICY**

28. American Guarantee provided coverage to Westport under Policy No. ERP 3091564-01 (the “Policy”) for the period December 14, 2019 to December 14, 2020.

29. American Guarantee agreed that, “[l]oss, if any, will be adjusted with and payable to the First Named Insured as shown on this Policy.” Westport is identified as the First Named Insured on the Policy, and accordingly, Westport is empowered to pursue claims on behalf of its subsidiary entities.

30. The Policy covers “[a]ll risks of direct physical loss of or damage from any cause unless excluded.” *See* Policy at §7.11 (defining “Covered Cause of Loss”).

31. The Policy provides broad coverage, with American Guarantee agreeing to provide numerous coverages implicated by Westport’s pandemic-related losses, including, but not limited to, direct property loss of or damage to property, time element losses, losses due to orders of civil or military authority, losses due to impairment of ingress or egress, losses from suspension of business activities (partial and total), decontamination cost, contingent property damage, protection and preservation of property coverage, expediting costs, extra expense, and professional fees incurred in preparing its claims.

32. The Policy issued by American Guarantee provides coverage to Westport's insured locations nationwide. *See* Policy at §§ 1.01; 1.03.

**C. THE SARS-COV-2 VIRUS AND THE COVID-19 GLOBAL PANDEMIC**

33. The SARS-CoV-2 virus was identified in China in late 2019 or January 2020 as the cause of a severe respiratory illness known as COVID-19.

34. In early 2020, the SARS-CoV-2 virus began spreading in the United States and Canada, with broad community spread underway in many states, including, but not limited to, New York, California, Florida, Washington state, and Massachusetts in March 2020.

35. The SARS-CoV-2 virus has spread across the globe, resulting in a worldwide pandemic that has caused tens of millions of infections and at least two million deaths, including more than 500,000 in the United States.

36. Governmental authorities and private companies (including Westport) and individuals have taken actions in response to the SARS-CoV-2 virus and the COVID-19 pandemic. These actions have included, without limitation:

- a. Governmental orders of various kinds, including:
  - i. Orders restricting or prohibiting travel both internationally and within national borders;
  - ii. Quarantine orders applicable to individuals infected by or potentially exposed to the SARS-CoV-2 virus, whether or not infected or symptomatic;
  - iii. Orders closing or limiting businesses confirmed to have experienced the actual presence of either the SARS-CoV-2 virus or confirmed cases of COVID-19 at their premises;
  - iv. Orders closing businesses or limiting commercial activity at locations without the confirmed or suspected presence of the SARS-CoV-2 virus but without any actual or suspected cases of COVID-19 at their premises, based on their geographic proximity to places where the SARS-CoV-2 virus was confirmed to be present, where cases of COVID-19 occurred, and where loss of or damage

to property has resulted from the presence of the SARS-CoV-2 virus.

- b. Responses of various kinds by private business (including Westport), including but not limited to:
  - i. **Remediating or Replacing Physical Property Adversely Altered by the SARS-CoV-2 Virus Adhering to the Property:** Remediation and/or disposal and/or replacement of personal property and real property that had been physically contacted and adversely altered by virus-containing materials (including respiratory particles, phlegm, and other materials) expelled by persons with COVID-19;
  - ii. **Business Shutdowns Due to Either the Virus (SARS-CoV-2) or the Resulting Disease (COVID-19) Being Present at a Location:** When disease outbreaks occur at a facility, or when other circumstances create a suspicion that the SARS-CoV-2 virus is present, a common and necessary response is to shut down the facility and undertake remedial efforts;
  - iii. **Time Element Loss Due to the SARS-CoV-2 Virus and/or COVID-19 Being in the Community (Even if *not* at the Business Location):** Suspension of business activities due to business premises being rendered unreasonably dangerous for occupancy and unfit for their ordinary or intended purposes (even in cases in which SARS-CoV-2 virus and/or COVID-19 was neither actually present nor suspected to be present at the business location), due to pandemic conditions and the threat posed by SARS-CoV-2 virus and/or COVID-19 in general geographic proximity of the business location;
  - iv. **Extra Expenses to Remain Operational Even With COVID-19 at the Business Location:** Undertaking out-of-the-ordinary activities and expenses, such as testing, protective equipment, reconfiguration of work spaces for social distancing, reduced or staggered schedules, facilitation of remote work, etc., in order to continue operations at a business location or at replacement locations and to mitigate the effects of shutdowns or slowdowns caused by the actual presence of COVID-19 at a facility (including indoor and outdoor air and other physical property being altered or threatened by attachment of the SARS-CoV-2 virus);
  - v. **Extra Expenses and Expediting Costs to Remain Operational Even With the SARS-CoV-2 Virus and/or COVID-19 Being in the Community (Even if Not at the Business Location):** Undertaking out-of-the-ordinary activities and expenses, such as

testing, protective equipment, reconfiguration of public and private spaces for social distancing, reduced or staggered schedules, facilitation of remote work, etc., in order to render properties safe for occupancy and fit for their ordinary purpose or intended purposes (even in cases in which the SARS-CoV-2 virus and/or COVID-19 was neither actually present nor suspected to be present at the business location), due to pandemic conditions and the threat posed by the SARS-CoV-2 virus and/or COVID-19 in geographic proximity to the business location;

- vi. **Claims Preparation Costs:** Retention of outside financial and operational experts to document and calculate losses arising from the SARS-CoV-2 virus and/or COVID-19.

**D. THE SARS-COV-2 VIRUS HAS PARTICULAR QUALITIES THAT MAKE IT UNIQUELY DANGEROUS TO HUMAN HEALTH AND DEVASTATING TO BUSINESSES AND ECONOMIES**

37. The SARS-CoV-2 virus is a respiratory virus that causes COVID-19 (as opposed to its variant, the SARS-CoV-1 virus, which caused the SARS pandemic in the early 2000s). COVID-19 is a dangerous and potentially fatal communicable disease. The SARS-CoV-2 virus can be transmitted by human-to-human contact, airborne viral particles in ambient air, and contact with affected indoor and outdoor air, surfaces, and/or objects. According to research published in The Journal of the American Medical Association, a person who sneezes can release a cloud of pathogen-bearing droplets that can span as far as 23 to 27 feet. The United States Centers for Disease Control and Prevention (“CDC”) has stated that the SARS-CoV-2 virus is most likely to spread person-to-person when people are within six feet of each other, but has acknowledged that the virus also may spread from an infected person who is more than six feet away or even who has left a given space.

38. The SARS-CoV-2 virus is uniquely dangerous, for reasons that include the following:

- Many viruses do not cause communicable diseases; SARS-CoV-2 does cause communicable disease.

- Many viruses do not infect humans; SARS-CoV-2 does infect humans.
- Even among viruses that infect humans, many are incapable of direct transmission from human to human; SARS-CoV-2 is capable of human-to-human transmission.
- Even among viruses that transmit between humans, many do not threaten serious illness or any illness at all; unlike those innocuous viruses, SARS-CoV-2 poses a substantial threat of serious illness and even death.
- Even among viruses that can cause serious human illness, many are not contagious until after the carrier has become symptomatic, thus allowing affected individuals to isolate themselves before spreading the virus. By contrast, SARS-CoV-2 has been shown to be transmittable during a pre-symptomatic incubation period of up to 21 days before symptoms appear; even more worrisome, the SARS-CoV-2 virus is transmittable by the estimated 40% to 70% of human carriers who *never* exhibit any symptoms. Whether or not symptoms of COVID-19 ever appear, human carriers of SARS-CoV-2 are believed to be especially contagious during the “pre-symptomatic incubation” period due to high viral loads coupled with a lack of awareness that they are infected and must isolate.
- Finally, few if any viruses have resulted in the widespread illness, death, loss and damage to property, and economic devastation already wrought by SARS-CoV-2 (and new variants of the virus have evolved during this crisis that appear to be worsening and/or extending the number of COVID-19 outbreaks).

Thus, unique among viruses, SARS-CoV-2 has resulted in hundreds or thousands of discrete outbreaks that have caused unprecedented levels of illness, death, and global economic calamity.

**E. WHEN SARS-COV-2 VIRAL PARTICLES COME IN CONTACT WITH PROPERTY, THAT PROPERTY SUFFERS ACTUAL PHYSICAL DAMAGE (INCLUDING ADVERSE ALTERATION)**

39. To understand why the SARS-CoV-2 virus has had such devastating health consequences and also has resulted in so many outbreaks of COVID-19, so much physical loss and damage to property, and so many different government-ordered or privately undertaken business shutdowns, one must understand the manner in which the SARS-Co-V-2 virus interacts with the physical environment and why SARS-CoV-2 triggers the insurance protection provided by the Insurers for exactly these types of losses.

40. The SARS-CoV-2 virus is expelled from the mouth and/or nose, and it travels within respiratory droplets when humans cough, sneeze, scream, sing, or even speak loudly or breathe heavily.

41. Mouth and nose secretions, including saliva, nasal discharge, and respiratory secretions such as mucus, form an aerosol cloud in the surrounding air. The expelled aqueous droplets contain multiple copies of suspended infectious SARS-CoV-2 viral particles. The mouth- and nose-emitted droplets are approximately spherical in shape and widely vary by size. Scientific literature somewhat arbitrarily divides these droplets into “small” droplets (those less than about 5 microns in diameter) and “large” droplets (those exceeding about 5 microns in diameter). Because the SARS-CoV-2 viral particle diameter is roughly 100 nanometers (i.e., 0.1 microns) even a 5-micron respiratory droplet can easily accommodate *many thousands* of SARS-CoV-2 viral particles.

42. Droplet *size* is the most important determinant of aerosol behavior, including the length of travel of the expelled respiratory droplets. Large droplets (as defined above) within an

aerosol plume are strongly affected by gravity; for example, 50- to 100-micron droplets typically will travel only up to a couple of meters before they fall to the ground or land on another surface. In contrast, small droplets (as defined above) can remain airborne almost indefinitely under most indoor conditions and can travel with air currents long distances. Whatever their size, virus-containing droplets eventually encounter physical objects and surfaces (called fomites) and can settle there.

43. Once expelled from the mouth and/or nose, aqueous droplets, including virus-containing ones, can attach to surfaces. The suspended viral particles can then themselves collide with the surface and nonspecifically adsorb to it (i.e., form a noncovalent chemical bond with the surface). Furthermore, the landed droplet's water will undergo evaporation, and eventually some fraction of the viral particles may end up being deposited onto the surface either directly or indirectly (i.e., through other solids contained in the droplet).

44. There is a distinction between viral particles that are *adsorbed* to a host surface and those simply *deposited* onto it. In the former case, as stated above, there is an actual chemical bond (albeit a relatively weak one) between the viral particle and the surface; in this scenario, the virus particle is relatively hard to detach. In contrast, the deposition entails merely a physical presence of the viral particle on the surface (akin to spilled flour) and is readily reversible; in this instance, the virus is relatively easy to remove from the surface.

45. In addition, there are various intermediate scenarios in between the virus being adsorbed and merely deposited. For example, some endogenous polymeric molecules present in respiratory droplets (such as polysaccharides and proteins) may act as a "bridge" binding the virus to the surface. Also, electrostatic attraction between the surface and the viral particles may play a role in addition to basic gravity. Furthermore, porous objects like fabrics represent a special case

because they may entrap viral particles, thus making them hard to access, inactivate, or remove. In this case, the original respiratory droplets are first absorbed by the fabric; once their water subsequently evaporates, the viral particles become embedded and entangled within the bulk of the object.

46. The type of bond that forms between viral particles and physical objects varies depending on the type of object, and often markedly so. The interaction of *both* the virus-containing respiratory aqueous droplets *and* the viral particles themselves with surfaces depends on the nature of the latter. For example, when it adheres to a clean glass (or another hydrophilic) surface, an aqueous droplet spreads out; this increases the droplet's footprint on the surface and facilitates evaporation of the moisture. In contrast, when an aqueous droplet lands on plastic objects (or other objects with hydrophobic or greasy surfaces), it beads up, thereby minimizing its contact area and diminishing the evaporation. Likewise, the viral particle's propensity to adsorb to a surface strongly depends on the nature of the latter: in general, one would expect the tendency of the viral particles to adsorb to be more pronounced in the case of hydrophobic, as opposed to hydrophilic, surfaces. Furthermore, whether an adhered (deposited, adsorbed, or in between) viral particle remains stuck to the surface and, if so, whether it retains its infectivity should depend on the properties of the host surface as well.

47. With respect to the retention of the viral particles on the surface, numerous *additional* factors (i.e., those besides the type of the host object) may have a substantial effect: how smooth and clean the surface is, temperature, relative humidity, and airflow (e.g., ventilation).

48. The bond between viral particles and physical objects persists until broken through intervening forces. An effective way to break the bond between the viral particles and a surface they have adhered to is to wash the surface with water containing detergents (e.g., soapy water) or

organic solvents, such as alcohol (ethanol). In doing so, energetic rubbing will be more effective in removing the viral particles than gentle flushing. The underlying mechanisms here are that physically deposited viral particles can be washed off and adsorbed ones can be desorbed by such treatments. While some disinfectants, such as aqueous detergents, can both inactivate the virus and remove it from surfaces, some others, like fumigants and ultraviolet light, only inactivate.

49. If left undisturbed, the virus-surface bond will persist. Whether adsorbed or simply physically deposited (and in various intermediate scenarios), viral particles will remain on the surface indefinitely if left undisturbed. Some studies suggest that SARS-CoV-2 can be detected on certain surfaces many weeks after infected persons have departed, with the SARS-CoV-2 virus remaining viable for as long as seven days on a range of common surfaces, including plastic, stainless steel, glass, and wood; other researchers have found viable SARS-CoV-2 samples on glass, stainless steel, and paper currency for up to approximately a month under indoor conditions.

50. Physical objects that have been altered through the formation of a bond with viral particles are dangerous. Humans can become infected by touching, or otherwise coming in contact with, an object to which viral particles have attached for as long as the virus remains infective. In fact, this is one of the three recognized main mechanisms of spreading COVID-19; the other two are a direct transmission from an infected person to people in close proximity via large respiratory droplets (“person-to-person transmission”; if inhaled, such large droplets deposit primarily in the upper airways of the head and neck) and also an indirect transmission via small aerosol particles traveling over long distances (“airborne transmission”; if inhaled, such small droplets deposit primarily in the lower respiratory tract). When a person touches a surface containing an infectious virus and then his/her mouth, eyes, or nose, the person may become infected. Which of these three disease transmission mechanisms is dominant varies widely and is highly circumstance-specific.

51. Airborne transmission has the potential to be exacerbated through HVAC systems that if not properly designed, maintained, or renovated, can be rendered unreasonably dangerous through the absorption and then redistribution of SARS-CoV-2 viral particles across entire buildings, with studies finding wide dispersion of the SARS-CoV-2 virus and confirmed presence on ceiling vent openings, vent exhaust filters, ductwork, and other surfaces more than 50 meters from the original human source.

52. By bonding with, and becoming part of, the air or other physical objects that it comes in contact with, the SARS-CoV-2 virus adversely alters the air or other physical objects, as well as the facility or building in which air or other physical objects are located. Both the objects and the building are transformed from safe for occupancy and commercial activity to property that is uninhabitable, unfit for its intended purpose, dangerous and, indeed, potentially deadly. In short, the property is physically altered and physically damaged. And even the owners of property or buildings that are potentially infected or under threat of infection if utilized or occupied during local epidemic conditions have effectively incurred a loss to property, because—simply put—the personal property or buildings are no longer safe, habitable, or fit for their intended purpose until the local epidemic conditions have been controlled and ultimately eliminated.

53. Dr. Alexander M. Klibanov has submitted expert reports in connection with briefs of *amici curiae* in three federal Courts of Appeals (as of the date of this Complaint) supporting the allegations contained in paragraphs 37 to 52 of this Complaint. *See Out West Restaurant Grp., Inc. v. Affiliated FM Ins. Co.*, No. 21-15585 (9th Cir. July 19, 2021), Dkt. No. 22-2 at 44; *SAS Intl., Ltd. v. General Star Indemnity Co.*, No. 21-1219 (1st Cir. Aug. 9, 2021), Ex. D. to Brief of Amici Curiae Amphenol Corporation and Lawrence General Hospital; *Ascent Hospitality*

*Management Co. v. Employers Ins. Co. of Wausau*, No. 21-11924 (11th Cir. Aug. 31, 2021), Ex. B to brief of Amici Curiae Rockland Funding, LLC D/B/A Westbrook Partners.

**F. THE IMPACT OF THE COVID-19 PANDEMIC ON WESTPORT'S BUSINESSES**

54. As a consequence of the global pandemic, Westport has undertaken the activities identified in Paragraph 36(b)(i)-(vi), at substantial cost.

55. Westport has incurred substantial loss—including but not limited to loss of or damage to property, time-element losses, Extra Expenses and Expediting Costs—as a result of the presence of COVID-19 at various of its properties.

56. Numerous Westport properties have incurred covered loss of or damage to property, time-element losses due to government or private closures or suspensions of business, loss of ingress or egress, losses due to Cancellation, Extra Expenses, and/or Expediting Costs.

57. Westport has incurred substantial loss—including but not limited to physical loss of or damage to property, time-element losses, Extra Expenses and/or Expediting Costs—even in cases in which the SARS-CoV-2 virus and/or COVID-19 was neither actually present nor suspected to be present at the insured location, due to pandemic conditions and the threat posed by the SARS-CoV-2 virus and/or COVID-19 in general geographic proximity of the insured location.

58. None of the losses has occurred as the direct or indirect result of pollution-type releases of viruses or any other foreign substances.

59. The Policy provides several different types of coverages applicable or potentially applicable to Westport's past, current, and future COVID-19 losses, including, but not limited to, the following.

**1. Loss or Damage to Property and Direct Time-Element Losses:**

60. The Policy provides combined primary coverage of up to \$250 million per occurrence for physical loss of or damage to Property, unless such Property is excluded or results

from an excluded cause of loss. This coverage extends to physical loss of or damage to covered property caused by the presence of the SARS-CoV-2 virus and/or incidences of COVID-19 at specific Westport property locations.

61. Westport has incurred substantial covered losses as a consequence of loss of or damage to its property as a result of direct exposure of (and actual adverse physical alteration of) its own covered Property. This actual adverse physical alteration of its property as a result of the SARS-CoV-2 virus adhering to the property has resulted in loss due to the adherence of the SARS-CoV-2 virus to physical property and resulting adverse alteration of the property, requiring either remediation or disposal and replacement.

62. The Policy's coverage also extends to physical loss to covered property as a result of the *threat* of SARS-CoV-2 becoming present at Westport property locations and the resulting danger posed by such locations becoming a disease vector for COVID-19. Such *threat of virus* has caused covered loss both at Westport properties and those of third parties (such as Westport's customers and suppliers).

63. The Policy also covers "Time Element" loss as a result of the SARS-CoV-2-virus-related physical loss of or damage to property described above.

64. Westport is entitled to recover its covered losses with respect to physical loss of or damage to its property, and resulting Time Element losses, up to the limits provided in the Policy.

65. American Guarantee has not paid Westport for any of its covered Property or Time Element losses and has refused to do so.

## 2. Losses Due to Orders of Civil Authority:

66. The Policy provides up to 60 days per occurrence for losses resulting from the temporary closure or suspension of activities at Westport's insured locations as a result of orders

of civil or military authority occasioned by SARS-CoV-2-virus-caused damage to property of the type covered under the Policy near covered locations.

67. Westport has incurred substantial covered losses due to orders of Civil or Military Authority that were entered as a consequence of damage to property of Westport and/or to property belonging to third parties. Such damage to property was of the type covered under the Policy (including, without limitation, (a) damage to property caused by communicable disease (i.e., COVID-19), (b) damage to property caused by exposure to the SARS-CoV-2 virus, and (c) damage to property caused by the threat of exposure to the SARS-CoV-2 virus). Such damage to property occurred within one mile of the covered Westport properties incurring the covered losses due to the orders of Civil or Military Authority.

68. Westport is entitled to recover its covered Civil or Military Authority losses, up to the limits provided in the Policy.

69. American Guarantee has not paid Westport for any of its losses that are covered pursuant to the Policy's Civil or Military Authority provisions and has refused to do so.

**3. Losses Due to Impairment of Ingress or Egress:**

70. The Policy provides up to 60 days for time-element losses due to the prevention of ingress to or egress from covered locations.

71. Due to restrictions on travel or movement occasioned by SARS-CoV-2-virus-caused loss or physical damage to property, Westport has incurred substantial covered losses due to Loss of Ingress or Egress as a consequence of COVID-19.

72. Westport is entitled to recover its covered Ingress-Egress losses, up to the limits provided in the Policy.

73. American Guarantee has not paid Westport for any of its losses that are covered pursuant to the Policy's Ingress-Egress provisions and has refused to do so.

**4. Contingent Time-Element Losses:**

74. The Policy provides up to \$10 million per occurrence for time-element losses resulting from physical loss of or damage of the type insured to property of Westport's customers and suppliers.

75. Numerous of Westport's customers and suppliers have incurred physical loss of or damage of the type covered by the Policy at property of the type insured in the United States.

76. Westport is entitled to recover its covered Contingent Time Element Losses, up to the limits provided in the Policy.

77. American Guarantee has not paid Westport for any of its covered losses pursuant to the Policy's Contingent Time Element provisions and has refused to do so.

**5. Expediting Costs and Extra Expenses:**

78. The Policy provides coverage up to the policy limits for Expediting Costs and Extra Expenses incurred by Westport to minimize covered losses.

79. Westport has incurred substantial covered Expediting Costs and Extra Expenses in order to minimize covered losses relating to COVID-19.

80. Westport is entitled to recover its covered Expediting Costs and Extra Expenses incurred to minimize covered losses, up to the limits provided in the Policy.

81. American Guarantee has not paid Westport for any of its covered losses pursuant to the Policy's Expediting Costs and Extra Expenses provisions and has refused to do so.

**6. Professional Fees**

82. The Policy provides coverage up to stated limits for, *inter alia*, reasonable fees paid by Westport to accountants and other professionals, and for the costs of using its own employees to prepare the claim and respond to American Guarantee's requests for information and documents.

83. Westport is entitled to recover its covered Professional Fees.

84. American Guarantee has not paid Westport for any of its covered Professional Fees and has refused to do so.

**7. Protection and Preservation of Property**

85. The Policy provides coverage up to stated limits for, *inter alia*, reasonable and necessary costs incurred for actions to temporarily protect or preserve Covered Property from imminent physical loss or damage due to a Covered Loss and for Gross Earnings loss for a stated period of time incurred due to taking reasonable action for the temporary protection and preservation of Covered Property.

86. Westport is entitled to recover its covered costs and loss of Gross Earnings incurred to take such protective and preservative action.

87. American Guarantee has not paid Westport for any of such costs and losses and has refused to do so.

**8. Other Available Coverages**

88. The foregoing is not intended to be an exhaustive list of the various coverages available to Westport under the Policy for its pandemic-related losses. Westport hereby seeks all available coverages with respect to losses relating to COVID-19, and reserves all rights as to all such coverages.

**9. Liberalization of Policy**

89. At least some of the losses incurred by Westport are insured pursuant to state-mandated endorsements and/or state-mandated statutes or regulations that modify the terms of some or all of the Policy by operation of law and/or by operation of various conditions requiring compliance with state requirements and/or liberalization of policy terms to reflect state-mandated provisions. On information and belief, American Guarantee failed to include required

endorsements reflecting such state-specific requirements that operate to revoke or modify exclusions or otherwise require coverage to be provided for at least some portion of Westport's losses. Further, one or more state-mandated endorsements, unless specifically limited to properties located within that state, operate to extend the benefit of liberalized provisions to all loss of or damage to property, and other coverages, wherever happening.

**G. AMERICAN GUARANTEE HAS FAILED TO PROVIDE COVERAGE, IN WHOLE OR IN PART, NOTWITHSTANDING WESTPORT'S COMPLIANCE WITH THE POLICY AND CLEAR ENTITLEMENT TO COVERAGE**

90. Westport has complied with all terms, conditions and requirements of the Policy or is excused from doing so, as American Guarantee waived or is estopped from enforcing such terms, conditions and requirements of the Policy.

91. Notwithstanding Westport's timely compliance, American Guarantee to date has failed to pay Westport's claim or any part of the claim.

92. On or about March 18, 2021 American Guarantee denied coverage under the Policy for Westport's pandemic-related losses.

93. As a consequence, to protect its rights and to obtain the insurance coverage for which it has paid, and that American Guarantee agreed to provide, Westport brings this lawsuit.

**FIRST COUNT – CLAIM FOR DECLARATORY RELIEF**

94. Paragraphs 1 through 93 of the Complaint are hereby repeated and realleged as Paragraphs 1 through 93 of this First Count as if fully set forth herein.

95. Westport is entitled to coverage under the Policy for its existing and ongoing COVID-19 losses, as described in this Complaint and as to be proven at trial.

96. Based on the coverage positions it has stated, American Guarantee contends otherwise, creating an actual bona fide and substantial dispute as to American Guarantee's coverage obligations which requires settlement by the Court.

97. Westport is therefore entitled under Practice Book § 17-54 et. seq. to a declaratory judgment that:

- a. Each coverage identified in the preceding paragraphs is triggered by Westport's claims;
- b. All conditions precedent under the Policy have been satisfied or excused, or the Defendant has waived or is estopped from enforcing, all conditions precedent under the Policy;
- c. No exclusions in the Policy apply to preclude or limit coverage for Westport's claims;
- d. The Defendant is obligated to cover Westport up to the applicable combined limit of liability of the Policy with respect to, e.g., (i) COVID-19-related losses and expenses already sustained by Westport's businesses to date; and (ii) COVID-19-related losses and expenses to be sustained by Westport's businesses as the COVID-19 pandemic continues;
- e. The Defendant is obligated under the Policy to indemnify Westport for its real property losses, time element losses, extra expense, and other losses sustained as a result of direct physical loss of or damage to property due to the SARS-CoV-2 virus and/or COVID-19;
- f. The Defendant is obligated under the Policy to indemnify Westport for its claims of extra expense incurred to continue business;
- g. The Defendant is obligated under the Policy to indemnify Westport for its claims of time element losses and extra expense as a result of orders of civil or military authority that have limited, restricted, or prohibited access to insured properties as a result of the SARS-CoV-2 virus and/or COVID-19 at insured property or other locations within one mile;
- h. The Defendant is obligated under the Policy to indemnify Westport for its claims of time element losses and extra expense wherever ingress to or egress from insured property has been partially or totally prevented as a result of the SARS-CoV-2 virus and/or COVID-19 at insured property or other locations;
- i. The Defendant is obligated under the Policy to indemnify Westport for its claims for losses and extra expense associated with physical loss of or damage to property at contingent time element locations;
- j. The Defendant is obligated under the Policy to indemnify Westport for its claims for actual loss sustained to prevent loss and costs incurred to temporarily protect against actual or impending physical loss of or damage to insured property;

- k. The Defendant is obligated under the Policy to indemnify Westport for its expediting costs and extra expenses;
- l. The Defendant is obligated under the Policy to indemnify Westport for its Professional Fees;
- m. The Defendant is obligated under the Policy to indemnify Westport for any other covered categories of covered loss or damage;
- n. The threat of physical exposure of property or premises to the SARS-CoV-2 virus that renders property unreasonably dangerous and/or unfit for its ordinary intended purpose constitutes “direct physical loss of or damage” to property under the Policy;
- o. Actual or suspected exposure of property to the SARS-CoV-2 virus constitutes “direct physical loss of or damage” to property under the Policy.

### **SECOND COUNT – BREACH OF CONTRACT**

98. Paragraphs 1 through 93 of the Complaint are hereby repeated and realleged as Paragraphs 1 through 93 of this Second Count as if fully set forth herein.

99. The Policy is a valid and enforceable contract between Westport and American Guarantee, providing All Risks coverage designed to cover the losses occasioned by the COVID-19 pandemic.

100. Westport is entitled to coverage, up to the applicable limits of liability, of the losses that it has incurred as a consequence of the COVID-19 pandemic.

101. No terms, conditions, or exclusions of the Policy apply to bar or restrict coverage.

102. Westport has complied with all applicable provisions of the Policy, including payment of premiums, timely notice, and timely proof of loss or is otherwise excused from compliance therewith.

103. American Guarantee unjustifiably failed to pay for Westport’s covered losses.

104. American Guarantee is in breach of its Policy.

105. As a direct and proximate result of American Guarantee's breach, Westport has suffered and continues to suffer substantial and ongoing damages totaling more than \$12 million to date.

WHEREFORE, Westport demands:

On its First Count:

1. A declaratory judgment that:
  - a. Each coverage identified in the preceding paragraphs is triggered by Westport's claims;
  - b. All conditions precedent under the Policy have been satisfied or excused, or the Defendant has waived or is estopped from enforcing, all conditions precedent under the Policy;
  - c. No exclusions in the Policy apply to preclude or limit coverage for Westport's claims;
  - d. The Defendant is obligated to cover Westport up to the applicable combined limit of liability of the Policy with respect to, e.g., (i) COVID-19-related losses and expenses already sustained by Westport's businesses to date; and (ii) COVID-19-related losses and expenses to be sustained by Westport's businesses as the COVID-19 pandemic continues;
  - e. The Defendant is obligated under the Policy to indemnify Westport for its real property losses, time element losses, extra expense, and other losses sustained as a result of direct physical loss of or damage to property due to the SARS-CoV-2 virus and/or COVID-19;
  - f. The Defendant is obligated under the Policy to indemnify Westport for its claims of extra expense incurred to continue business;
  - g. The Defendant is obligated under the Policy to indemnify Westport for its claims of time element losses and extra expense as a result of orders of civil or military authority that have limited, restricted, or prohibited access to insured properties as a result of the SARS-CoV-2 virus and/or COVID-19 at insured property or other locations within one mile;
  - h. The Defendant is obligated under the Policy to indemnify Westport for its claims of time element losses and extra expense wherever ingress to or egress from insured property has been partially or totally prevented as a result of the SARS-CoV-2 virus and/or COVID-19 at insured property or other locations;

- i. The Defendant is obligated under the Policy to indemnify Westport for its claims for losses and extra expense associated with physical loss of or damage to property at contingent time element locations;
  - j. The Defendant is obligated under the Policy to indemnify Westport for its claims for actual loss sustained to prevent loss and costs incurred to temporarily protect against actual or impending physical loss of or damage to insured property;
  - k. The Defendant is obligated under the Policy to indemnify Westport for its expediting costs and extra expenses;
  - l. The Defendant is obligated under the Policy to indemnify Westport for its Professional Fees;
  - m. The Defendant is obligated under the Policy to indemnify Westport for any other covered categories of covered loss or damage;
  - n. The threat of physical exposure of property or premises to the SARS-CoV-2 virus that renders property unreasonably dangerous and/or unfit for its ordinary intended purpose constitutes “direct physical loss of or damage” to property under the Policy;
  - o. Actual or suspected exposure of property to the SARS-CoV-2 virus constitutes “direct physical loss of or damage” to property under the Policy; and
2. Taxable costs.
  3. Such other relief as the Court may deem appropriate.

On its Second Count:

1. Damages.
2. Interest.
3. Taxable Costs.
4. Such other relief as the Court many deem appropriate.

**PLAINTIFF,  
WESTPORT CAPITAL PARTNERS LLC**

/s/ Marc J. Kurzman \_\_\_\_\_

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*Attorneys for Plaintiff*

RETURN DATE: OCTOBER 26, 2021 : SUPERIOR COURT  
WESTPORT CAPITAL PARTNERS LLC : J.D. OF STAMFORD/NORWALK  
V. : AT STAMFORD  
AMERICAN GUARANTEE AND LIABILITY :  
INSURANCE COMPANY : SEPTEMBER 13, 2021

**STATEMENT OF AMOUNT IN DEMAND**

Other relief, in addition to money damages, exclusive of costs and interest in excess of \$15,000, pursuant to Connecticut General Statutes § 52-91 and Connecticut Practice Book § 10-20, is sought herein.

**PLAINTIFF,  
WESTPORT CAPITAL PARTNERS LLC**

/s/ Marc J. Kurzman  
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RETURN DATE: OCTOBER 26, 2021 : SUPERIOR COURT  
WESTPORT CAPITAL PARTNERS LLC : J.D. OF STAMFORD-NORWALK  
V. : AT STAMFORD  
AMERICAN GUARANTEE AND :  
LIABILITY INSURANCE COMPANY : SEPTEMBER 13, 2021

**CERTIFICATE OF NOTICE**

Pursuant to Practice Book §17-56, the Plaintiff states that all persons having an interest in the subject matter of the requested declaratory judgment that is direct, immediate and adverse to the interest of the Plaintiff or the Defendant have been joined as parties to this action.

THE PLAINTIFF,

WESTPORT CAPITAL PARTNERS LLC.

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