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19 **DISTRICT COURT**

20 **CLARK COUNTY, NEVADA**

21 WYNN RESORTS, LIMITED

22 Plaintiff,

23 v.

24 FACTORY MUTUAL INSURANCE
25 COMPANY

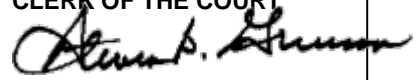
26 Defendant.

CASE NO.:
DEPT NO.:

27 **COMPLAINT AND DEMAND FOR JURY
28 TRIAL**

Exempt from Arbitration:
Business Court Matter
Declaratory Relief Sought and Amount in
Controversy Greater Than \$50,000

Business Court Requested:
EDCR 1.61 – Business Tort Claim / Enhanced
Case Management



CASE NO: A-21-835683-B
Department 27

1 Plaintiff Wynn Resorts, Limited (“Wynn Resorts”), by its attorneys, upon knowledge with
2 respect to its own acts and upon information and belief with respect to all other matters, complains
3 of Defendant Factory Mutual Insurance Company (“Factory Mutual”) and alleges as follows:

4 **NATURE OF THE ACTION**

5 1. Wynn Resorts is the world’s preeminent designer, developer, and operator of
6 integrated resorts featuring luxury hotel rooms, meeting and convention facilities, an array of dining
7 and entertainment options, high-end retail space, and gaming. Since its founding in 2002, Wynn
8 Resorts has consistently been recognized by *Fortune* magazine as one of the World’s Most Admired
9 Companies in the hotel, casino and resort category, and awarded more Five-Star awards from
10 *Forbes Travel Guide* than any other independent hotel company in the world.

11 2. Among its global portfolio of luxury resorts in the United States, Wynn Resorts
12 owns and operates Wynn Las Vegas and Encore at Wynn Las Vegas, respectively the largest and
13 second largest *Forbes Travel Guide* Five-Star resorts in the world, and Encore Boston Harbor, the
14 largest private single-phase construction project in the history of the Commonwealth of
15 Massachusetts.

16 3. Unfortunately, like many companies throughout the country, Wynn Resorts
17 sustained significant losses throughout 2020 and 2021 as a result of the COVID-19 pandemic.
18 Indeed, the hospitality and travel industries—which depend on the ability to safely travel, lodge
19 and entertain guests—were perhaps among the hardest hit by the pandemic and the staggering
20 human, property and financial losses it has caused.

21 4. Despite its best efforts to safely address these extraordinary challenges, Wynn
22 Resorts incurred substantial property and financial losses caused by the prevalence of COVID-19
23 at its own and other nearby premises, which rendered these properties unfit for their ordinary use,
24 and required the imposition of various closures, capacity limits and other restrictions on their
25 normal operations.

26 5. Nevertheless, at the same time that the COVID-19 pandemic brought its operations
27 to a standstill, Wynn Resorts remained committed to leading by example by continuing to pay the
28

1 full wages of its over 27,500 employees during the closures and volunteering whatever resources it
2 could to help those in its local communities most in need.

3 6. To insure against situations such as this, Wynn Resorts purchased “all risks”
4 commercial property insurance policies from Factory Mutual in the form of Mutual Corporation
5 Non-Assessable Policy Nos. 1048495 and 1064616 (the “Policies,” true and correct copies of which
6 are attached to the concurrently-filed appendix of exhibits as Exhibits 1 and 2). In exchange for
7 substantial premium, each of the Policies expressly provides \$2.25 billion worth of broad
8 protections against “all risks of physical loss or damage” to property, including the risks of
9 pandemic-related losses. The Policies provide such protections through multiple, distinct coverage
10 sections, including, but not limited to, for Wynn Resorts’ losses caused by:

- 11 ▪ loss or damage to Wynn Resorts’ own property;
- 12 ▪ loss or damage to the property of Wynn Resorts’ customers and suppliers;
- 13 ▪ loss or damage to property at a location that attracts business to Wynn Resorts, which
14 is located within 1 mile of a Wynn Resorts insured location;
- 15 ▪ any restriction of access to Wynn Resorts’ property, including where caused by the order
16 of a civil authority issued in response to physical loss or damage to property within 5
17 miles of a Wynn Resorts insured location;
- 18 ▪ the actual presence of communicable disease at Wynn Resorts’ property;
- 19 ▪ reasonable and necessary costs to temporarily protect or preserve Wynn Resorts’
20 property; and
- 21 ▪ extra expenses incurred to continue Wynn Resorts’ business as nearly normal as
22 practicable.

23 7. Wynn Resorts has unquestionably suffered COVID-19-related losses that trigger
24 each of these coverage sections under the Policies. Yet, in sharp contrast to Wynn Resorts’
25 commitment to protecting its own employees and communities throughout the pandemic, Factory
26 Mutual has turned its back on Wynn Resorts and refused to pay even a single penny of the
27 substantial insurance to which Wynn Resorts is entitled under the Policies.

28 8. Rather than honoring its clear coverage obligations owed to Wynn Resorts under
the Policies, Factory Mutual has instead made a calculated bad faith effort to dodge its contractual
obligations by improperly directing Wynn Resorts’ insurance claim into, at most, a claim made

1 under a limited \$1 million sublimit for on-site “communicable disease” coverage. In doing so,
2 Factory Mutual has not only misrepresented the express language of the Policies to Wynn Resorts,
3 but has remarkably even gone so far as to make objectively false factual assertions regarding Wynn
4 Resorts’ claim, including baselessly contending that “COVID-19 was not actually present at a
5 location owned, leased or rented by Wynn Resorts.”

6 9. Factory Mutual’s conduct is nothing more than an after-the-fact attempt to avoid
7 paying amounts rightfully owed to its policyholder, Wynn Resorts. But Factory Mutual is no victim
8 of the Policies it sold: all insurers take “bets” when selling insurance and deciding how much to
9 seek in premiums for those bets. However, once they take such “bets” (in the form of entering into
10 an insurance contract), they cannot later renege on paying their obligations, as Factory Mutual is
11 attempting to improperly do here. Indeed, Factory Mutual’s own statements prior to the COVID-
12 19 pandemic belie the meritless positions it has taken with respect to Wynn Resorts’ claim, and
13 reveal the extent of its duplicity in seeking to avoid its contractual obligations to Wynn Resorts.

14 10. Factory Mutual’s refusal to honor its contractual obligations and its continuing
15 breaches of its obligations to adjust Wynn Resorts’ claim in good faith have therefore required
16 Wynn Resorts to commence this action to enforce its rights under the Policies.

17 **THE PARTIES**

18 11. Plaintiff Wynn Resorts is a corporation organized under the laws of the state of
19 Nevada with its principal place of business in Las Vegas, Nevada.

20 12. Upon information and belief, Defendant Factory Mutual is a company formed under
21 the laws of Rhode Island with its principal place of business in Johnston, Rhode Island. Upon
22 information and belief, Factory Mutual is licensed to transact, and is regularly transacting,
23 insurance business in the state of Nevada, including at all relevant times hereto.

24 **JURISDICTION AND VENUE**

25 13. This Court possesses jurisdiction over this matter pursuant to NRS 14.065, and the
26 amount in dispute is in excess of \$15,000.

27 14. Venue and jurisdiction in this District are proper under NRS 13.010 because both
28 Wynn Resorts and Factory Mutual transact business within this Judicial District, including insofar

1 as the Policies were issued to Wynn Resorts in this District and insure, among other locations,
2 Wynn Resorts' locations within this District.

3 15. Factory Mutual is subject to personal jurisdiction in Nevada, and within this District,
4 pursuant to NRS 14.065, as Factory Mutual availed itself of opportunities to conduct business in
5 Nevada, establishing minimum contacts with the forum, and this State and District are the locations
6 where a substantial part of the events or omissions giving rise to the claims set forth herein occurred
7 and where a substantial part of the losses underlying the claims occurred.

8 16. Factory Mutual further agreed in the Policies' "Jurisdiction" provision, that "[a]ny
9 disputes arising hereunder will be exclusively subject to United States of America jurisdiction."

10 17. Factory Mutual is additionally subject to jurisdiction in Nevada because it
11 committed tortious acts within this State aimed at a Nevada-based organization.

12 FACTUAL ALLEGATIONS

13 A. Wynn Resorts

14 18. Wynn Resorts is the world's preeminent designer, developer, and operator of
15 integrated resorts featuring luxury hotel rooms, meeting and convention facilities, an array of dining
16 and entertainment options, high-end retail space, and gaming, all supported by superior levels of
17 customer service provided by more than 27,500 employees.

18 19. In 2021, Wynn Resorts was once again included on *Fortune* magazine's World's
19 Most Admired Companies list in the hotel, casino, and resort category, and ranked first overall in
20 the category of Quality of Products / Services among all international hotel companies.

21 20. Wynn Resorts has a demonstrated track record of developing and operating
22 integrated resorts that stimulate local and regional economic activity, by attracting a wide range of
23 customers (including domestic and high-net-worth international tourists), extending the average
24 length of stay per visitor, complementing existing convention and meeting business with five-star
25 accommodations and appropriately scaled meeting amenities, elevating service levels with the
26 execution of five-star customer service, and stimulating city-wide investment and employment.

27 21. In Nevada, Wynn Resorts, through its subsidiaries, owns and operates Wynn Las
28 Vegas, which opened in 2005, and Encore Las Vegas, an expansion of Wynn Las Vegas, which

1 opened in 2008. Wynn Las Vegas is located at the intersection of Las Vegas Boulevard and Sands
2 Avenue, and occupies approximately 215 acres of land fronting The Las Vegas Strip. The property
3 features approximately 194,000 square feet of casino space with 209 table games and 1,737 slot
4 machines, as well as private gaming salons, a sky casino, a poker room, and a race and sports book.

5 22. Wynn Las Vegas also features two luxury hotel towers with a total of 4,748 guest
6 rooms, suites, and villas, which offer swimming pools, private cabanas, two full-service spas and
7 salons, and a wedding chapel. In addition, Wynn Las Vegas offers 31 food and beverage outlets,
8 approximately 152,000 square feet of high-end, brand-name retail space, approximately 513,000
9 square feet of meeting and convention space, as well as two theaters, three nightclubs, a beach club,
10 and a golf course.

11 23. Wynn Las Vegas and Encore Las Vegas have each earned Five-Star status on the
12 2021 Forbes Travel Guide (“FTG”) Star Rating list and are respectively the largest and second
13 largest FTG Five-Star resorts in the world. Wynn Las Vegas and Encore Las Vegas collectively
14 received seven FTG Five-Star awards in 2021, the most of any resorts in North America.

15 24. Wynn Las Vegas was also among the first resorts in the world to become Sharecare
16 Health Security VERIFIED™ with Forbes Travel Guide. The comprehensive facility verification
17 helps ensure that guests can book with confidence at a resort that has consistent and robust health
18 and safety procedures in place.

19 25. Wynn Resorts, through its subsidiaries, also owns and operates Encore Boston
20 Harbor, an integrated resort in Everett, Massachusetts, adjacent to Boston along the Mystic River,
21 which recently opened in June 2019. As the largest private single-phase construction project in the
22 history of the Commonwealth of Massachusetts, the property consists of approximately 208,000
23 square feet of casino space with 198 table games and approximately 1,890 slot machines, private
24 and high-limit gaming areas, and a poker room.

25 26. Encore Boston Harbor also features a luxury hotel tower with a total of 671 guest
26 rooms and suites, which offers a spa and salon. In addition, Encore Boston Harbor offers 16 food
27 and beverage outlets and a nightclub, approximately 8,000 square feet of high-end, brand-name
28 retail space, and approximately 71,000 square feet of meeting and convention space.

1 27. Despite the widespread and unexpected business challenges presented by the
2 COVID-19 pandemic, Wynn Resorts has remained committed to its employees and the local
3 communities it serves. Throughout the COVID-19 pandemic, Wynn Resorts:

- 4 ▪ committed to pay all employees, including part-time employees, their full wages,
5 benefits and estimated tips while its resorts were closed;
- 6 ▪ increased the benefits and relaxed the criteria for its employees to take advantage of
7 Wynn Resorts' Employee Lifeline Fund for those whose financial situation was
8 adversely affected by circumstances such as layoffs of their spouses;
- 9 ▪ voluntarily adopted an emergency leave policy to allow employees to take paid sick
10 leave if they or any family member in their household is diagnosed with COVID-19;
- 11 ▪ partnered with Clark County's University Medical Center to provide COVID-19 testing
12 to its employees and exposed family members, with over 25,000 tests administered in
13 2020; and
- 14 ▪ offered Wynn Las Vegas employees no-cost professionally-supervised learning centers
15 for their children attending public school "virtually."

16 28. At the same time, Wynn Resorts has also played an active role in supporting its local
17 communities battle the COVID-19 pandemic, which has included:

- 18 ▪ providing millions of dollars in cash and in-kind donations for COVID-19 relief efforts,
19 including more than 245,000 N95-equivalent respirator masks, 1,775,000 surgical
20 masks, and 640,000 pairs of medical gloves and hospital gowns to hospitals, nursing
21 homes, and law enforcement agencies;
- 22 ▪ assisting the Southern Nevada Health District's COVID-19 contact tracing efforts by
23 allocating more than 100 team members from the Wynn Teleservices Call Center;
- 24 ▪ making its on-site rapid COVID-19 testing facility available to student athletes in the
25 Clark County Schools;
- 26 ▪ establishing a COVID-19 vaccination center onsite at Encore Las Vegas in partnership
27 with Clark County's University Medical Center, which vaccinated up to 1,000 people
28 per day during its five days a week operation; and
- 29 ▪ offering a complimentary one-night stay at Wynn Las Vegas to 10,000 front-line
30 hospital and medical workers, police, and firefighters to show its appreciation.

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

32 29. COVID-19 is a deadly communicable disease caused by an RNA virus, known as
33 the "novel coronavirus" (or SARS-CoV-2), and recognized by the crown-like appearance of the
34

1 glycoprotein spikes on its envelope when viewed under an electron microscope.¹

2 30. The first human case of COVID-19 is believed to have occurred in or around
3 December 2019.²

4 31. In response to its rapid and continued spread, on January 30, 2020, the World Health
5 Organization (“WHO”) declared the COVID-19 outbreak to be a public health emergency of
6 international concern.³

7 32. By February 26, 2020, the Centers for Disease Control and Prevention (“CDC”)
8 advised that COVID-19 was being transmitted freely without the ability to trace the origin of new
9 infections, also known as “community spread.”⁴

10 33. Noting its “alarming levels of spread and severity,” on March 11, 2020, the WHO
11 declared the COVID-19 outbreak a worldwide pandemic.⁵

12 34. As of June 1, 2021, the WHO reports a confirmed 170 million cases of COVID-19
13 globally and over 3.5 million deaths, with the United States facing more than 32 million confirmed
14 cases and 588,596 deaths—more than any other country.⁶ Moreover, due in part to the initial
15 absence of available tests, it has been reported that, at least in the United States, the number of
16 people infected with COVID-19 may actually be up to ten times higher than officially reported.⁷

17
18 ¹ Marco Cascella et al., *Features, Evaluation, and Treatment of Coronavirus (COVID-19)*, NCBI (April 20, 2021),
19 <https://www.ncbi.nlm.nih.gov/books/NBK554776/>.

20 ² *Coronavirus Disease 2019 (COVID-19) Situation Report – 94*, WORLD HEALTH ORG. (April 23, 2020),
21 <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200423-sitrep-94-covid-19.pdf>.

22 ³ *Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding
23 the outbreak of novel coronavirus (2019-nCoV)*, WORLD HEALTH ORG. (January 30, 2020),
24 [https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-
25 regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).

26 ⁴ *CDC Confirms Possible Instance of Community Spread of COVID-19 in U.S.*, CTRS. FOR DISEASE CONTROL AND
27 PREVENTION (February 26, 2020), <https://www.cdc.gov/media/releases/2020/s0226-Covid-19-spread.html>.

28 ⁵ *WHO Director-General’s opening remarks at the media briefing on COVID-19 – 11 March 2020*, WORLD HEALTH
ORG. (March 11, 2020), [https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-
remarks-at-the-media-briefing-on-covid-19---11-march-2020](https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020).

⁶ *WHO Coronavirus (COVID-19) Dashboard*, WORLD HEALTH ORG., <https://covid19.who.int/> (last accessed on June
1, 2021).

⁷ Fiona P. Havers et al., *Seroprevalence of Antibodies to SARS-CoV-2 in 10 Sites in the United States, March 23-May
12, 2020*, JAMA INTERNAL MEDICINE (July 21, 2020),
<https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2768834>.

1 35. In addition to posing severe health risks, COVID-19 is also highly contagious and
2 resilient. COVID-19 travels through respiratory droplets, physically transforming the air exposed
3 to it and attaching itself to the surfaces it contacts (*i.e.*, forming a noncovalent chemical bond with
4 the affected surface), on which it can survive for extended periods of time.⁸

5 36. According to the CDC and various other sources, COVID-19 spreads most
6 commonly when within six feet of an infected person or via contact with surfaces exposed to
7 COVID-19, referred to as fomite transmission.⁹

8 37. As reported by the *The New York Times*, “[a]n infected person talking for five
9 minutes in a poorly ventilated space can also produce as many viral droplets as one infectious
10 cough.”¹⁰ And, one human sneeze can expel droplets that can travel up to 27 feet at nearly a
11 hundred miles an hour.¹¹

12 38. Notably, COVID-19 can be transmitted via pre-symptomatic, symptomatic, and
13 asymptomatic infected persons (*i.e.*, those who have no sign of illness).¹²

14 39. The incubation period for COVID-19, which is the time between exposure
15 (becoming infected) and symptom onset can be up to fourteen days. During this period, known as
16 the pre-symptomatic phase, infected persons can be contagious and therefore transmit COVID-19
17 before symptom onset.¹³

18 ⁸ Edris Joonaki et al., *Surface Chemistry Can Unlock Drivers of Surface Stability of SARS-CoV-2 in a Variety of*
19 *Environmental Conditions*, CHEM (September 10, 2020), [https://www.cell.com/chem/pdf/S2451-9294\(20\)30411-3.pdf](https://www.cell.com/chem/pdf/S2451-9294(20)30411-3.pdf).

20 ⁹ *How COVID-19 Spreads*, CTRS. FOR DISEASE CONTROL AND PREVENTION (updated May 13, 2021),
21 <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>; G. Kampf et al.,
22 *Persistence of coronaviruses on inanimate surfaces and their inactivation with biocidal agents*, Vol. 104, J. HOSPITAL
23 *INFECTION* (February 6, 2020), [https://www.journalofhospitalinfection.com/article/S0195-6701\(20\)30046-3/fulltext](https://www.journalofhospitalinfection.com/article/S0195-6701(20)30046-3/fulltext);
24 *Coronavirus Disease (COVID-19): How is it transmitted?*, WORLD HEALTH ORG. (December 13, 2020),
25 <https://www.who.int/news-room/q-a-detail/coronavirus-disease-covid-19-how-is-it-transmitted>.

26 ¹⁰ Yuliya Pashina-Kottas et al., *This 3-D Simulation Shows Why Social Distancing Is So Important*, N.Y. TIMES (April
27 14, 2020), [https://www.nytimes.com/interactive/2020/04/14/science/coronavirus-transmission-cough-6-feet-ar-
28 ul.html](https://www.nytimes.com/interactive/2020/04/14/science/coronavirus-transmission-cough-6-feet-ar-ul.html).

¹¹ Sarah Gibbens, *See how a sneeze can launch germs much farther than 6 feet*, NATIONAL GEOGRAPHIC (April 17,
2020), <https://www.nationalgeographic.com/science/article/coronavirus-covid-sneeze-fluid-dynamics-in-photos>.

¹² *Coronavirus Disease 2019 (COVID-19) Situation Report -73*, WORLD HEALTH ORG. (April 2, 2020),
[https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-
19.pdf?sfvrsn=5ae25bc7_6](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_6).

¹³ *Id.*

1 40. In addition, studies have estimated that over 40% of infected individuals may never
2 develop symptoms, yet still spread COVID-19 through physical droplets.¹⁴ Such seemingly
3 healthy people can therefore unknowingly spread COVID-19 via speaking, breathing or touching
4 objects.

5 41. At the time that Factory Mutual received Wynn Resorts' COVID-19 claim under
6 the Policies, numerous scientific studies and reports had already documented that COVID-19
7 physically alters, and can remain present in and on, premises' airspace and property for extended
8 periods of time. By way of example and without limitation:

- 9 ▪ According to a study published in *The New England Journal of Medicine*, researchers
10 from UCLA, Princeton University, the National Institute of Allergy and Infectious
11 Diseases, and the CDC determined that COVID-19 can survive for up to 3 hours in
aerosols, up to 4 hours on copper, up to 24 hours on cardboard, and up to 72 hours on
plastic and stainless steel.¹⁵
- 12 ▪ Another study found that coronaviruses, such as SARS-CoV and MERS-CoV, can
13 remain infectious on inanimate surfaces at room temperature for up to nine days.¹⁶
- 14 ▪ A peer-reviewed article published in *Virology Journal* found that COVID-19 can
15 survive on surfaces for up to 28 days at ambient temperature and humidity (20 °C [68
°F] and 50% relative humidity), concluding that COVID-19 “can remain infectious for
16 significantly longer time periods than generally considered possible.”¹⁷
- 17 ▪ In its *Morbidity and Mortality Weekly Report*, on March 23, 2020, the CDC also
18 reported that COVID-19 was identified on a variety of surfaces in the cabins of the
19 Diamond Princess cruise ship 17 days after the cabins had been vacated.¹⁸

20
21 ¹⁴ See, e.g. Erika Edwards, *Asymptomatic COVID-19 Cases May Be More Common Than Suspected*, NBC NEWS (May
22 27, 2020), <https://www.nbcnews.com/health/health-news/asymptomatic-covid-19-cases-maybe-more-common-suspected-n1215481>.

23 ¹⁵ Neeltje van Doremalen, Ph.D. et al., *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*,
24 NEW ENGLAND J. MEDICINE (April 16, 2020),
25 <https://www.nejm.org/doi/pdf/10.1056/NEJMc2004973?articleTools=true> (emphasis added).

26 ¹⁶ See G. Kampf et al., *Persistence of coronaviruses on inanimate surfaces and their inactivation with biocidal agents*,
27 Vol. 104, J. HOSPITAL INFECTION (February 6, 2020), [https://www.journalofhospitalinfection.com/article/S0195-6701\(20\)30046-3/fulltext](https://www.journalofhospitalinfection.com/article/S0195-6701(20)30046-3/fulltext) (emphasis added).

28 ¹⁷ Shane Riddell et al., *The effect of temperature on persistence of SARS-CoV-2 on common surfaces*, 17 VIROLOGY J.
(October 7, 2020), <https://virologyj.biomedcentral.com/articles/10.1186/s12985-020-01418-7> (emphasis added).

¹⁸ *Public Health Responses to COVID-19 Outbreaks on Cruise Ships – Worldwide, February – March 2020*, CTRS. FOR
DISEASE CONTROL AND PREVENTION (March 27, 2020),
https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.htm?s_cid=mm6912e3_w (emphasis added).

1 42. Given that infected individuals can spread COVID-19 by breathing or talking, and
2 because infectious droplets containing COVID-19 can remain present in the air and on surfaces for
3 numerous days, the risks posed by COVID-19 are not temporary.

4 **C. The Presence of COVID-19 Causes Physical Loss or Damage to Property**

5 43. By adhering to, and becoming a part of, the property that it comes into contact with
6 (including when suspended in indoor air), the presence of COVID-19 causes physical loss and/or
7 damage by corrupting, physically altering, and rendering such property dangerous, unsafe,
8 unusable, uninhabitable, and unfit for its ordinary and intended use.

9 44. To date, nearly 40 courts, including Nevada courts, have already found that
10 policyholders have adequately alleged or are, in fact, entitled to coverage for COVID-19-related
11 property damage and business interruption losses.

12 45. Moreover, even before the COVID-19 pandemic, courts have repeatedly determined
13 that the presence of hazardous substances at or on a property, including the airspace inside
14 buildings, constitutes property damage and that there may be “physical loss” to property even if the
15 property is not structurally damaged. By way of example and without limitation:

- 16 ▪ *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 39 (1968)
17 (determining that property had suffered a “direct physical loss” where gasoline vapors
18 penetrated the foundation of the insured church and accumulated, rendering the building
19 “uninhabitable, making further use of the building highly dangerous”);
- 20 ▪ *Farmers Ins. Co. v. Trutanich*, 123 Or. App. 6, 9-11 (1993) (determining that a home
21 infiltrated by the odor produced by a methamphetamine lab had sustained “direct
22 physical loss”);
- 23 ▪ *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, 1996 WL 1250616, at *2 (Mass. Super. Ct.
24 Mar. 15, 1996) (holding that the presence of oil fumes in a building may constitute
25 “physical loss” to property);
- 26 ▪ *Matzner v. Seaco Ins. Co.*, 1998 WL 566658, at *4 (Mass. Super. Ct. Aug. 12, 1998)
27 (determining that carbon monoxide levels in an apartment building sufficient to render
28 the building uninhabitable constituted “direct physical loss”);
- *Port Authority of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236
(3d Cir. 2002) (holding that where a property’s “function is nearly eliminated or
destroyed” or “made useless or uninhabitable” due to the actual or imminent threat of
release of asbestos fibers, the property has sustained “physical loss or damage”);
- *Motorists Mut. Ins. Co. v. Hardinger*, 131 F.App’x 823, 826-27 (3d Cir. 2005)
(determining that the presence of E. coli bacteria could amount to “physical loss” to a

1 home when “the functionality of the [] property was nearly eliminated or destroyed, or
2 ... the[] property was made useless or uninhabitable”);

- 3 ■ *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009)
4 (determining that “allegations that an unwanted odor permeated the building and
5 resulted in a loss of use of the building are reasonably susceptible to an interpretation
6 that physical injury to property has been claimed”);
- 7 ■ *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524, 543 (App. Div.
8 2009) (holding that property can sustain “physical damage,” without undergoing
9 structural alteration, when rendered “physically incapable of performing” its “essential
10 function”);
- 11 ■ *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, 2014 WL 6675934, at *5 (D.N.J.
12 Nov. 25, 2014) (explaining that “courts considering non-structural property damage
13 claims have found that buildings rendered uninhabitable by dangerous gases or bacteria
14 suffered direct physical loss or damage,” and determining that ammonia gas discharge
15 that rendered packaging facility “unfit for occupancy” and “unusable” constituted
16 “physical loss”);
- 17 ■ *Mellin v. Northern Security Ins. Co.*, 167 N.H. 544, 550-51 (2015) (determining that the
18 odor of cat urine inside a condominium constituted “physical loss”); and
- 19 ■ *Oregon Shakespeare Festival Ass’n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *9 (D.
20 Ore. June 7, 2016) (finding that a theater had sustained “physical loss or damage to
21 property” when wildfire smoke infiltrated the theater and “rendered it unusable for its
22 intended purposes” and “uninhabitable”).

23 46. Indeed, Factory Mutual itself has previously argued in court proceedings that mold
24 infestation in the clean room of a laboratory caused “physical loss or damage” by rendering the
25 clean room “unfit for its intended use”—despite not causing a structural alteration of the property—
26 and was therefore covered by property insurance. *See Factory Mut. Ins. Co. v. Federal Ins. Co.*,
27 Case No. 1:17-cv-00760 (D.N.M. Nov. 11, 2019), ECF No. 127 (attached to the concurrently-filed
28 appendix of exhibits as Exhibit 3) (asserting that any argument otherwise would be “*contrary to ...
the case law which broadly interprets the term ‘physical loss or damage’ in property insurance
policies*” and would “*create an extreme danger of confusing and misleading the jury about what is
physical loss or damage for purposes of establishing coverage*”) (emphasis added).

47. In support of its position in that case, Factory Mutual asserted that “[n]umerous
courts have concluded that loss of functionality or reliability under similar circumstances
constitutes physical loss or damage,” citing the same case law referred to in paragraph 45 above.
Additionally, Factory Mutual also argued that another insurer’s failure to define “physical loss or
damage” made that term “susceptible of more than one reasonable interpretation,” rendered the

1 policy “ambiguous,” and “must be construed against” that insurer (as the drafter of the insurance
2 policy). Thus, in addition to the actual policy language at issue here, Factory Mutual’s own prior
3 statements confirm that Wynn Resorts’ losses are covered under its Policies’ language.

4 48. Given that numerous courts have already determined that COVID-19 may cause
5 “physical loss or damage” to property and Factory Mutual’s prior confirmation of the same, Wynn
6 Resorts’ belief that the Policies afford coverage for its COVID-19-related losses is well-supported,
7 notwithstanding the contrary positions that Factual Mutual cites as part of its wrongful attempt to
8 avoid its substantial COVID-19 pandemic exposure.

9 **D. COVID-19 Has Been Present at Wynn Resorts’ Insured Locations and Within the**
10 **Policies’ Expressly Insured Five-Mile Vicinity Thereof**

11 49. No fewer than 2,267 Wynn Resorts employees, guests, tenants, vendors, and other
12 third-parties have informed Wynn Resorts that they contracted COVID-19. At least 761 of these
13 individuals were present at Wynn Resorts’ insured locations while infected with COVID-19.

14 50. Moreover, given the high percentage of asymptomatic cases of COVID-19, it is
15 statistically virtually certain that the actual number of Wynn Resorts employees, guests, tenants,
16 vendors, and other third-parties who have contracted COVID-19 is even greater than the over 2,267
17 individuals Wynn Resorts was expressly informed had contracted COVID-19.

18 51. In addition, it is also certain or virtually certain that COVID-19 has been present at
19 the various “Attraction Properties” (as defined by the Policies) and other resorts, casinos, stores,
20 restaurants, conference and event spaces, theaters, and businesses in the Policies’ expressly insured
21 five-mile vicinity of Wynn Resorts’ properties.

22 52. This fact is reflected not only in publicly available accounts and the statements of
23 these businesses, but is also further confirmed with certainty or near-certainty by statistical
24 modeling based on the known incidence of COVID-19 infection, despite the lack of commercially
25 available tests for fomite or aerosolized COVID-19.¹⁹

26 ¹⁹ See, e.g., *Caesars Casino Complaint*, ¶ 265 in the matter of *Caesars Ent. Inc. v. ACE Am. Ins. Co.*, Case No. A-21-
27 831477-B (Dist. Ct., Clark Cnty. Mar. 19, 2021) (stating that “Caesars has confirmed that, on its Las Vegas properties
28 alone, over 2,600 employees, guests, contractors, vendors, or third parties that had been present on the Las Vegas
Covered Properties have tested or claimed to be positive for COVID-19. At least some of those employees, guests,
contractors, vendors, or third parties were present on the Las Vegas Covered Properties while positive with COVID-

1 53. Early in the COVID-19 pandemic, testing of individuals was generally limited and
2 official accounts likely underreported the extent of COVID-19 infections.²⁰ However, based on
3 testing available at that time, local positivity rates demonstrate the pervasiveness of COVID-19
4 throughout the jurisdictions where Wynn Resorts’ insured properties are located.

5 54. In that regard, epidemiologists have explained that “the percent positive is a critical
6 measure because it gives us an indication of how widespread infection is in the area where the
7 testing is occurring[.]”²¹ The WHO explained that the percent positive for COVID-19 should
8 remain below 5% for at least two weeks before area businesses can safely reopen.²²

9 55. As reflected below, the cities and states in which Wynn Resorts’ insured properties
10 are located were experiencing exceptionally high COVID-19 positivity rates, indicating
11 uncontrolled community spread of COVID-19 and its certain or virtually certain presence at Wynn
12 Resorts’ insured locations and the Policies’ expressly insured five-mile vicinity thereof:

- 13 ▪ **Las Vegas**: As of April 1, 2020, Las Vegas had a daily positivity rate of over 15%.²³
- 14 ▪ **Nevada**: As of April 1, 2020, Nevada had a daily positivity 7-day moving positivity
15 average of 13.8%.²⁴
- 16 ▪ **Massachusetts**: As of April 1, 2020, Massachusetts had a daily positivity 7-day moving
17 positivity average of 18.2%.²⁵

18 _____
19 19.”) (emphasis added); *see also* Aroon Chande et al., *Real-time, interactive website for US-county-level COVID-19*
event risk assessment, NATURE HUMAN BEHAVIOR (November 9, 2020), [https://www.nature.com/articles/s41562-020-](https://www.nature.com/articles/s41562-020-01000-9)
20 [01000-9](https://www.nature.com/articles/s41562-020-01000-9).

21 ²⁰ *See, e.g.*, Benedict Carey and James Glanz, *Hidden Outbreaks Spread Through U.S. Cities Far Earlier Than*
Americans Knew, Estimates Say, N.Y. TIMES (Apr. 23, 2020, updated July 6, 2020),
<https://www.nytimes.com/2020/04/23/us/coronavirus-early-outbreaks-cities.html>.

22 ²¹ David Dowdy et al., *COVID-19 Testing: Understanding the “Percent Positive”*, JOHNS HOPKINS BLOOMBERG SCH.
OF PUB. HEALTH EXPERT INSIGHTS (Aug. 10, 2020), [https://www.jhsph.edu/covid-19/articles/covid-19-testing-](https://www.jhsph.edu/covid-19/articles/covid-19-testing-understanding-the-percent-positive.html)
23 [understanding-the-percent-positive.html](https://www.jhsph.edu/covid-19/articles/covid-19-testing-understanding-the-percent-positive.html).

24 ²² *Id.*

25 ²³ *Percent of People Receiving COVID-19 Viral Tests Who Have Positive Results in Las Vegas*, S. NEV. HEALTH DIST.,
[https://media.southernnevadahealthdistrict.org/download/COVID-19/updates/September/city-reports/20200916-City-](https://media.southernnevadahealthdistrict.org/download/COVID-19/updates/September/city-reports/20200916-City-Report-Las-Vegas.pdf)
26 [Report-Las-Vegas.pdf](https://media.southernnevadahealthdistrict.org/download/COVID-19/updates/September/city-reports/20200916-City-Report-Las-Vegas.pdf) (last accessed on June 1, 2021).

27 ²⁴ *Daily State-By-State Testing Trends: Nevada*, JOHNS HOPKINS UNIV. OF MED. CORONAVIRUS RESOURCE CTR.,
<https://coronavirus.jhu.edu/testing/individual-states/nevada> (last accessed on June 1, 2021).

28 ²⁵ *Daily State-By-State-Testing Trends: Massachusetts*, JOHNS HOPKINS UNIV. OF MED. CORONAVIRUS RESOURCE
CTR., <https://coronavirus.jhu.edu/testing/individual-states/massachusetts> (last accessed on June 1, 2021).

1 56. COVID-19 accordingly, and unfortunately, became present throughout Wynn
2 Resorts’ insured locations, as well as throughout the locations within the Policies’ expressly insured
3 five-mile vicinity thereof.

4 57. The actual presence of COVID-19 at Wynn Resorts’ insured locations and the
5 locations within the Policies’ expressly insured five-mile vicinity thereof has caused physical loss
6 and/or damage by corrupting, physically altering, and rendering such property dangerous, unsafe,
7 unusable, uninhabitable, and unfit for its ordinary and intended use.

8 **E. The COVID-19-Related Civil Authority Orders**

9 58. In response to the COVID-19 pandemic, on March 16, 2020, the CDC and members
10 of the national Coronavirus Task Force issued guidance to the American public, titled “30 Days to
11 Slow the Spread,” concerning measures to slow the spread of COVID-19. The Task Force’s
12 guidance advocated for far-reaching social distancing measures, such as working from home and
13 avoiding shopping trips and gatherings of more than 10 people.

14 59. Federal, state and local governments thereafter imposed unprecedented orders
15 prohibiting travel into the United States and suspending and/or severely curtailing the operations
16 of non-essential businesses, including various operations of integrated resorts such as those owned,
17 operated or managed by Wynn Resorts (the “Closure Orders”). Other contemporaneously issued
18 orders directed citizens to stay at home except for certain limited activities (the “Stay at Home
19 Orders”).

20 60. State and local authorities issued the Closure Orders and Stay at Home Orders in
21 response to the presence of, and attendant physical loss and damage to property caused by, COVID-
22 19 in the localities where Wynn Resorts’ insured properties are located.

23 61. In addition, numerous other state and local authorities throughout the country have
24 also expressed that such orders were issued in part to mitigate the physical loss and damage to
25 property caused by COVID-19, including, but not limited to, the following:

- 26 ▪ On March 16, 2020, the Mayor of New York City issued an emergency executive order
27 closing non-essential businesses in New York City and declaring, “this order is given
28

1 because of the propensity of the virus to spread person to person and also because the
2 virus physically is causing property loss and damage.²⁶

- 3
- 4 ■ On March 16, 2020, the Mayor of the City of New Orleans issued an emergency order
5 suspending large gatherings and closing certain categories of businesses, stating “there
6 is reason to believe that COVID-19 may be spread amongst the population by various
7 means of exposure, including the propensity to spread person to person and the
8 propensity to attach to surfaces for prolonged periods of time, thereby spreading from
9 surface to person and causing property loss and damage in certain circumstances.”²⁷
 - 10 ■ On March 19, 2020, the City of Los Angeles issued its “Safer At Home” Order,
11 “because, among other reasons, the COVID-19 virus can spread easily from person to
12 person and it is physically causing property loss or damage due to its tendency to attach
13 to surfaces for prolonged periods of time.”²⁸
 - 14 ■ On March 22, 2020, Broward County, Florida issued an emergency order
15 acknowledging that COVID-19 “is physically causing property damage.”²⁹
 - 16 ■ On March 27, 2020, the State of North Carolina issued an executive order in response
17 to the COVID-19 pandemic “to assure adequate protection for lives,” as well as “to
18 assure adequate protection of ... property.”³⁰
 - 19 ■ On March 31, 2020, the Sonoma County Health Officer extended its Shelter in Place
20 Order No. C19-05, in relevant part, “because the [COVID-19] virus physically is
21 causing property loss or damage due to its proclivity to stay airborne and to attach to
22 surfaces for prolonged periods of time.”
 - 23 ■ On April 14, 2020, the City and County of San Francisco confirmed that it issued all of
24 its COVID-19 orders “because of the propensity of the virus to spread person to person
25 and also because the virus physically is causing property loss or damage due to its
26 proclivity to attach to surfaces for prolonged periods of time.”³¹

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26 The City of New York, Office of the Mayor, *Emergency Executive Order No. 100* (March 16, 2020) <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-100.pdf> (emphasis added).

27 City of New Orleans Mayor LaToya Cantrell, *Mayoral Proclamation to Promulgate Emergency Orders During the State of Emergency Due to COVID-19* (March 16, 2020), <https://nola.gov/mayor/executive-orders/emergency-declarations/03162020-mayoral-proclamation-to-promulgate-emergency-orders-during-the-state-of-emergency-due-to-co/> (emphasis added).

28 City of Los Angeles, *Public Order Under City of Los Angeles Emergency Authority* (March 19, 2020, revised May 27, 2020), <https://www.lamayor.org/sites/g/files/wph1781/files/page/file/20200527%20Mayor%20Public%20Order%20SAFER%20AT%20HOME%20ORDER%202020.03.19%20%28REV%202020.05.27%29.pdf> (emphasis added).

29 *Broward County Administrator’s Emergency Order 20-01* (March 22, 2020), <https://www.broward.org/CoronaVirus/Documents/BerthaHenryExecutiveOrder20-01.pdf> (emphasis added).

30 State of North Carolina Governor Roy Cooper, *Executive Order No. 121* (March 27, 2020), <https://files.nc.gov/governor/documents/files/EO121-Stay-at-Home-Order-3.pdf> (emphasis added).

31 Office of the Mayor, San Francisco, *Tenth Supplement to Mayoral Proclamation Declaring the Existence of a Local Emergency Dated February 25, 2020* (April 14, 2020), https://sfmayor.org/sites/default/files/10th%20Mayoral%20Supplement_041420.pdf (emphasis added).

- 1 ▪ On April 20, 2020, the State of Indiana issued an executive order recognizing that
2 COVID-19 has the “propensity to physically impact surfaces and personal property.”³²
- 3 ▪ On April 23, 2020, a Dallas County Judge issued an amended “Safer at Home Order”
4 explaining that “this Emergency Order is necessary because of the propensity of the
5 virus to spread person to person and also because the virus is physically causing
6 property damage due to its proclivity to attach to surfaces for prolonged periods of
7 time.”³³
- 8 ▪ On April 28, 2020, the State of New Mexico issued a public health order acknowledging
9 the “threat” COVID-19 “poses” to “property.”³⁴

10 **i. The Nevada Closure and Stay at Home Orders**

11 62. On March 5, 2020, Clark County reported its first known case of COVID-19 in
12 Nevada.³⁵ Within the next week, multiple Las Vegas casinos also reported their first documented
13 cases of COVID-19 at their premises.

14 63. On March 11, 2020, MGM Resorts International issued a press release explaining
15 that the Southern Nevada Health District had confirmed a case of COVID-19 involving a guest of
16 The Mirage, who had attended a conference from March 5-8, 2020.³⁶

17 64. In the days immediately thereafter, MGM Resorts International further reported that
18 “several” employees had tested positive, including another employee at the Luxor Hotel &
19 Casino.³⁷

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³² State of Indiana, Executive Department, *Executive Order 20-22* (April 20, 2020),
21 <https://www.in.gov/sboa/files/Executive-Order-20-22-Extension-of-Stay-at-Home.pdf> (emphasis added).

22 ³³ *Amended Order of County Judge Clay Jenkins* (April 23, 2020),
23 <https://www.cityofirving.org/DocumentCenter/View/43931/04-23-2020-Dallas-County-Updated-Order> (emphasis
24 added).

25 ³⁴ New Mexico Department of Health, Office of the Secretary, *Public Health Emergency Order Clarifying that Current*
26 *Guidance Documents, Advisories, and Emergency Public Health Orders Remain in Effect; and Amending Prior Public*
27 *Health Emergency Orders to Impose County-by-County Restrictions Due to COVID-19* (April 28, 2021),
28 <https://www.nmhealth.org/publication/view/rules/6694/> (emphasis added).

29 ³⁵ *Southern Nevada Health District announces positive case of COVID-19 in a Clark County resident*, S. NEV. HEALTH
30 DIST. (March 5, 2020), <https://www.southernnevadahealthdistrict.org/news-release/southern-nevada-health-district-announces-positive-case-of-covid-19-in-a-clark-county-resident/>.

31 ³⁶ *MGM Resorts International Statement on COVID-19 Case Involving Guest at the Mirage*, MGM RESORTS INT’L
32 (March 11, 2020), <https://investors.mgmresorts.com/investors/news-releases/press-release-details/2020/MGM-Resorts-International-Statement-On-COVID-19-Case-Involving-Guest-At-The-Mirage/default.aspx>.

33 ³⁷ Carolyn Williams, *MGM Resorts letter says ‘several’ employees tested presumptive positive for COVID-19; layoffs, closures addressed*, LAS VEGAS 8 NEWS NOW (March 13, 2020), <https://www.8newsnow.com/coronavirus/mgm-resorts-letter-says-several-employees-test-presumptive-positive-for-covid-19-addresses-layoffs/>.

1 65. The Mirage is located less than half a mile away from Wynn Las Vegas and Encore
2 Las Vegas and is within the Policies' insured vicinity.

3 66. The Luxor Hotel & Casino is located approximately two miles away from Wynn
4 Las Vegas and Encore Las Vegas and is within the Policies' insured vicinity.

5 67. On March 12, 2020, Nevada Governor Steve Sisolak ("Governor Sisolak")
6 "declare[d] an emergency and direct[ed] all state agencies to supplement the efforts of all impacted
7 and threatened counties to save lives, *protect property*, and protect the health and safety of persons
8 in this state."³⁸ By that time, Clark County had reported eight cases of COVID-19, which increased
9 to 42 confirmed cases and one confirmed death by March 17, 2020.³⁹

10 68. On March 17, 2020, Governor Sisolak ordered that all casinos, bars, and restaurants
11 close, and signed Declaration of Emergency Directive 002 on March 18, 2020.⁴⁰

12 69. Governor Sisolak's orders required the closure of all Nevada gaming operations
13 from March 17, 2020 to May 15, 2020, during which time the Nevada Gaming Control Board also
14 ordered all gaming operations to close.

15 70. On March 31, 2020, Governor Sisolak issued the Declaration of Emergency
16 Directive 010, ordering all Nevada residents to stay at home.⁴¹

17 71. On April 29, 2020, Governor Sisolak issued Declaration of Emergency Directive
18 016, expressly acknowledging the threat that COVID-19 poses to property, stating the "*ability of*
19 *the novel coronavirus that causes COVID-19 to survive on surfaces for indeterminate periods of*

20 ³⁸ State of Nevada Executive Department, *Declaration of Emergency for COVID-19* (March 12, 2020),
21 https://gov.nv.gov/News/Emergency_Orders/2020/2020-03-12_-_COVID-19_Declaration_of_Emergency/ (emphasis
added).

22 ³⁹ *Update: Clark County case numbers for March 12, 2020*, S. NEV. HEALTH DIST. (March 12, 2020),
23 <https://www.southernnevadahealthdistrict.org/news-release/update-clark-county-case-numbers-for-march-12-2020/>;
March 17, 2020 - COVID-19 Update, S. NEV. HEALTH DIST. (March 17, 2020),
24 <https://www.southernnevadahealthdistrict.org/news-release/march-17-2020-covid-19-update/>.

25 ⁴⁰ Melissa Etehad et al., *Nevada orders all casinos, bars, restaurants closed as U.S. coronavirus cases surge* (March
26 17, 2020), L.A. TIMES, <https://www.latimes.com/world-nation/story/2020-03-17/las-vegas-to-close-all-casinos-at-midnight>;
State of Nevada Executive Department, *Declaration of Emergency Directive 002* (March 8, 2020),
https://gov.nv.gov/News/Emergency_Orders/2020/2020-03-18_-_COVID-19_Declaration_of_Emergency_Directive_002/.

27 ⁴¹ State of Nevada Executive Department, *Declaration of Emergency Directive 010 Stay at Home Order* (March 31,
28 2020), [https://gov.nv.gov/News/Emergency_Orders/2020/2020-03-31_-_COVID-19_Declaration_of_Emergency_Directive_010_-_Stay_at_Home_Order_\(Attachments\)/](https://gov.nv.gov/News/Emergency_Orders/2020/2020-03-31_-_COVID-19_Declaration_of_Emergency_Directive_010_-_Stay_at_Home_Order_(Attachments)/).

1 time renders some property unusable and contributes to contamination, damage, and property
2 loss.”⁴²

3 72. As part of Declaration of Emergency Directive 016, Governor Sisolak ordered that
4 “[g]aming operations, not including licensed online gaming or mobile wagering operations, shall
5 remain closed until the Nevada Gaming Control Board determines that operations may safely
6 resume.”⁴³

7 73. On May 7, 2020, Governor Sisolak issued Declaration of Emergency Directive 018
8 regarding Phase One reopening, which excluded gaming operations from the Phase One reopening
9 and directed the Nevada Gaming Control board to issue guidance for the phased resumption of
10 gaming operations.⁴⁴

11 74. On May 28, 2020, Governor Sisolak issued Declaration of Emergency Directive 021
12 – Phase Two Reopening Plan, reiterating that the Nevada Gaming Control Board would provide
13 guidance for gaming reopening and stating that such a reopening would occur no earlier than June
14 4, 2020.⁴⁵

15 75. The Nevada Gaming Control Board’s “Health and Safety Policy for Resumption of
16 Gaming Operations,” issued on April 21, 2020 and amended on April 14, 2021 (the “NGCB
17 Policy”), set forth the requirements for casino reopenings.⁴⁶

18 76. Pursuant to the NGCB Policy, Wynn Resorts submitted comprehensive plans to the
19 Nevada Gaming Control Board for mitigating the spread of COVID-19 at its properties, which
20 included (among other required measures): cleaning, disinfecting, and sanitizing guidelines;

21 _____
22 ⁴² State of Nevada Executive Department, *Declaration of Emergency Directive 016* (April 29, 2020),
[https://gov.nv.gov/News/Emergency_Orders/2020/2020-04-29_-_COVID-19_Declaration_of_Emergency_Directive_016_\(Attachments\)/](https://gov.nv.gov/News/Emergency_Orders/2020/2020-04-29_-_COVID-19_Declaration_of_Emergency_Directive_016_(Attachments)/) (emphasis added).

23 ⁴³ *Id.*

24 ⁴⁴ State of Nevada Executive Department, *Declaration of Emergency Directive 018* (May 7, 2020),
[https://gov.nv.gov/News/Emergency_Orders/2020/2020-05-07_-_COVID-19_Declaration_of_Emergency_Directive_018_-_Phase_One_Reopening_\(Attachments\)/](https://gov.nv.gov/News/Emergency_Orders/2020/2020-05-07_-_COVID-19_Declaration_of_Emergency_Directive_018_-_Phase_One_Reopening_(Attachments)/).

25 ⁴⁵ State of Nevada Executive Department, *Declaration of Emergency Directive 021 – Phase Two Reopening Plan* (May
26 28, 2020), [https://gov.nv.gov/News/Emergency_Orders/2020/2020-05-28_-_COVID-19_Declaration_of_Emergency_Directive_021_-_Phase_Two_Reopening_Plan_\(Attachments\)/](https://gov.nv.gov/News/Emergency_Orders/2020/2020-05-28_-_COVID-19_Declaration_of_Emergency_Directive_021_-_Phase_Two_Reopening_Plan_(Attachments)/).

27 ⁴⁶ *Health and Safety Policies for Resumption of Gaming Operations*, NEV. GAMING CONTROL BD. (April 14, 2021),
28 <https://gaming.nv.gov/modules/showdocument.aspx?documentid=16731>.

1 limitations on the number of players at each table game and overall building occupancy; face
2 coverings for guests; employee training on COVID-19 safety and disinfection protocols; and social
3 distancing requirements.⁴⁷

4 77. On July 10, 2020, Governor Sisolak issued Declaration of Emergency Directive 027,
5 which again closed bars and taverns in seven counties, including Clark County, in response to the
6 continued spread of COVID-19 and which remained in effect until September 20, 2020.⁴⁸

7 78. On November 23, 2020, Governor Sisolak issued Declaration of Emergency
8 Directive 035, which limited gaming areas, retail stores, restaurants and bars, non-retail venues,
9 pools and aquatic facilities, and other establishments to 25% occupancy.⁴⁹

10 79. In February 2021, Nevada published its “Roadmap to Recovery,” which set forth a
11 timeline for the phased reopening of various businesses and social gatherings. Consistent with the
12 “Roadmap to Recovery,” on February 14, 2021, Governor Sisolak issued Declaration of Emergency
13 Directive 037, which eased Emergency Directive 035’s restrictions on gaming floors and indoor
14 food and beverage establishments, to allow for 35% occupancy, while also raising occupancy
15 restrictions at retail stores, pools and aquatic facilities to 50%.⁵⁰

16 80. On March 12, 2021, Governor Sisolak issued Declaration of Emergency Directive
17 041, which eased certain COVID-19 mitigation protocols and increased occupancy to 50% at
18 casinos and indoor food and beverage establishments, beginning March 15, 2021.⁵¹

19
20 ⁴⁷ *Id.*

21 ⁴⁸ State of Nevada Executive Department, *Declaration of Emergency Directive 027* (July 10, 2020),
22 [https://gov.nv.gov/News/Emergency_Orders/2020/2020-07-10_-_COVID-
19_Declaration_of_Emergency_Directive_027_\(Attachments\)/](https://gov.nv.gov/News/Emergency_Orders/2020/2020-07-10_-_COVID-19_Declaration_of_Emergency_Directive_027_(Attachments)/); *COVID-19 Mitigation and Management Task Force*
23 *approves Clark County and Elko County plans to reopen bars due to improved data and mitigation efforts*, STATE OF
24 NEV. (Sept. 17, 2020), [https://gov.nv.gov/News/Press/2020/COVID-
19_Mitigation_and_Management_Task_Force_approves_Clark_County_and_Elko_County_plans_to_reopen_bars_d
ue_to_improved_data_and_mitigation_efforts/](https://gov.nv.gov/News/Press/2020/COVID-19_Mitigation_and_Management_Task_Force_approves_Clark_County_and_Elko_County_plans_to_reopen_bars_due_to_improved_data_and_mitigation_efforts/).

25 ⁴⁹ State of Nevada Executive Department, *Declaration of Emergency for Directive 035* (Nov. 23, 2020),
26 [https://gov.nv.gov/News/Emergency_Orders/2020/2020-11-24_-_
COVID19_Emergency_Declaration_Directive_035/](https://gov.nv.gov/News/Emergency_Orders/2020/2020-11-24_-_COVID19_Emergency_Declaration_Directive_035/).

27 ⁵⁰ State of Nevada Executive Department, *Declaration of Emergency Directive 037* (Feb. 14, 2021),
28 <https://nvhealthresponse.nv.gov/wp-content/uploads/2021/02/Directive-037.pdf>.

⁵¹ State of Nevada Executive Department, *Declaration of Emergency Directive 041* (March 12, 2021),
<https://nvhealthresponse.nv.gov/wp-content/uploads/2021/03/Emergency-Directive-041.pdf>.

1 81. In connection with this directive, on April 14, 2021, the Nevada Gaming Control
2 Board issued revised “Health and Safety Policies for Resumption of Gaming Operations,” which
3 imposed occupancy limits of 50% in gaming areas, restrictions on the number of players per table
4 game, cleaning, disinfecting, and sanitizing guidelines, and employee training on proper cleaning
5 and disinfection protocols (among other required measures).⁵²

6 82. On May 3, 2021, after Wynn Resorts showed that over 88% of employees were fully
7 vaccinated against COVID-19, the Nevada Gaming Control Board finally allowed Wynn Resorts’
8 gaming floors to resume operations at full capacity.⁵³

9 **ii. The Massachusetts Closure and Stay at Home Orders**

10 83. On March 10, 2020, Massachusetts Governor Charlie Baker (“Governor Baker”)
11 issued Executive Order No. 591, declaring a state of emergency in Massachusetts relating to
12 COVID-19.⁵⁴ By that time, Massachusetts had 92 confirmed and presumptive cases of COVID-
13 19, including 41 in Middlesex County.⁵⁵

14 84. On March 12, 2020, the Massachusetts Gaming Commission (the “MGC”)
15 announced that an individual who visited Encore Boston Harbor on March 5, 2020 had tested
16 positive for COVID-19.⁵⁶

17 85. The next day, Governor Baker issued COVID-19 Order No. 2, prohibiting
18 gatherings of more than 250 people.⁵⁷

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21 _____
22 ⁵² *Health and Safety Policies for Resumption of Gaming Operations*, NEV. GAMING CONTROL BD. (April 14, 2021),
<https://gaming.nv.gov/modules/showdocument.aspx?documentid=16731>.

23 ⁵³ Bailey Schulz, *Wynn, Encore casinos can operate at 100 percent capacity*, LAS VEGAS REVIEW J. (May 3, 2021),
<https://www.reviewjournal.com/business/wynn-encore-casinos-can-operate-at-100-percent-capacity-2345782/>.

24 ⁵⁴ Office of the Governor, Commonwealth of Massachusetts, *Governor’s Declaration of Emergency* (March 10, 2020),
<https://www.mass.gov/doc/governors-declaration-of-emergency-march-10-2020-aka-executive-order-591/download>.

25 ⁵⁵ Massachusetts Department of Public Health, *Coronavirus Disease 2019 (COVID-19) Cases in MA* (March 10, 2020),
<https://www.mass.gov/doc/covid-19-cases-in-massachusetts-march-10-2020/download>.

26 ⁵⁶ *COVID-19 Updates and Alerts*, MASS. GAMING COMM’N, <https://massgaming.com/news-events/covid19/> (last
27 accessed on June 1, 2021).

28 ⁵⁷ Office of the Governor, Commonwealth of Massachusetts, *Order Prohibiting Gatherings of More Than 250 People*
(March 13, 2020), <https://www.mass.gov/doc/order-prohibiting-gatherings-of-more-than-250-people/download>.

1 86. On March 14, 2020, the MGC temporarily suspended operations at the state’s three
2 casinos, including Encore Boston Harbor.⁵⁸ By that time, Massachusetts now had 138 confirmed
3 and presumptive cases of COVID-19, including 65 in Middlesex County.⁵⁹

4 87. On March 23, 2020, Governor Baker issued COVID-19 Order No. 13, prohibiting
5 gatherings of more than 10 people, and temporarily closing the brick-and-mortar premises of
6 businesses and organizations not providing “COVID-19 Essential Services,” including various
7 operations of Encore Boston Harbor.⁶⁰ Additionally, Governor Baker directed the Massachusetts
8 Department of Public Health to issue a stay at home advisory outlining self-isolation and social
9 distancing protocols for residents.⁶¹

10 88. On March 25, 2020, April 3, 2020, May 1, 2020 and May 14, 2020, the MGC
11 extended the temporary suspension of operations at the state’s three casinos, including Encore
12 Boston Harbor.⁶² Pursuant to the MGC’s orders, Encore Boston Harbor remained closed.⁶³

13 89. Likewise, on March 31, 2020, April 28, 2020, and May 15, 2020, Governor Baker
14 issued COVID-19 Orders Nos. 21, 30, and 32, which extended the time period for which COVID-
15 19 Order No. 13’s restrictions would remain in place, including the temporary closure of businesses
16 not providing “COVID-19 Essential Services” including various operations of Encore Boston
17 Harbor.⁶⁴

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20 ⁵⁸ *COVID-19 Updates and Alerts*, MASS. GAMING COMM’N, <https://massgaming.com/news-events/covid19/> (last
21 accessed on June 1, 2021).

22 ⁵⁹ Massachusetts Department of Public Health, *Coronavirus Disease 2019 (COVID-19) Cases in MA* (March 14, 2020),
<https://www.mass.gov/doc/covid-19-cases-in-massachusetts-as-of-march-14-2020/download>.

23 ⁶⁰ Office of the Governor, Commonwealth of Massachusetts, *COVID-19 Order No. 13* (March 23, 2020),
<https://www.mass.gov/doc/march-23-2020-essential-services-and-revised-gatherings-order/download>.

24 ⁶¹ *Id.*

25 ⁶² *COVID-19 Updates and Alerts*, MASS. GAMING COMM’N, <https://massgaming.com/news-events/covid19/> (last
26 accessed on June 1, 2021).

27 ⁶³ *Updates*, ENCORE BOSTON HARBOR, <https://encorebostoninfo.com/> (last accessed on June 1, 2021).

28 ⁶⁴ Office of the Governor, Commonwealth of Massachusetts, *COVID-19 Order No. 21* (March 31, 2020),
<https://www.mass.gov/doc/march-31-2020-essential-services-extension-order/download>; *COVID-19 Order No. 30*
(April 28, 2020), <https://www.mass.gov/doc/signed-second-extension-of-essential-services-order/download>; *COVID-19*
Order No. 32 (May 15, 2020), <https://www.mass.gov/doc/may-15-2020-24-hour-extension-order/download>.

1 90. On May 18, 2020, Governor Baker released the “Reopening Massachusetts” plan, a
2 report issued by the state’s Reopening Advisory Board, which set forth a four-stage plan for the
3 reopening of businesses and activities within Massachusetts.⁶⁵

4 91. Under the “Reopening Massachusetts” plan, Governor Baker announced that
5 Massachusetts anticipated allowing casinos to reopen under Phase III of the plan, subject to strict
6 compliance with restrictions, safety precautions, and capacity limitations designed to protect
7 against the spread of COVID-19. Nightclubs and other large venues would not be allowed to open
8 until Phase IV, which would occur once there was “full resumption of activity.”⁶⁶

9 92. On July 2, 2020, following the implementation of “Reopening Massachusetts”
10 Phase I in May 2020 and Phase II in June 2020, Governor Baker issued COVID-19 Order No. 43,
11 which implemented Step 1 of Phase III of the plan allowing for the reopening of casinos, provided
12 they complied with all COVID-19-related safety protocols.”⁶⁷

13 93. That same day, the MGC vacated its orders temporarily suspending operations of
14 the state’s three casinos, thereby allowing for their reopening subject to strict compliance with the
15 MGC’s newly-drafted “Minimum Requirements for the Initial Phase 3 Opening of Gaming
16 Establishments” (the “Reopening Requirements”).⁶⁸

17 94. The MGC’s Reopening Requirements include detailed COVID-19-related
18 guidelines and protocols regarding cleaning and sanitization, social distancing, guest screening,
19 capacity limits and reporting measures, among others. The requirements included, for example,
20 frequent cleaning and sanitization of all gaming equipment and devices, installation of plexiglass
21 dividers at slot machines and table games, minimum distancing requirements between slot

22 ⁶⁵ Office of the Governor, Commonwealth of Massachusetts, *Reopening Massachusetts* (May 18, 2020),
23 <https://www.mass.gov/doc/reopening-massachusetts/download>.

24 ⁶⁶ *Id.*; see also Office of the Governor, Commonwealth of Massachusetts, *COVID-19 Order No. 33* (May 18, 2020),
<https://www.mass.gov/doc/may-18-2020-re-opening-massachusetts-order/download>; *COVID-19 Order No. 37* (June
25 6, 2020), <https://www.mass.gov/doc/june-6-2020-phase-ii-reopening/download>.

26 ⁶⁷ See Young-Jin Kim, *Massachusetts to Enter Phase 3 of Reopening Process Monday, Baker Says*, NBC BOSTON (July
27 22, 2020), <https://www.nbcboston.com/news/local/mass-gov-baker-to-provide-coronavirus-update-4/2152686/>.

28 ⁶⁸ *COVID-19 Updates and Alerts*, MASS. GAMING COMM’N, <https://massgaming.com/news-events/covid19/> (last
accessed on June 1, 2021); MGC Communications, *The Commission Approves Detailed Health and Safety
Requirements for Casino Reopening* (June 23, 2020), [https://massgaming.com/blog-post/the-commission-approves-
detailed-health-and-safety-requirements-for-casino-reopening/](https://massgaming.com/blog-post/the-commission-approves-detailed-health-and-safety-requirements-for-casino-reopening/).

1 machines, no more than three player positions at each blackjack-style table, limitations on food and
2 alcohol service, and adherence to a capacity limit calculated by a formula that equated to
3 approximately 40% capacity.⁶⁹ In addition, the Reopening Requirements strictly prohibited any
4 craps, poker and roulette “until further notice.”⁷⁰

5 95. Prior to reopening and in compliance with the Reopening Requirements, Encore
6 Boston Harbor submitted to the MGC a detailed plan for combatting the spread of COVID-19 at its
7 property, which included, among other measures: cleaning and sanitizing guidelines; face coverings
8 for guests; hand sanitizer at points of entry and throughout the gaming floor; occupancy limits; and
9 social distancing protocols.⁷¹ As required by the Reopening Requirements, Encore Boston Harbor
10 identified and worked with “an individual with expert qualifications in the fields of public health
11 and/or epidemiology to develop and approve its Plan.”⁷²

12 96. Even after casinos were allowed to re-open, Governor Baker and the MGC
13 continued to issue COVID-19-related orders that restricted Encore Boston Harbor’s operations.

14 97. For example, on July 24, 2020, Governor Baker issued COVID-19 Order No. 45
15 requiring all individuals traveling to Massachusetts to quarantine for 14 days, unless coming from
16 certain designated “lower-risk” states or having proof of a negative COVID-19 test within 72 hours
17 before arrival.⁷³

18 98. On October 8, 2020, the MGC issued an order allowing for the reintroduction of
19 roulette, subject to detailed COVID-19-related health and safety requirements, including, but not
20 limited to: limits on the number of roulette tables permitted and the number of players per table;

23 ⁶⁹ Massachusetts Gaming Commission Investigation and Enforcement Bureau, *Minimum Requirements for the Initial*
24 *Phase 3 Opening of Gaming Establishments* (June 23, 2020), [https://massgaming.com/wp-content/uploads/Reopening-](https://massgaming.com/wp-content/uploads/Reopening-Minimum-Standards-06.23.20.pdf)
25 [Minimum-Standards-06.23.20.pdf](https://massgaming.com/wp-content/uploads/Reopening-Minimum-Standards-06.23.20.pdf).

26 ⁷⁰ *Id.*

27 ⁷¹ *Id.*

28 ⁷² *Id.*

⁷³ Office of the Governor, Commonwealth of Massachusetts, *COVID-19 Order No. 45* (July 24, 2020),
<https://www.mass.gov/doc/july-24-2020-travel-order-pdf/download>.

1 plexiglass dividers between players; and social distancing and sanitization protocols.⁷⁴ Despite the
2 addition of roulette gaming positions, no increase to overall capacity limits was allowed.⁷⁵

3 99. On November 5, 2020, in connection with the Massachusetts Department of Public
4 Health's Stay at Home Advisory, Governor Baker issued COVID-19 Order No. 53 requiring
5 casinos, restaurants and other businesses to close each day from 9:30 p.m. to 5:00 a.m.⁷⁶ That same
6 day, the MGC supplemented its Reopening Requirements to adhere to the Governor's order
7 requiring early closing and limited hours for the state's gaming establishments.⁷⁷ This mandatory
8 night-time closing remained in effect until January 21, 2021.⁷⁸

9 100. On December 22, 2020, Governor Baker issued COVID-19 Order No. 62 reducing
10 capacity at casinos, restaurants, and retail businesses to 25%.⁷⁹ That same day, the MGC limited
11 gaming establishments to 25% capacity, including workers and staff.⁸⁰ The 25% capacity limit
12 remained in place until February 8, 2021, at which time the 40% capacity limit was reinstated.⁸¹

13 101. On March 11, 2021, the MGC issued an order allowing for the reintroduction of
14 craps and a fourth player position at blackjack-style tables, subject to detailed COVID-19-related

15 ⁷⁴ *COVID-19 Updates and Alerts*, MASS. GAMING COMM'N, <https://massgaming.com/news-events/covid19/> (last
16 accessed on June 1, 2021); Massachusetts Gaming Commission Investigation and Enforcement Bureau, *Minimum
17 Requirements for the Reintroduction of Roulette at the Category 1 Gaming Establishments* (October 8, 2020),
[https://massgaming.com/wp-content/uploads/Minimum-Requirements-for-the-Reintroduction-of-Roulette-at-
18 Category-1-Gaming-Establishments-10.8.20.pdf](https://massgaming.com/wp-content/uploads/Minimum-Requirements-for-the-Reintroduction-of-Roulette-at-Category-1-Gaming-Establishments-10.8.20.pdf).

19 ⁷⁵ *Id.*

20 ⁷⁶ Office of the Governor, Commonwealth of Massachusetts, *COVID-19 Order No. 53* (November 2, 2020),
<https://www.mass.gov/doc/covid-19-order-53/download>.

21 ⁷⁷ *COVID-19 Updates and Alerts*, MASS. GAMING COMM'N, <https://massgaming.com/news-events/covid19/> (last
22 accessed on June 1, 2021).

23 ⁷⁸ Office of the Governor, Commonwealth of Massachusetts, *COVID-19 Order No. 62* (January 21, 2021),
<https://www.mass.gov/doc/covid-19-order-62/download>.

24 ⁷⁹ Office of the Governor, Commonwealth of Massachusetts, *COVID-19 Order No. 59* (December 22, 2020),
25 <https://www.mass.gov/doc/covid-19-order-59/download>; see also *COVID-19 Order No. 60* (January 7, 2021),
26 <https://www.mass.gov/doc/covid-19-order-60/download>.

27 ⁸⁰ *COVID-19 Updates and Alerts*, MASS. GAMING COMM'N, <https://massgaming.com/news-events/covid19/> (last
28 accessed on June 1, 2021); Massachusetts Gaming Commission Investigation and Enforcement Bureau, *Requirements
to Ensure Compliance with COVID-19 Order No. 59, Temporarily Applying Further Capacity Restrictions to Statewide
COVID-19 Safety Rules* (December 22, 2020), [https://massgaming.com/wp-content/uploads/Requirements-to-Ensure-
Compliance-with-COVID-19-Order-No.-59-Order-Temporarily-Applying-Further-Capacity-Restrictions-to-
Statewide-COVID-19-Safety-Rules-12.22.20.pdf](https://massgaming.com/wp-content/uploads/Requirements-to-Ensure-Compliance-with-COVID-19-Order-No.-59-Order-Temporarily-Applying-Further-Capacity-Restrictions-to-Statewide-COVID-19-Safety-Rules-12.22.20.pdf).

⁸¹ Office of the Governor, Commonwealth of Massachusetts, *COVID-19 Order No. 62* (January 21, 2021),
<https://www.mass.gov/doc/covid-19-order-62/download>.

1 health and safety requirements, including, but not limited to: social distancing measures; plexiglass
2 dividers between players; and sanitization protocols.⁸² The MGC continued to limit overall casino
3 capacity to 40%, despite the increase in player positions and the reintroduction of craps.⁸³

4 102. Only recently, on May 29, 2021, did Governor Baker lift all of the state's COVID-
5 19-related restrictions and permit operating capacity to increase to 100% for all industries,
6 including casinos.⁸⁴ Similarly, the MGC rescinded its COVID-19-related orders imposing
7 restrictions and operation requirements on the state's casinos, effective May 29, 2021.⁸⁵

8 F. The Effect of the COVID-19 Pandemic on Wynn Resorts' Insured Locations

9 103. As described above, due to the presence of, and attendant physical loss and damage
10 to property caused by, COVID-19, state and local authorities ordered closures in every jurisdiction
11 in which Wynn Resorts' insured properties are located.

12 104. As a result of these Closure Orders and related Stay at Home Orders, various
13 operations at Wynn Resorts' insured locations were closed from mid-March 2020 through early
14 June 2020, in the case of Wynn Las Vegas and Encore Las Vegas, and mid-March 2020 through
15 mid-July 2020, in the case of Encore Boston Harbor.

16 105. Throughout the COVID-19 pandemic, Wynn Resorts' insured locations have also
17 sustained physical loss and/or damage caused by the presence of COVID-19, which corrupted,
18 physically altered, and rendered such property dangerous, unsafe, unusable, uninhabitable and unfit
19 for its ordinary and intended use.

20
21 ⁸² *COVID-19 Updates and Alerts*, MASS. GAMING COMM'N, <https://massgaming.com/news-events/covid19/> (last
22 accessed on June 1, 2021); Massachusetts Gaming Commission Investigation and Enforcement Bureau, *Minimum*
23 *Requirements for (1) Expanding Blackjack-Style Tables to Include a 4th Player Position and (2) the Reintroduction of*
24 *Craps at the Category 1 Gaming Establishments* (March 11, 2021), [https://massgaming.com/wp-](https://massgaming.com/wp-content/uploads/Minimum-Requirements-for-Expanding-Blackjack-Style-Tables-and-the-Reintroduction-of-Craps.pdf)
[content/uploads/Minimum-Requirements-for-Expanding-Blackjack-Style-Tables-and-the-Reintroduction-of-](https://massgaming.com/wp-content/uploads/Minimum-Requirements-for-Expanding-Blackjack-Style-Tables-and-the-Reintroduction-of-Craps.pdf)
[Craps.pdf](https://massgaming.com/wp-content/uploads/Minimum-Requirements-for-Expanding-Blackjack-Style-Tables-and-the-Reintroduction-of-Craps.pdf).

25 ⁸³ *Id.*

26 ⁸⁴ Office of Governor Charlie Baker and Lt. Governor Karyn Polito, *Baker-Polito Administration to Lift COVID*
27 *Restrictions May 29, State to Meet Vaccination Goal by Beginning of June* (May 17, 2021),
[https://www.mass.gov/news/baker-polito-administration-to-lift-covid-restrictions-may-29-state-to-meet-vaccination-](https://www.mass.gov/news/baker-polito-administration-to-lift-covid-restrictions-may-29-state-to-meet-vaccination-goal-by-beginning-of-june)
[goal-by-beginning-of-june](https://www.mass.gov/news/baker-polito-administration-to-lift-covid-restrictions-may-29-state-to-meet-vaccination-goal-by-beginning-of-june).

28 ⁸⁵ *COVID-19 Updates and Alerts*, MASS. GAMING COMM'N, <https://massgaming.com/news-events/covid19/> (last
accessed on June 1, 2021).

1 106. However, these conditions were not unique to Wynn Resorts’ insured locations and
2 were instead present throughout the Policies’ expressly insured vicinity—*i.e.*, at locations away
3 from, but within a five-statute mile vicinity of Wynn Resorts’ insured locations (and beyond).

4 107. Nevertheless, during the period that its operations were shut down due to the Closure
5 Orders, Wynn Resorts proactively enlisted a team of medical and public health experts to determine
6 whether and, if so, the manner in which, Wynn Resorts’ insured locations could be safely reopened.
7 Following the guidance of these experts and the CDC, Wynn Resorts implemented rigorous health
8 and safety protocols and modifications to its insured locations to facilitate their safe reopening and
9 to mitigate the physical loss or damage to property caused by COVID-19, which the NGCB Policy
10 and the MGC’s Reopening Requirements (discussed above) mirrored.

11 108. As part of and/or in addition to the reduced capacity, reduced hours, and other
12 significant restrictions imposed by the reopening orders of state and local authorities (discussed
13 above), these protocols and mitigation measures included, by way of example, and without
14 limitation: (i) limiting the number of seats per table game; (ii) slot machine spacing; (iii)
15 temperature checks; (iv) mask protection; (v) physical distancing; (vi) suspension of certain
16 entertainment and nightlife offerings; (vii) increased cleaning and sanitation protocols; (viii)
17 preparation of all venues with PPE; (ix) optimized HVAC systems; (x) flushing of all water
18 systems; and (xi) health screening for employees and guests.

19 109. In addition to these efforts, Wynn Las Vegas also established an on-site rapid
20 COVID-19 testing facility, which provides same-day PCR tests to Wynn Resorts guests and
21 employees, and is designed to help facilitate a return to more normal business activities, such as
22 conventions and other mass gatherings. Wynn Resorts also established a round-the-clock, multi-
23 department contact tracing team to ensure that any employee who tests positive for COVID-19
24 receives detailed, thorough and personalized service to ensure that they and their families return to
25 full health and to reduce the risk of community spread.

26 110. Accordingly, the physical loss and/or damage to property caused by the prevalence
27 of COVID-19 at Wynn Resorts’ insured locations and locations within the Policies’ expressly
28 insured five-mile vicinity thereof, together with the impact of the Closure Orders on Wynn Resorts’

1 operations, has resulted in a direct and immediate business income loss to Wynn Resorts. Wynn
2 Resorts' estimated COVID-19-related losses total at least \$595 million and will continue to accrue
3 until all of Wynn Resorts' insured locations resume normal operations.

4 G. The Factory Mutual "All Risks" Insurance Policies

5 111. In exchange for substantial premium, Wynn Resorts purchased commercial property
6 insurance from Factory Mutual for the April 15, 2019 to April 15, 2020 and April 15, 2020 to April
7 15, 2021 policy periods in the form of Mutual Corporation Non-Assessable Policy Nos. 1048495
8 and 1064616 (defined above as the "Policies," true and correct copies of which are attached to the
9 concurrently-filed appendix of exhibits as Exhibits 1 and 2).

10 112. As set forth in the "Schedule of Locations" included as Appendix A to the Policies,
11 the Policies insure various locations owned by Wynn Resorts and its subsidiaries, including, but
12 not limited to, Wynn Las Vegas, Encore Las Vegas, and Encore Boston Harbor. (Ex. 1 at WR_FM
13 Policies_079-80; Ex. 2 at WR_FM Policies_175-177).

14 113. The Policies provide a maximum per "occurrence" limit of liability of \$2.25 billion
15 for "all coverages involved," with certain of their coverage sections, but not others, subject to
16 sublimits and/or time limits. (Ex. 1 at WR_FM Policies_009-13; Ex. 2 at WR_FM Policies_105-
17 108).

18 114. In addition to certain location-specific deductibles, claims under the Policies are
19 subject to a deductible of "\$250,000 combined all coverages, per **occurrence**."⁸⁶ (Ex. 1 at WR_FM
20 Policies_013; Ex. 2 at WR_FM Policies_109)

21 115. The Policies define the term "**occurrence**," in relevant part, as "the sum total of all
22 loss or damage of the type insured, including any insured TIME ELEMENT loss, arising out of or
23 caused by one discrete event of physical loss or damage...." (Ex. 1 at WR_FM Policies_076; Ex.
24 2 at WR_FM Policies_171).

25
26
27
28 ⁸⁶ Unless otherwise noted, bolded or capitalized terms in this Complaint appear in that manner in the Policies.

1 **i. The Policies’ “Property Damage” Coverage**

2 116. The Policies’ insuring agreement states that: “This Policy covers property, as
3 described in this Policy, against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as
4 hereinafter excluded, while located as described in this Policy.” (Ex. 1 at WR_FM Policies_001,
5 008; Ex. 2 at WR_FM Policies_096, 103).

6 117. Accordingly, if the Policies do not expressly exclude a particular risk of physical
7 loss or damage to property, then that non-excluded risk triggers coverage.

8 118. The Policies cover both the risks of “physical loss” and “damage” to Wynn Resorts’
9 property.

10 119. As used in the Policies, the term “physical loss” is separate, distinct, and has an
11 independent meaning from the term “damage.”

12 120. The Policies do not define the terms “physical,” “loss” or “damage,” nor do the
13 Policies define the phrase “physical loss or damage.”

14 121. In addition to providing broad “all risks” coverage, the Policies’ “Property Damage”
15 coverage section also contains several “Additional Coverages for insured physical loss or damage,”
16 including for “Communicable Disease Response,” “Expediting Costs,” and “Protection and
17 Preservation of Property.” (Ex. 1 at WR_FM Policies_024, 029-30, 032, 037-38; Ex. 2 at WR_FM
18 Policies_119, 124-125, 127, 132-133).

19 122. The Policies state that the “Additional Coverages” are subject to the Policies’
20 “applicable exclusions and deductibles, all as shown in this section and elsewhere in this Policy.”
21 (Ex. 1 at WR_FM Policies_024; Ex. 2 at WR_FM Policies_119).

22 123. The Policies’ “Communicable Disease Response” additional coverage provides:

23 If a **location** owned, leased or rented by the Insured has the actual not suspected presence
24 of **communicable disease** and access to such **location** is limited, restricted or prohibited
25 by:

26 1) an order of an authorized governmental agency regulating the actual not suspected
27 presence of **communicable disease**; or

28 2) a decision of an Officer of the Insured as a result of the actual not suspected presence of
communicable disease,

1 this Policy covers the reasonable and necessary costs incurred by the Insured at such
2 **location** with the actual not suspected presence of **communicable disease** for the:

3 1) cleanup, removal and disposal of the actual not suspected presence of **communicable**
4 **diseases** from insured property; and

5 2) actual costs of fees payable to public relations services or actual costs of using the
6 Insured’s employees for reputation management resulting from the actual not suspected
7 presence of **communicable diseases** on insured property.

8 This Additional Coverage will apply when access to such **location** is limited, restricted or
9 prohibited in excess of 48 hours.

10 This Additional Coverage does not cover any costs incurred due to any law or ordinance
11 with which the Insured was legally obligated to comply prior to the actual not suspected
12 presence of **communicable disease**.

13 (Ex. 1 at WR_FM Policies_029-30; Ex. 2 at WR_FM Policies_124-125).

14 124. The Policies define “**location**” to include any location specified in the Policies’
15 “Schedule of Locations,” or any building “bounded on all sides by public streets, clear land space
16 or open waterways....” (Ex. 1 at WR_FM Policies_075; Ex. 2 at WR_FM Policies_170).

17 125. The Policies define the term “**communicable disease**” as: “disease which is:

18 A. transmissible from human to human by direct or indirect contact with an affected
19 individual or the individual’s discharges, or

20 B. Legionellosis.” (Ex. 1 at WR_FM Policies_073; Ex. 2 at WR_FM Policies_168).

21 126. The Policies’ “Communicable Disease Response” additional coverage shares a
22 \$1 million aggregate sublimit with the “Interruption by Communicable Disease” coverage section,
23 which is part of the Policies’ “Time Element” coverage (described below).⁸⁷ (Ex. 1 at WR_FM
24 Policies_010; Ex. 2 at WR_FM Policies_106).

25 127. The Policies’ “Expediting Costs” additional coverage insures the “reasonable and
26 necessary costs incurred: 1) for the temporary repair of insured physical damage to insured
27 property; 2) for the temporary replacement of insured equipment suffering insured physical
28 damage; and 3) to expedite the permanent repair or replacement of such damaged property.” (Ex.
1 at WR_FM Policies_032; Ex. 2 at WR_FM Policies_127).

⁸⁷ The 2020-2021 Policy’s “Communicable Disease Response” additional coverage shares a \$10,000 aggregate sublimit with the “Interruption by Communicable Disease” coverage section.

1 128. The Policies’ “Expediting Costs” additional coverage is subject to a \$100 million
2 sublimit that is shared with the Policies’ “Extra Expense” coverage section, which is part of the
3 Policies’ “Time Element” coverage (described below). (Ex. 1 at WR_FM Policies_011; Ex. 2 at
4 WR_FM Policies_106).

5 129. The Policies’ “Protection and Preservation of Property” additional coverage insures
6 “reasonable and necessary costs incurred for actions to temporarily protect or preserve insured
7 property; provided such actions are necessary due to actual, or to prevent immediately impending,
8 insured physical loss or damage to such insured property.” (Ex. 1 at WR_FM Policies_037; Ex. 2
9 at WR_FM Policies_132).

10 **ii. The Policies’ “Time Element” Coverage**

11 130. In addition to its “Property Damage” coverage, the Policies also afford broad “Time
12 Element” coverage, which insures Wynn Resorts’ lost earnings “directly resulting from physical
13 loss or damage of the type insured” to Wynn Resorts’ property. (Ex. 1 at WR_FM Policies_044;
14 Ex. 2 at WR_FM Policies_139).

15 131. The Policies’ “Time Element” coverage section also “covers expenses reasonably
16 and necessarily incurred by the Insured to reduce the loss otherwise payable under this section of
17 this Policy.” (Ex. 1 at WR_FM Policies_045; Ex. 2 at WR_FM Policies_140).

18 132. The Policies’ “Time Element” coverage section also includes “Extra Expense”
19 coverage, which is defined to include “extra expenses to temporarily continue as nearly **normal** as
20 practicable the conduct of the Insured’s business....” (Ex. 1 at WR_FM Policies_047; Ex. 2 at
21 WR_FM Policies_142).

22 133. The Policies’ “Time Element” coverage section also includes “Rental Insurance,”
23 covering:

- 24 1) the fair rental value of any portion of the property occupied by the Insured;
25 2) the income reasonably expected from rentals of unoccupied or unrented portions of such
26 property; and
27 3) the rental income from the rented portions of such property according to bona fide leases,
28 contracts or agreements in force at the time of loss,

all not to include noncontinuing charges and expenses.

1 (Ex. 1 at WR_FM Policies_048; Ex. 2 at WR_FM Policies_143).

2 134. The Policies' "Time Element" coverage section also includes various "Coverage
3 Extensions," including, but not limited to, for:

- 4 ▪ "Civil or Military Authority";
- 5 ▪ "Continent Time Element Extended";
- 6 ▪ "Ingress/Egress";
- 7 ▪ "Attraction Property";
- 8 ▪ "Extended Period of Liability";
- 9 ▪ "Interruption by Communicable Disease"; and
- 10 ▪ "Protection and Preservation of Property Time Element."

11 (Ex. 1 at WR_FM Policies_051, 054-56, 058-63; Ex. 2 at WR_FM Policies_147, 149-151, 154-
12 158).

13 135. The Policies' "Civil or Military Authority" coverage extension provides:

14 This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the
15 Insured during the PERIOD OF LIABILITY if an order of civil or military authority limits,
16 restricts or prohibits partial or total access to an insured **location** provided such order is the
17 direct result of physical damage of the type insured at the insured **location** or within five
18 statute miles/eight kilometres of it.

19 For the purpose of this Extension only, State Gaming Control Board or Nevada Gaming
20 Commission will also be considered a civil authority.

21 (Ex. 1 at WR_FM Policies_054; Ex. 2 at WR_FM Policies_149).

22 136. The Policies' "Contingent Time Element Extended" coverage provides:

23 This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the
24 Insured during the PERIOD OF LIABILITY directly resulting from physical loss or damage
25 of the type insured to property of the type insured at **contingent time element locations**
26 located within the TERRITORY of this Policy.

27 As respects CONTINGENT TIME ELEMENT EXTENDED:

28 1) Time Element loss recoverable under this Extension is extended to include the following
TIME ELEMENT COVERAGE EXTENSIONS:

CIVIL OR MILITARY AUTHORITY
CONTINGENT TIME ELEMENT EXTENDED ...
EXTENDED PERIOD OF LIABILITY
INGRESS/EGRESS....

1 (Ex. 1 at WR_FM Policies_054-55; Ex. 2 at WR_FM Policies_150).

2 137. The Policies define “contingent time element location” to include:

3 A. any **location**:

4 1) of a direct customer, supplier, contract manufacturer or contract service provider to the
5 Insured;

6 2) of any company under a royalty, licensing fee or commission agreement with the Insured;

7 B. any **location** of a company that is a direct or indirect customer, supplier, contract
8 manufacturer or contract service provider to a **location** described in A1 above....

9 (Ex. 1 at WR_FM Policies_074; Ex. 2 at WR_FM Policies_169).

10 138. The Policies have a per “occurrence” sublimit for “Contingent Time Element
11 Extended” coverage of \$50 million. (Ex. 1 at WR_FM Policies_011; Ex. 2 at WR_FM
12 Policies_106).

13 139. The Policies’ coverage for “Ingress/Egress” provides:

14 This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the
15 Insured due to the necessary interruption of the Insured’s business due to partial or total
16 physical prevention of ingress to or egress from an insured **location**, whether or not the
17 premises or property of the Insured is damaged, provided that such prevention is a direct
18 result of physical damage of the type insured to property of the type insured.

19 (Ex. 1 at WR_FM Policies_055; Ex. 2 at WR_FM Policies_150-151).

20 140. The Policies’ Time Element coverage section also provides coverage for loss
21 suffered by Wynn Resorts in connection with physical loss or damage to an “Attraction Property”
22 as follows:

23 This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the
24 Insured during the PERIOD OF LIABILITY directly resulting from physical loss or damage
25 of the type insured to property of the type insured that attracts business to an insured
26 **location** and is within 1 statute mile/1.6 kilometres of the insured **location**, except this
27 coverage will apply to the McCarran International Airport.

28 (Ex. 1 at WR_FM Policies_058-59; Ex. 2 at WR_FM Policies_154).

141. The time limits for the Policies’ “Civil or Military Authority,” “Ingress/Egress,” and
“Attraction Property” coverage sections are 30 days. (Ex. 1 at WR_FM Policies_010-11; Ex. 2 at
WR_FM Policies_105-106).

142. The Policies’ “Time Element” coverage section also provides an “Extended Period
of Liability,” covering the reduction in sales resulting from the interruption of business “for such

1 additional length of time as would be required with the exercise of due diligence and dispatch to
2 restore the Insured’s business to the condition that would have existed had no loss happened....”
3 (Ex. 1 at WR_FM Policies_060; Ex. 2 at WR_FM Policies_156).

4 143. The Policies have an “Extended Period of Liability” of 365 days. (Ex. 1 at WR_FM
5 Policies_011; Ex. 2 at WR_FM Policies_106).

6 144. The Policies’ “Interruption by Communicable Disease” coverage extension
7 provides that:

8 If a **location** owned, leased or rented by the Insured has the actual not suspected presence
9 of **communicable disease** and access to such **location** is limited, restricted or prohibited
10 by:

- 11 1) an order of an authorized governmental agency regulating the actual not suspected
12 presence of **communicable disease**; or
13 2) a decision of an Officer of the Insured as a result of the actual not suspected
14 presence of **communicable disease**,

15 this Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the
16 Insured during the PERIOD OF LIABILITY at such **location** with the actual not suspected
17 presence of **communicable disease**.

18 This Extension will apply when access to such **location** is limited, restricted, or prohibited
19 in excess of 48 hours.

20 (Ex. 1 at WR_FM Policies_061-62; Ex. 2 at WR_FM Policies_157-158).

21 145. The Policies’ “Interruption by Communicable Disease” coverage extension is
22 subject to a time limit of one year and shares the \$1 million sublimit with the “Communicable
23 Disease Response” coverage provided in the “Property Damage” coverage section. (Ex. 1 at
24 WR_FM Policies_012; Ex. 2 at WR_FM Policies_107).⁸⁸

25 146. The Policies’ “Protection and Preservation of Property Time Element” coverage
26 extension provides that:

27 This Policy covers the Actual Loss Sustained by the Insured for a period of time not to
28 exceed 48 hours prior to and 48 hours after the Insured first taking reasonable action for the
temporary protection and preservation of property insured by this Policy provided such

⁸⁸ The 2020-2021 Policy’s “Interruption by Communicable Disease” coverage extension is subject to a time limit of one year and shares a \$10,000 aggregate sublimit with the “Communicable Disease Response” coverage provided in the “Property Damage” coverage section.

1 action is necessary to prevent immediately impending insured physical loss or damage to
2 such insured property.

3 (Ex. 1 at WR_FM Policies_063; Ex. 2 at WR_FM Policies_158).

4 **H. Wynn Resorts' COVID-19 Losses Trigger Multiple Coverage Sections of the Factory**
5 **Mutual Insurance Policies**

6 147. In addition to triggering the Policies' "all risks" property coverage, Wynn Resorts'
7 COVID-19 losses also trigger multiple "Additional Coverages," "Time Element" coverage, and
8 "Time Element Coverage Extensions" provided under the Policies.

9 **i. Wynn Resorts' COVID-19 Losses Trigger the Policies' "Property Damage"**
10 **Coverage**

11 148. The presence of COVID-19 is an insured risk of "physical loss or damage" under
12 the Policies.

13 149. The presence of COVID-19 at Wynn Resorts' insured locations has caused physical
14 loss and damage to Wynn Resorts' property by corrupting, physically altering, and rendering such
15 property dangerous, unsafe, uninhabitable, and unfit for its ordinary and intended use—that is, as
16 predominantly indoor venues for persons to congregate at and patronize for gaming, entertainment,
17 accommodation, and dining.

18 150. Accordingly, the Policies' "all risks" property coverage has been triggered and
19 Wynn Resorts' physical loss and damage to its property caused by the presence of COVID-19 is
20 covered by the Policies up to the full \$2.25 billion per "occurrence" limits provided by each of the
21 Policies.

22 **ii. Wynn Resorts' COVID-19 Losses Trigger the Policies' "Communicable**
23 **Disease" Additional Coverage**

24 151. COVID-19 qualifies as a "communicable disease" under the Policies.

25 152. The actual presence of COVID-19 has been confirmed at Wynn Resorts' insured
26 locations.

27 153. Wynn Resorts' insured locations have incurred costs for the cleanup, removal and
28 disposal of the actual presence of COVID-19 from insured property.

1 154. The actual presence of COVID-19 at Wynn Resorts’ insured locations has also
2 resulted in decisions by Wynn Resorts and/or the issuance of orders by authorized governmental
3 agencies regulating communicable disease that limited, restricted and/or prohibited access to such
4 locations, resulting in losses to Wynn Resorts.

5 155. These costs and losses are covered under the Policies’ “Communicable Disease
6 Response” and “Interruption by Communicable Disease” additional coverage.

7 156. However, the “Communicable Disease Response” and “Interruption by
8 Communicable Disease” additional coverage does not apply to limit any other coverage available
9 under the Policies, including, but not limited to, those triggered by physical loss or damage caused
10 by COVID-19 away from Wynn Resorts’ insured locations.

11 **iii. Wynn Resorts’ COVID-19 Losses Trigger the Policies’ “Protection and
12 Preservation of Property” Additional Coverage**

13 157. The risk and actual presence of COVID-19 at Wynn Resorts’ insured locations has
14 threatened and continues to threaten to cause physical loss or damage to Wynn Resorts’ insured
15 property.

16 158. The threatened and actual physical loss or damage to Wynn Resorts’ insured
17 property caused by COVID-19 at Wynn Resorts’ insured locations has required Wynn Resorts to
18 take reasonable and necessary action to temporarily protect or preserve its insured property, the
19 costs and resultant “Time Element” loss from which trigger coverage under the Policies’
20 “Protection and Preservation of Property” and “Protection and Preservation of Property Time
21 Element” additional coverage.

22 **iv. Wynn Resorts’ COVID-19 Losses Trigger the Policies’ “Time Element”
23 and “Extra Expense” Coverage**

24 159. Wynn Resorts has suffered “Time Element” loss as a direct result of the physical
25 loss and damage to its insured property caused by the presence of COVID-19 at its insured
26 locations.

27 160. This loss triggers coverage under the Policies’ “Time Element” coverage up to the
28 full \$2.25 billion per “occurrence” limits provided under each of the Policies.

1 161. The physical loss or damage caused by COVID-19 at its insured locations has also
2 required Wynn Resorts to incur reasonable and necessary extra expenses to temporarily continue
3 as nearly as normal as practicable the conduct of Wynn Resorts’ business.

4 162. Such expenses are beyond those that would have normally been incurred in
5 conducting Wynn Resorts’ business absent the physical loss or damage caused by COVID-19 at its
6 insured locations, and trigger coverage under the Policies’ “Extra Expenses” coverage, subject to
7 the Policies’ applicable limits.

8 **v. Wynn Resorts’ COVID-19 Losses Trigger the Policies’ “Expediting Costs”**
9 **Additional Coverage**

10 163. The physical loss or damage caused by COVID-19 at its insured locations has also
11 required Wynn Resorts to incur reasonable and necessary costs for the temporary repair or
12 replacement and/or to expedite the permanent repair or replacement of such damaged property.

13 164. Such costs trigger coverage under the Policies’ “Expediting Costs” coverage,
14 subject to the Policies’ applicable limits.

15 **vi. Wynn Resorts’ COVID-19 Losses Trigger the Policies’ “Civil or Military**
16 **Authority” Coverage**

17 165. The physical damage caused by the presence of COVID-19 at property located at or
18 within five statute miles of Wynn Resorts’ insured locations has directly resulted in the issuance of
19 orders from civil authorities limiting, restricting and/or prohibiting partial or total access to Wynn
20 Resorts’ insured locations.

21 166. Wynn Resorts has accordingly sustained and will continue to sustain “Time
22 Element” loss as a direct result of such civil authority orders limiting, restricting and/or prohibiting
23 partial or total access to Wynn Resorts’ insured locations, which triggers coverage under the
24 Policies’ “Civil or Military Authority” coverage, subject to the Policies’ applicable limits.

1 **vii. Wynn Resorts’ COVID-19 Losses Trigger the Policies’ “Contingent Time**
2 **Element Extended” Coverage**

3 167. The presence of COVID-19 at the locations of Wynn Resorts’ direct and indirect
4 customers, suppliers, contract manufacturers and/or contract service providers has caused physical
5 loss or damage to property at such locations.

6 168. In addition, the presence of COVID-19 at the locations of companies under a
7 royalty, licensing fee and/or commission agreement with Wynn Resorts has caused physical loss
8 or damage to property at such locations.

9 169. Wynn Resorts has accordingly sustained and will continue to sustain “Time
10 Element” loss as a result of the physical loss or damage to property at the locations described in the
11 preceding two paragraphs, triggering coverage under the Policies’ “Contingent Time Element
12 Extended” coverage, subject to the Policies’ applicable limits.

13 **viii. Wynn Resorts’ COVID-19 Losses Trigger the Policies’ “Ingress/Egress”**
14 **Coverage**

15 170. The physical damage caused by the presence of COVID-19 at property located at or
16 near Wynn Resorts’ insured locations has directly resulted in the partial and/or total physical
17 prevention of ingress to or egress from Wynn Resorts’ insured locations.

18 171. The necessary interruption of Wynn Resorts’ business due to such partial and/or
19 total physical prevention of ingress to or egress from Wynn Resorts’ insured locations has caused
20 Wynn Resorts to sustain “Time Element” loss and “Extra Expense” triggering coverage under the
21 Policies’ “Ingress/Egress” coverage, subject to the Policies’ applicable limits.

22 **ix. Wynn Resorts’ COVID-19 Losses Trigger the Policies’ “Attraction**
23 **Property” Coverage**

24 172. The presence of COVID-19 has also caused and is continuing to cause physical loss
25 and damage to property away from Wynn Resorts’ insured locations, including property located
26 within 1 statute mile of Wynn Resorts’ insured locations that attracts business to Wynn Resorts’
27 insured locations.

1 173. As a direct result of such physical loss and damage to the properties that attract
2 business to Wynn Resorts' insured locations, Wynn Resorts has sustained and will continue to
3 sustain "Time Element" loss and "Extra Expense" triggering coverage under the Policies'
4 "Attraction Property" coverage, subject to the Policies' applicable limits.

5 **I. No Policy Exclusion Applies to Wynn Resorts' COVID-19 Losses**

6 174. A communicable disease, such as COVID-19, is a covered, not an excluded, risk of
7 physical loss or damage under the Policies.

8 175. A pandemic, such as the COVID-19 pandemic, is a covered, not an excluded, risk
9 of physical loss or damage under the Policies.

10 176. No exclusion in the Policies applies to preclude or limit coverage for Wynn Resorts'
11 claimed COVID-19 losses.

12 **i. The Policies' So-Called "Contamination Exclusion" Does Not Apply to**
13 **Wynn Resorts' COVID-19 Losses**

14 177. Factory Mutual has contended that the Policies' so-called "Contamination
15 Exclusion" applies to limit or bar coverage for Wynn Resorts' COVID-19 losses. Factory Mutual
16 is incorrect.

17 178. The Policies' "Contamination Exclusion" states, in relevant part, that:

18 This Policy excludes the following unless directly resulting from other physical damage not
19 excluded by this Policy:

- 20 1) **contamination**, and any cost due to **contamination** including the inability to use or
21 occupy property or any cost of making property safe or suitable for use or occupancy.
22 If **contamination** due only to the actual not suspected presence of **contaminant(s)**
23 directly results from other physical damage not excluded by this Policy, then only
24 physical damage caused by such **contamination** may be insured.

(Ex. 1 at WR_FM Policies_021; Ex. 2 at WR_FM Policies_116).

25 179. The Policies define "**contaminant**" as "anything that causes **contamination**" and
26 define "**contamination**" as: "any condition of property due to the actual or suspected presence of
27 any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or
28 pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold or
mildew." (Ex. 1 at WR_FM Policies_073; Ex. 2 at WR_FM Policies_168).

1 180. For various reasons, the “Contamination Exclusion” does not apply to Wynn
2 Resorts’ COVID-19 losses. Among the reasons, Factory Mutual has acknowledged that COVID-
3 19 is a “**communicable disease**” as that term is defined in the Policies. The “Contamination
4 Exclusion” does not include or use the defined term “**communicable disease**” anywhere in the
5 exclusion or in the definition of “**contamination**.”

6 181. Indeed, the “Contamination Exclusion” cannot apply to anything defined as
7 “**communicable disease**.” Given that the Policies’ “Contamination Exclusion” and
8 “Communicable Disease” coverage do not reference one another, were the “Contamination
9 Exclusion” to apply to “**communicable disease**,” the Policies’ “Communicable Disease” coverage
10 would be vitiated and rendered illusory.

11 182. Instead, and as at least one Nevada court has already determined, so-called
12 “contamination” exclusions, like the one Factory Mutual drafted in the Policies at issue here, apply
13 to traditional forms of environmental and industrial pollution, not to naturally occurring
14 catastrophes such as the COVID-19 pandemic. To the extent that COVID-19 has been present at
15 Wynn Resorts’ insured locations or the Policies’ expressly insured five-mile vicinity thereof, its
16 presence has been the result of a natural process, as opposed to an act of pollution or contamination.
17 Wynn Resorts accordingly reasonably expected and understood that the Policies’ “Contamination
18 Exclusion” would apply only to polluting activities, as opposed to natural catastrophes such as the
19 COVID-19 pandemic.

20 183. Moreover, the “Contamination Exclusion” excludes only contamination and
21 associated “costs” incurred as a direct result of contamination, not “loss” or “damage,” such as the
22 “Time Element” loss and extra expenses claimed by Wynn Resorts at issue in this action.

23 **J. Factory Mutual’s Wrongful Breach of Its “All Risks” Insurance Policies**

24 184. Wynn Resorts timely reported its COVID-19 losses to Factory Mutual under the
25 Policies on June 1, 2020.

26 185. In response, as part of its broader bad faith strategy to avoid paying losses to its
27 policyholders, Factory Mutual began a concerted effort to repeatedly and improperly attempt to
28

1 limit the scope of coverage for Wynn Resorts' COVID-19 claim to the Policies' sublimited
2 "Communicable Disease Response" and "Interruption by Communicable Disease" coverage.

3 186. Specifically, by letter dated June 15, 2020, Factory Mutual asserted that "COVID-
4 19 meets the definition of a communicable disease under the Policy," but referred Wynn Resorts
5 only to the Policies' sublimited "Communicable Disease Response and "Interruption by
6 Communicable Disease" coverage in a bad faith effort to misdirect its policyholder and conceal the
7 other available coverage afforded by its Policies.

8 187. By letter dated September 14, 2020, Factory Mutual again asserted that "COVID-
9 19 meets the definition of a communicable disease under the Policy," but again referred Wynn
10 Resorts only to the Policies' sublimited "Communicable Disease Response" and "Interruption by
11 Communicable Disease" coverage as part of the same continuing bad faith effort to misdirect its
12 policyholder and conceal the other available coverage afforded by its Policies.

13 188. Notwithstanding Factory Mutual's repeated bad faith efforts to pigeonhole Wynn
14 Resorts' COVID-19 claim into only the Policies' sublimited "Communicable Disease" coverage,
15 by letter dated October 28, 2020, Wynn Resorts submitted its interim proof of loss to Factory
16 Mutual for its COVID-19 claim, expressly stating that Wynn Resorts' "claim is being submitted
17 under all potentially applicable coverage sections" (emphasis added).

18 189. However, in response, by letter dated November 11, 2020, Factory Mutual
19 "rejected" Wynn Resorts' interim proof of loss, again referring Wynn Resorts only to the Policies'
20 sublimited "Communicable Disease Response" and "Interruption by Communicable Disease"
21 coverage.

22 190. Thereafter, by letter dated May 14, 2021, Wynn Resorts submitted its supplemental
23 interim proof of loss to Factory Mutual, which itemized its COVID-19-related losses by insured
24 location, month and business segment (*i.e.*, casino, hotel, food and beverage, entertainment, retail
25 and other operations). In addition, Wynn Resorts provided an itemization (anonymized for privacy
26 purposes) of the no less than 2,267 confirmed COVID-19 cases for Wynn Resorts employees,
27 guests, tenants and vendors who were present at Wynn Resorts' insured locations. Wynn Resorts
28 again reiterated that it "submitted its COVID-19 claim under *all* applicable coverage sections of

1 the Policies, including, but not limited to the Policies’ coverage for: ‘Property Damage,’ ‘Time
2 Element,’ ‘Extra Expense,’ ‘Rental Insurance,’ ‘Civil or Military Authority,’ ‘Ingress/Egress,’
3 ‘Attraction Property,’ ‘Protection and Preservation of Property’ and ‘Communicable Disease.’”

4 191. In response, by letter dated May 27, 2021, Factory Mutual “rejected” Wynn Resorts’
5 supplemental interim proof of loss and wrongfully denied coverage for Wynn Resorts’ COVID-19
6 claim in breach of its coverage obligations under the Policies. While again stating that “COVID-
7 19 is a communicable disease,” Factory Mutual’s denial letter now asserted, without support, that
8 “COVID-19 was not actually present at a location owned, leased or rented by Wynn Resorts.”
9 Factory Mutual’s denial letter further contended, also without support, that “the presence of
10 COVID-19, even if established, would not constitute ‘physical loss or damage,’ and it would be
11 excluded as ‘contamination’.”

12 192. In doing so, Factory Mutual has intentionally mishandled Wynn Resorts’ claim as
13 part of a broader strategy to improperly limit the coverage available for COVID-19 claims to, at
14 most, the limited sublimit of its “Communicable Disease” coverage, despite its knowledge that the
15 risks of COVID-19 trigger *multiple* coverage sections of its “all risks” Policies.

16 193. Specifically, Factory Mutual, together with its affiliate, Affiliated FM Insurance
17 Company, issued internal “Talking Points on the 2019 Novel Coronavirus (2019-nCoV)”
18 (hereinafter, the “Talking Points”). A true and correct copy of the Talking Points, obtained from
19 *Treasure Island, LLC v. Affiliated FM Ins. Co.*, Case No. 2:20-cv-00965 (D. Nev.), ECF No. 2-8,
20 is attached to the concurrently-filed appendix of exhibits as Exhibit 4.

21 194. Upon information and belief, the Talking Points were issued internally to advise
22 Factory Mutual’s claim adjusters of how to respond to COVID-19 claims, because “[s]everal of
23 [Factory Mutual’s] clients have inquired as to whether there is coverage for losses they have or
24 expect to incur as a result of the virus, which has spread outside of China.”

25 195. Upon information and belief, Factory Mutual issued the Talking Points *before*
26 receiving the details of Wynn Resorts’ COVID-19 claim.

1 201. The Policies constitute valid contracts of insurance between Wynn Resorts and
2 Factory Mutual.

3 202. Wynn Resorts has timely satisfied all obligations and complied with all conditions
4 applicable under the Policies.

5 203. An actual and justiciable controversy presently exists between Wynn Resorts and
6 Factory Mutual regarding their respective rights and obligations, and the availability of coverage,
7 under the Policies for Wynn Resorts' COVID-19 claim.

8 204. Given that the parties have an actual and justiciable controversy regarding their
9 respective rights and obligations under the Policies, a declaratory judgment of the parties'
10 respective rights and obligations under the Policies is necessary.

11 205. Pursuant to the Nevada Uniform Declaratory Judgment Act (NRS 30.010 *et seq.*),
12 Wynn Resorts therefore seeks a declaratory judgment in favor of Wynn Resorts and against Factory
13 Mutual declaring that:

- 14 i. Wynn Resorts' losses resulting from the physical loss or damage to property caused
15 by the presence of COVID-19 at Wynn Resorts' insured locations and locations
16 within the Policies' expressly insured five-mile vicinity thereof, are covered in their
entirety by the Policies and that Factory Mutual is obligated to pay for such losses
under the Policies' triggered coverage sections including, but not limited to:
- 17 a. Property Damage;
 - 18 b. Communicable Disease Response;
 - 19 c. Expediting Costs;
 - 20 d. Protection and Preservation of Property;
 - 21 e. Time Element;
 - 22 f. Extra Expense;
 - 23 g. Rental Insurance;
 - 24 h. Civil or Military Authority;
 - 25 i. Contingent Time Element Extended;
 - 26 j. Ingress/Egress;
 - 27 k. Attraction Property;
 - 28 l. Extended Period of Liability;

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- m. Interruption by Communicable Disease; and
- n. Protection and Preservation of Property Time Element.
- ii. No exclusion in the Policies applies to bar or limit coverage for Wynn Resorts’ claim.
- iii. The sublimit applicable to the Policies’ on-site “Communicable Disease Response” and “Interruption by Communicable Disease” coverage does not limit or restrict coverage under the Policies’ various other coverage sections triggered by physical loss or damage caused by COVID-19, including, but not limited to, at locations away from Wynn Resorts’ insured locations.
- iv. Wynn Resorts is entitled to any other declaratory relief that the Court deems just and proper.

**SECOND CAUSE OF ACTION
(Breach of Contract)**

206. Wynn Resorts repeats and realleges the allegations in paragraphs 1 through 205 as though fully set forth herein.

207. The Policies constitute valid contracts of insurance between Wynn Resorts and Factory Mutual, and their terms have been triggered to obligate Factory Mutual to provide insurance to Wynn Resorts.

208. Wynn Resorts has timely satisfied all obligations and complied with all conditions applicable under the Policies.

209. Factory Mutual has materially breached its obligations under the Policies by unjustifiably refusing to acknowledge coverage and pay for Wynn Resorts’ claimed COVID-19 losses.

210. Wynn Resorts has suffered and continues to suffer damages as a direct and proximate result of Factory Mutual’s breach of its obligations under the Policies, with the exact amount to be proven at trial.

1 unfair or deceptive act or practice in the business of insurance in violation of NRS 686A.310(c)
2 and (n).

3 222. Factory Mutual’s deliberate and calculated practice of attempting to influence and
4 direct policyholders’ claims for coverage for COVID-19 losses into only the sublimited
5 “Communicable Disease” coverage of its policy forms constitutes an unfair or deceptive act or
6 practice in the business of insurance in violation of NRS 686A.310(a), (c), (e), (l) and (n).

7 223. In particular, and among other things, Factory Mutual’s deliberate and calculated
8 use of the Talking Points to coach its claims adjusters to influence and direct policyholders’ claims
9 for coverage for COVID-19 losses into only the sublimited “Communicable Disease” coverage of
10 its policy forms constitutes an unfair or deceptive act or practice in the business of insurance in
11 violation of NRS 686A.310(a), (c), (e), (l) and (n).

12 224. Factory Mutual’s deliberate and calculated practice of denying coverage for
13 policyholders’ claims based on COVID-19 losses without conducting an adequate investigation of
14 the specific facts or law applicable to particular claims constitutes an unfair or deceptive act or
15 practice in the business of insurance in violation of NRS 686A.310(a), (c), (e), (l) and (n).

16 225. In particular, and among other things, Factory Mutual’s deliberate and calculated
17 use of the Talking Points to reach predetermined conclusions regarding coverage for COVID-19
18 claims without consideration of the specific facts or law applicable to particular claims constitutes
19 an unfair or deceptive act or practice in the business of insurance in violation of NRS 686A.310(a),
20 (c), (e), (l) and (n).

21 226. Factory Mutual’s deliberate and calculated attempt to improperly restrict coverage
22 for Wynn Resorts’ COVID-19 losses to the Policies’ sublimited “Communicable Disease”
23 coverage has compelled Wynn Resorts to institute this litigation to recover amounts due under the
24 Policies, which constitutes an unfair or deceptive act or practice in the business of insurance in
25 violation of NRS 686A.310(f).

26 227. As a result of Factory Mutual’s unfair or deceptive acts or practices in the business
27 of insurance, Wynn Resorts has suffered and continues to suffer damages, with the exact amount
28 to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, Wynn Resorts prays for judgment against Factory Mutual as follows:

- i. On the First Cause of Action, Wynn Resorts prays:
 - a. for Declaratory Judgment as set forth in the First Cause of Action above; and
 - b. for attorneys' fees and costs, and such other and further relief as the Court deems just and proper.
- ii. On the Second Cause of Action, Wynn Resorts prays:
 - a. for an order declaring that Factory Mutual has breached its obligations under the Policies;
 - b. for compensatory damages in excess of \$15,000, in an amount to be determined at trial, interest thereon, and attorneys' fees and costs; and
 - c. for such other and further relief the Court deems just and proper.
- iii. On the Third Cause of Action, Wynn Resorts prays:
 - a. for an order declaring that Factory Mutual has breached its duty of good faith and fair dealing owed to Wynn Resorts under the Policies;
 - b. for compensatory damages in excess of \$15,000, in an amount to be determined at trial, plus consequential damages, punitive damages, interest thereon, and attorneys' fees and costs; and
 - c. for such other and further relief the Court deems just and proper.
- iv. On the Fourth Cause of Action, Wynn Resorts prays:
 - a. for an order declaring that Factory Mutual's conduct violates the Nevada Unfair Claims Practices Act, NRS 686A.310;
 - b. for compensatory damages in excess of \$15,000, in an amount to be determined at trial, plus consequential damages, punitive damages, interest thereon, and attorneys' fees and costs; and
 - c. for such other and further relief the Court deems just and proper.

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v. For All Causes of Action, all pre-judgment and post-judgment interest as allowed by law and all of Wynn Resorts' costs incurred as a consequence of having to prosecute this lawsuit, including attorneys' fees and costs, and such other and further relief as the Court deems just and proper.

JURY DEMAND

Wynn Resorts demands trial by jury on all issues so triable.

Dated: June 3, 2021
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