

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 1:20-cv-21525-UU**

EL NOVILLO RESTAURANT  
d/b/a DJJ RESTAURANT CORP.,  
and EL NOVILLO RESTAURANT  
d/b/a TRIAD RESTAURANT CORP.,  
on behalf of themselves and all others  
similarly situated,

Plaintiffs,

v.

CERTAIN UNDERWRITERS AT LLOYD'S  
LONDON, and UNDERWRITERS AT  
LLOYD'S LONDON KNOWN  
AS SYNDICATE XLC 2003, AFB 2623,  
AFB 623, BRT 2987, BRT 2988, WRB 1967,  
and MSP 318,

Defendants.

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**CLASS ACTION**

**JURY DEMAND**

**FIRST AMENDED CLASS ACTION COMPLAINT**

Plaintiffs, El Novillo Restaurant d/b/a DJJ Restaurant Corporation and El Novillo Restaurant d/b/a Triad Restaurant Corporation, on behalf of themselves and all others similarly situated, bring this First Amended Class Action Complaint against Certain Underwriters at Lloyd's London and Underwriters at Lloyd's London known as Syndicate XLC 2003, AFB 2623, AFB 623, BRT 2987, BRT 2988, WRB 1967 and MSP 318 (the "Underwriter Defendants") for a declaratory judgment of rights and obligations under contracts of insurance and for the Underwriter Defendants' anticipated breach of insurance policies regarding their denial of business interruption coverage, and additional coverages. Plaintiffs bring these claims on behalf of similarly situated all-risk commercial property insurance policyholders who have suffered enormous business

income losses and related covered expenses resulting from the direct physical loss or damage to property as the result of civil authority orders putting in place measures to stop the spread of the deadly COVID-19 outbreak, and in support thereof state:

## **I. INTRODUCTION**

1. On March 11, 2020, World Health Organization Director General Tedros Adhanom Ghebreyesus declared the COVID-19 outbreak a worldwide pandemic: “WHO has been assessing this outbreak around the clock and we are deeply concerned both by the alarming levels of spread and severity, and by the alarming levels of inaction. We have therefore made the assessment that COVID-19 can be characterized as a pandemic.”<sup>1</sup>

2. On March 13, 2020, the President declared a national state of emergency over the COVID-19 pandemic, effective March 1, 2020, wherein he recognized the upcoming strain on the nation’s healthcare system from admission of COVID-19 patients and directed that “hospitals and medical facilities throughout the country assess their preparedness posture and be prepared to surge capacity and capability.”<sup>2</sup>

3. On March 16, 2020, the President of the Centers for Disease Control and Prevention (“CDC”), and members of the national Coronavirus Task Force issued public guidance styled “30 Days to Slow the Spread,” aimed at curbing the COVID-19 outbreak and preventing it from overwhelming the nation’s healthcare facilities. The guidance advised individuals to adopt far-

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<sup>1</sup> See <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-COVID-19---11-march-2020>

<sup>2</sup> See Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (Covid-19) Outbreak, available at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last visited 7/3/2020).

reaching social distancing measures, such as working from home, avoiding shopping trips and gatherings of more than ten people, and avoiding bars, restaurants, and food courts where people gather in close proximity to each other.<sup>3</sup>

4. Following this advice, state and municipal government administrations across the nation recognized the need to protect the health and safety of their residents from the person-to-person and surface-to-person spread of the coronavirus. As a result, many governmental entities entered civil authority orders suspending or severely curtailing business operations of “non-essential” businesses that interact with and provide gathering places for the consuming public. Currently, almost all states and many municipalities have issued some sort of “stay-at-home” order and ordered non-essential business operations to close.

5. These far-reaching restrictions and prohibitions have been catastrophic for restaurants and other food-service businesses, as well as retail establishments, entertainment venues, and other businesses which have been forced to close, furlough employees, and endure a sudden shutdown of cash flow.

6. Most businesses secure all-risk commercial property insurance to protect themselves against losses from such catastrophic events. These policies are bilateral contracts: the insurer promises to indemnify the policyholder for actual business losses, including lost income, incurred when business operations are involuntarily suspended in exchange for payment of the policy premium. This coverage, commonly known as “business interruption” coverage, is standard in most all-risk commercial property insurance policies, including those purchased by Plaintiffs and the putative Class members.

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<sup>3</sup> See The President’s Coronavirus Guidelines for America: 30 Days to Slow the Spread, *available at* [https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20\\_coronavirus-guidance\\_8.5x11\\_315PM.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf) (last visited July 6, 2020).

7. The Underwriter Defendants are denying claims for business income losses and other covered expenses resulting from the measures put in place by the civil authorities to stop the spread of COVID-19. This action seeks a declaratory judgment affirming that the COVID-19 pandemic and the corresponding response by civil authorities to stop the outbreak's spread trigger coverage, have caused physical loss or damage to the insured property, provide coverage for future civil authority orders that result in future suspensions or curtailments of business operations, and finding that the Underwriter Defendants are liable for the losses suffered by policyholders.

8. In addition, this action brings a claim against the Underwriter Defendants for the anticipatory breach of their obligations under common all-risk commercial property insurance policies to indemnify Plaintiffs and others similarly situated for business losses, extra expenses, and other related losses resulting from actions taken by civil authorities to stop the human-to-human and surface-to-human spread of COVID-19.

9. Plaintiffs bring this action on behalf of a proposed class of policyholders who paid premiums in exchange for an all-risk commercial property insurance policy that included lost business income and extra expense coverage.

## **II. JURISDICTION AND VENUE**

10. This is an action asserting class action claims for declaratory relief and damages from the anticipatory breach of insurance policies issued by the Underwriter Defendants.

11. This Court also has jurisdiction over this action pursuant to the Class Action Fairness Act of 2005 ("CAFA") (*codified in* 28 U.S.C. §§ 1332, 1453, 1711–15). Diversity exists among the Plaintiffs and Defendants, there are more than one hundred members of the putative Class, and the amount in controversy exceeds \$5 million. 28 U.S.C. § 1332(d)(2). In determining whether the \$5 million amount in controversy requirement of 28 U.S.C. § 1332(d)(2) is met, the

claims of the putative Class members are aggregated. 28 U.S.C. § 1332(d)(6).

12. This Court also has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(a) because all claims alleged herein form part of the same case or controversy.

13. Venue is proper in this forum pursuant to 28 U.S.C. § 1391 because a substantial part of the events giving rise to Plaintiffs' claims occurred here, and Underwriter Defendants transact business, engaged in misconduct, or may be found in this District.

14. This Court has personal jurisdiction over Defendants pursuant to Fla. Stat. § 48.193(1)(a) because Plaintiffs' claims arise out of, among other things, Defendants conducting, engaging in, and/or carrying on business in Florida; Defendants breaching a contract in this state by failing to perform acts required by contract to be performed in this state; and Defendants contracting to insure property in Florida, including but not limited to Plaintiffs' premises. Defendants also purposefully availed themselves of the opportunity of conducting activities in the state of Florida by marketing their insurance policies and services within the state, and intentionally developing relationships with brokers, agents, and customers within the state to insure property within the state, all of which resulted in the policies at issue in this action.

15. All conditions precedent to this action have occurred, been performed, or have been waived.

### **III. THE PARTIES**

16. Plaintiff, El Novillo Restaurant d/b/a DJJ Restaurant Corp, is a Florida corporation authorized to do business and doing business at 15450 New Barn Road, Miami-Dade County, Hialeah, Florida. DJJ owns, operates, manages and controls the restaurant El Novillo.

17. Plaintiff, El Novillo Restaurant d/b/a Triad Restaurant Corp., is Florida corporation authorized to do business and doing business at 6830 Bird Road, Miami-Dade County, Miami,

Florida. Triad Restaurant Corp. owns, operates, manages and controls the restaurant El Novillo.

18. Plaintiffs have provided notice to the Underwriter Defendants of their business income losses and extra expense incurred as required by policy provisions.

19. On or about July 1, 2019, Defendant Underwriters issued all-risk commercial property insurance policy no. 773TA10063 to DJJ Restaurant Corp. and policy no. 773TA10064 to Triad Restaurant Corp. *See Exhibits A and B.*

20. Defendant Underwriters at Lloyd's London is composed of syndicates of individual underwriters that share respective and several liability under an insurance policy.

21. Upon information and belief the liabilities under insurance policy nos. 773TA10063 and 773TA10064 are shared among a syndicate of seven underwriters identified only by a pseudonym and respective allocation of liability: XLC 2003 (50%), AFB 2623 (12.3%), AFB 623 (2.7%), BRT 2987 (13.5%), BRT 2988 (1.5%), WRB 1967 (10%), and MSP 318 (10%).

#### **IV. FACTUAL ALLEGATIONS**

##### **A. The Global COVID-19 Pandemic**

22. Coronaviruses are a type of virus that often cause respiratory diseases in humans. In the fall of 2019, a new mutation of coronavirus was detected in China. The new virus variation has biological similarities to a coronavirus known as Severe Acute Respiratory Syndrome, and more commonly referred to as SARS. The World Health Organization has named the new virus SARS-CoV-2, and the respiratory disease that can develop in humans who have contracted the virus COVID-19, short for Coronavirus Disease-2019.

23. The coronavirus quickly spread from China to other parts of the world, including the United States. On March 11, 2020, World Health Organization Director General Tedros Adhanom Ghebreyesus declared the COVID-19 outbreak a worldwide epidemic caused by a virus

to which humans have no natural immunity. In other words, a global virus pandemic.

24. There is currently no vaccine or other preventive substance available to stimulate the production of antibodies in humans and provide immunity against contracting and developing COVID-19. To date, it has been reported that worldwide more than 500,000 people who developed COVID-19 have died. In the United States alone, almost 130,000 have died and more than 2.8 million people have tested positive for the presence of the virus.<sup>4</sup> These numbers continue to grow and have taxed the United States healthcare delivery system with an overflow of critically ill patients and a scarcity of ventilators for patients and personal protective equipment for health care providers.

25. Without a vaccine to protect against COVID-19, effective control of the outbreak relies on measures designed to minimize human-to-human and surface-to-human exposure. Earlier this year, the CDC warned that COVID-19 spreads when people are within six feet of each other or when a person comes in contact with a surface or object housing the virus.<sup>5</sup> Various other sources confirmed that the virus travels through close human contact and surface-to-human contact.<sup>6</sup>

26. While the CDC now advises that surface-to-human transmission is rare, it was

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<sup>4</sup> See <https://coronavirus.jhu.edu/map.html> (last visited July 6, 2020).

<sup>5</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-COVID-spreads.html>

<sup>6</sup> See *Persistence of coronaviruses on inanimate surfaces and their inactivation with biocidal agents*, Vol. 104, Kemp., G., et al., JOURNAL OF HOSPITAL INFECTION, No. 3, March 2020, pages 246-251 (remains infectious from 2 hours to 28 days depending on conditions); see also <https://www.ucsf.edu/news/2020/02/416671/how-new-coronavirus-spreads-and-progresses-and-why-one-test-may-not-be-enough> (doorknobs and table tops can contain the virus); <https://www.nytimes.com/2020/03/02/health/coronavirus-how-it-spreads.html> (virus can remain on metal, glass and plastic for several days). The CDC now believes that the virus is not easily transmitted surface to human due to the short time this virus can survive on a surface.

widely held when the COVID-19 outbreak began that both surface-to-human and human-to-human exposure would be particularly acute in public-gathering places such as movie theaters, shopping malls, restaurants, and bars. Accordingly, the CDC recommended that infected individuals quarantine at home, and others engage in preventative measures such as frequent hand washing, particularly after contact with shared objects and surfaces, and practice “social distancing.”

27. Because these recommendations did not effectively curb the spread of COVID-19, civil authorities issued orders closing “non-essential” business establishments, including restaurants, bars, hotels, theaters, personal care salons, gyms, and schools, mandating social distancing among the population, and more recently, requiring facial covering while in public places. This caused the cancellation of sporting events, parades, and concerts, the closure of amusement parks, and substantial travel restrictions. In addition, to conserve medical supplies, orders were issued prohibiting the performance of non-urgent or non-emergency elective procedures and surgeries forcing the suspension of operations at many medical, surgical, therapeutic, and dental practices.

28. Every state in the nation has declared a state of emergency due to the rapid increase in COVID-19 patient admissions, with many state and local governments issuing restrictive emergency orders. In Florida, for example, Governor DeSantis issued a series of executive orders closing restaurants (other than for take-out or deliveries), bars, taverns, pubs, night clubs, banquet halls, cocktail lounges, cafeterias, movie theaters, concert houses, auditoriums, playhouse, bowling alleys, arcades, gymnasiums, and fitness studios. On March 25, 2020, Miami-Dade County Mayor Carlos Gimenez issued an emergency order restricting hotels, motels and lodging facilities from accepting any occupants.

**B. The Underwriter Defendants' Standard Uniform All-Risk Commercial Property Insurance Policies**

29. The Underwriter Defendants use standard, uniform insurance policies issued by the Insurance Services Office (ISO), an insurance advisory organization that provides statistical and actuarial information to businesses and provides ISO commercial property forms for commercial property insurance policies.

30. The Underwriter Defendants' insurance policies issued to Plaintiffs and the Class members are "all risk" commercial property policies which cover loss or damage to the covered premises resulting from all risks other than those expressly excluded. These policies include business interruption coverage, which promises to indemnify the insured for lost income and certain expenses in the event of a business suspension.

31. The Underwriter Defendants' all-risk policies include a standard ISO policy form titled "Business Income (and Extra Expense) Coverage Form." This form is identified by numbers "CP 0010" and "CP 00 30."

32. Plaintiffs' Business Income (and Extra Expense) Coverage Form, designated CP 00 30 10 12 provides coverage as follows:

We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises. (emphasis added)

33. "Covered Cause of Loss" is defined in Plaintiffs' and the Class members' policies as any cause of loss not expressly excluded, and must be construed broadly and given its most comprehensive meaning.

34. Under the “Coverage – Business Income” provision of Plaintiffs’ standard policy “Business Income” is defined as:

- a. Net income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
- b. Continuing normal operating expenses incurred, including payroll.

35. The policies do not require that the business operations cease entirely, or that the insureds completely lose use of the insured premises in order to trigger coverage for business income losses and extra expense. Rather, “suspension” means:

- a. The slowdown or cessation of your business activities; or
- b. That a part or all of the described premises is rendered untenable, if coverage for Business Income Including “Rental Value” or “Rental Value” applies.

36. The “period of restoration” is the period of time beginning 72 hours after physical loss or damage to the property and ending on the date when the property is repaired or the business resumes at a new location, whichever comes first.

37. The Underwriter Defendants also promise to cover “Extended Business Income,” or the loss of business income beyond the period of restoration, under some circumstances. Specifically, the Underwriter Defendants promise to cover the insured’s actual loss of Business Income beginning on the date when the insured property is repaired, and ending either sixty days thereafter or on the date when operations are restored to the point that they generate business income at normal levels, whichever comes first.

38. In addition to lost business income, the policies cover necessary “Extra Expenses,” defined as “necessary expenses . . . incur[red] during the ‘period of restoration’ that [the insured] would not have incurred if there had been no direct physical loss or damage to property caused by

or resulting from a Covered Cause of Loss.”

39. Finally, form CP 00 30 10 12 includes a provision for “Additional Coverages-Civil Authority,” which can be triggered even when the standard business interruption coverage is not.

It provides:

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

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

40. Plaintiffs and all similarly situated Class members have suffered direct physical losses of or damage to their properties due to the suspension of their operations from the global COVID-19 pandemic and the civil authorities’ measures to reduce the number of COVID-19 cases that develop in the population. These losses are not covered by any of the exclusions included in Plaintiffs’ and the Class members’ all-risk policies.

### **C. Plaintiffs’ Factual Allegations**

41. In order to protect their businesses and income from losses, on July 1, 2019, Plaintiffs acquired from Underwriter Defendants standard ISO all-risk commercial property insurance policies under which Plaintiffs agreed to pay premiums in exchange for the Underwriter Defendants’ promise to indemnify Plaintiffs for losses including, but not limited to, business income losses at the insured properties.

42. The insured properties are defined in the policies, but are generally described as two restaurants located in South Florida: El Novillo restaurant located at 15450 New Barn Road, Miami Lakes, Florida; and El Novillo restaurant located at 6830 Bird Road, Miami, Florida. The policies, like all Class members' policies, are all-risk common policies that provide covered causes of loss for direct physical loss *or* damage to property unless expressly excluded in unambiguous terms that a reasonable policyholder would understand.

43. Plaintiffs' policies include standard form CP 00 30 10 12, described above, and as such do not require complete loss of the properties or total or structural damage to trigger coverage. The policies do not define "direct physical loss" or "damage to" property, and provide coverage for *either* loss of or damage to the properties.

44. Both policies provide coverage between the periods of July 1, 2019, and July 1, 2020, and are in full effect as Plaintiffs have faithfully paid the premiums due, which Underwriter Defendants have accepted.

45. On March 16, 2020, Miami-Dade County Mayor Carlos Gimenez issued Emergency Order 02-20 restricting operating times for all restaurants within Miami-Dade County to 6 a.m. to 11 p.m. other than for delivery.

46. On March 17, 2020, Governor Ron DeSantis issued Executive Order 20-68 further restricting restaurant operations in the State of Florida. On the same day, Miami-Dade County Mayor Carlos Gimenez issued Emergency Order 03-20 closing all restaurants in Miami-Dade County other than for delivery or takeout. These closings remained in effect until May 15, 2020, when Governor DeSantis issued Executive Order 20-123 partially lifting restrictions on restaurants but keeping in place limited occupancy, and requiring personal protective measures and structural changes within the properties to safeguard employees and customers.

47. Similar orders have been issued that close or restrict all non-essential business operations or prohibit public access to the property of non-essential businesses. These civil authority orders expressly state that the closing of non-essential businesses is necessary to minimize residents' contact with COVID-19 and protect public health and safety.

48. As a direct result of these governmental orders and the COVID-19 pandemic, Plaintiffs could not use their properties as intended, and were forced to suspend and curtail business operations and furlough employees. Plaintiffs suffered both direct physical losses and damage to the properties in the form of diminished value, lost business income, a reduction in right of full ownership, and forced physical alterations during a period of restoration.

49. Plaintiffs have faithfully paid their premiums and the Underwriter Defendants have accepted payment, and as such are obligated to honor their contractual duty to provide coverage for the business losses and extra expense suffered.

50. The Underwriter Defendants have no intention of providing any coverage under the policies due to any business income losses or expense incurred by policyholders because the losses and expense incurred derives from the COVID-19 pandemic. Indeed, they have taken the position in this litigation that Plaintiffs' losses are not covered.

**D. The COVID-19 Pandemic Has Affected Policyholders Nationwide.**

51. The COVID-19 pandemic and the ensuing governmental orders restricting access to non-essential businesses are physically impacting private commercial property in Miami-Dade County, the State of Florida, and throughout the United States, and threatening the very survival of thousands of restaurants, retail establishments, and other businesses which have had their business operations suspended or curtailed by order of civil authorities.

52. Almost all states enacted “stay-at-home” or “shelter-in-place” orders requiring the vast majority of the population to cease all public social activities, closed all non-essential businesses, placed restrictions on the business operations of “essential” businesses, and closed schools.<sup>7</sup> These measures were the direct result of evidence that COVID-19 presented a grave threat to public safety.

53. The Underwriter Defendants have received and accepted policy premiums from all Class policyholders, but have no intention of providing any coverage or indemnification under the policies if the business income losses and expenses are related to business interruption caused directly or indirectly by the COVID-19 pandemic.

54. The Underwriter Defendants are not alone in their intention to deny coverage. After a bipartisan group from the U.S. House of Representatives requested that insurers recognize financial losses relating to COVID-19 under the standard commercial interruption coverage, industry trade groups responded: “Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19.”<sup>8</sup>

55. The insurance industry has also been actively advising Insurance Commissioners that they do not intend to provide coverage for business interruption related to COVID-19. As a result, many small businesses that maintain commercial multi-peril insurance policies with business interruption coverage will have large uninsured losses because the insurance industry is

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<sup>7</sup> See State Data and Policy Actions to Address Coronavirus, *available at* <https://www.kff.org/coronavirus-covid-19/issue-brief/state-data-and-policy-actions-to-address-coronavirus/> (last visited July 6, 2020).

<sup>8</sup> See Insurers Reject House Members’ Request to Cover Uninsured COVID Business Losses, *INSURANCE JOURNAL*, Mar. 20, 2020, *available at* <https://www.insurancejournal.com/news/national/2020/03/20/561810.htm> (last visited July 6, 2020).

misstating that such policies do not cover COVID-19.

56. Insurers have written business interruption coverage for decades under “all-risk” policies that require the carrier to expressly exclude any peril not covered by the policy. Perils that are not expressly excluded are included regardless of whether they were unknown, unforeseen, unimaginable, and unprecedented when the policy issued. If the peril is not excluded, it is a “Covered Cause of Loss” under the policy.

57. The Underwriter Defendants could have excluded viruses, global pandemics, or mandatory closures/suspensions arising from viruses and pandemics from coverage under their “all-risk” policies. Because they chose not to do so, these perils are Covered Causes of Loss.

58. The insurance industry has not disavowed coverage because COVID-19 and the resulting mandatory business closures were excluded perils, but instead because the payment of all claims could threaten insurance companies’ bottom lines. The fact that the insurance industry may have underpriced business interruption coverage for unknown perils that could affect commercial property policyholders nationwide is not a defense to the payment of claims.

59. A declaratory judgment determining that the business income loss and extra expense coverage provided in common all-risk commercial property insurance policies applies to the suspension, curtailment, and interruption of business operations resulting from the pandemic and resulting measures put into place by civil authorities is necessary to prevent the Plaintiffs and similarly situated Class members from being denied critical coverage for which they have paid.

## **V. CLASS ACTION ALLEGATIONS**

60. Plaintiffs bring this class action and seek to certify and maintain it as a class action under Rules 23(a) and (b)(2) or (b)(3) of the Federal Rules of Civil Procedure on behalf of themselves and the following proposed Class:

61. The Nationwide Class is defined as:

All entities with insured property which have entered into standard all-risk commercial property insurance policies with the Underwriter Defendants, where such policies provide for business income loss and extra expense coverage and do not exclude coverage for pandemics, and who have suffered losses due to measures put in place by civil authorities to stop the spread of COVID-19.

62. Excluded from each class are the Underwriter Defendants, their employees, officers, directors, legal representatives, heirs, successors, and wholly or partly owned subsidiaries or affiliated companies; Class Counsel and their employees; and the judicial officers and their immediate family members and associated court staff assigned to this case.

63. Plaintiffs reserve the right to modify, expand, or amend the definitions of the proposed classes following the discovery period and before the Court determines whether class certification is appropriate.

64. Certification of Plaintiffs' claims for class-wide treatment is appropriate because Plaintiffs can prove the elements of their claims on a class-wide basis using the same evidence as would be used to prove those elements in individual actions alleging the same claims.

**A. Numerosity**

65. This action satisfies the requirements of Fed. R. Civ. P. 23(a)(1). The Class numbers at least in the thousands and consists of geographically dispersed business entities who are insured for business interruption losses under standard forms containing common terms. The Underwriter Defendants sell a large number of insurance policies in the state of Florida and in most, if not all, of the other 49 states and therefore joinder of the Class members is impracticable.

66. The identity of Class members is ascertainable, as the names and addresses of all Class members can be identified in the Underwriter Defendants' or their agent's books and records. Plaintiffs anticipate providing appropriate notice to the certified Class in compliance with Fed. R.

Civ. P. 23(c)(2)(A) and/or (B), to be approved by the Court after class certification, or pursuant to court order under Fed. R. Civ. P. 23(d).

**B. Typicality**

67. This action satisfies the requirements of Fed. R. Civ. P. 23(a)(3) because Plaintiffs' claims are typical of the claims of each of the Class members, as all Class members were and are similarly affected and their claims arise from the same all-risk commercial property insurance policy provisions entered into with the Underwriter Defendants. Each Class member's insurance policy contains the same ISO-issued form providing coverage for business income loss and use the same standard terms such as "covered cause of loss" and "loss of or damage to" property. None Class members' policies, as the Class is defined, exclude coverage due to a global pandemic. As such, a declaratory judgment as to the interpretation of the standard terms and the coverage rights and payment obligations under Plaintiffs' policies will address the rights and obligations of all Class members.

**C. Adequacy of Representation**

68. Plaintiffs are committed to prosecuting the action, will fairly and adequately protect the interests of the members of the Class, and have retained counsel competent and experienced in class action litigation, including litigation relating to insurance policies. Plaintiffs have no interests antagonistic to or in conflict with other members of the Class. Plaintiffs anticipate no difficulty in the management of this litigation as a class action.

**D. Commonality**

69. This action satisfies the requirements of Fed. R. Civ. P. 23(a)(2) because there are questions of law and fact that are common to each of the classes. These common questions predominate over any questions affecting only individual Class members. The questions of law

and fact common to the Class include, but are not limited to:

- a. Whether there is an actual controversy between Plaintiffs and Underwriter Defendants as to the rights, duties, responsibilities, and obligations of the parties under the business interruption coverage provisions contained in standard all-risk commercial property insurance policies;
- b. Whether the COVID-19 pandemic is a Covered Cause of Loss under the standard all-risk commercial property insurance policies;
- c. Whether the measures put in place by civil authorities to stop the spread of COVID-19 are a Covered Cause of Loss that caused loss of or damage to covered property;
- d. Whether the policy requires that there be structural damage to the insured property to trigger business interruption coverage where the policy provides coverage when there is “loss of or damage to” property;
- e. Whether the Underwriter Defendants have repudiated and anticipatorily breached the all-risk commercial property insurance policies the issued with business interruption coverage by intending to deny claims for coverage; and
- f. Whether Plaintiffs and the Class members suffered damages as a result of the anticipatory breach by the Underwriter Defendants.

**E. Superiority/Predominance**

70. This action satisfies the requirements of Fed. R. Civ. P. 23(b)(3). A class action is superior to other available methods for the fair and efficient adjudication of the rights of the Class members. The joinder of individual Class members is impracticable because of the vast number of Class members who have entered into the standard all-risk commercial property insurance policies with the Underwriter Defendants.

71. Because a declaratory judgment as to the interpretation of standard terms and rights and obligations under the standard all-risk commercial property insurance policies will apply to all Class members, most or all Class Members would have no rational economic interest in individually controlling the prosecution of specific actions. The burden imposed on the judicial system by individual litigation, and to the Underwriter Defendants, by even a small fraction of the

Class members, would be enormous.

72. In comparison to piecemeal litigation, class action litigation presents far fewer management difficulties, far better conserves the resources of both the judiciary and the parties, and far more effectively protects the rights of each Class member. The benefits to the legitimate interests of the parties, the court, and the public resulting from class action litigation substantially outweigh the expenses, burdens, inconsistencies, economic infeasibility, and inefficiencies of individualized litigation. Class adjudication is simply superior to other alternatives under Fed. R. Civ. P. 23(b)(3)(D). Class treatment will also avoid the substantial risk of inconsistent factual and legal determinations on the many issues in this lawsuit.

73. This action also satisfies the requirements of Fed. R. Civ. P. 23(b)(2) because by applying a uniform policy that its customers are not entitled to business income or extra expense coverage due to the COVID-19 pandemic and ensuing civil authority closures, the Underwriter Defendants have not acted and refused to act on grounds that apply generally to the Class, thereby requiring the Court's imposition of uniform relief to ensure compatible standards of conduct towards Class members, and making final declaratory relief appropriate respecting the proposed Class as a whole.

74. Plaintiffs are unaware of any obstacles likely to be encountered in the management of this action that would preclude its maintenance as a class action. Rule 23 provides the Court with the authority and flexibility to maximize the efficiencies and benefits of the class mechanism and reduce management challenges. The Court may, on motion of Plaintiffs or on its own determination, certify nationwide and statewide classes for claims sharing common legal questions; utilize the provisions of Fed. R. Civ. P. 23(c)(4) to certify particular claims, issues, or common questions of law or of fact for class-wide adjudication; certify and adjudicate bellwether

class claims; and utilize Fed. R. Civ. P. 23(c)(5) to divide any Class into subclasses.

## **VI. CLAIMS**

### **COUNT I**

#### **DECLARATORY JUDGMENT, 28 U.S.C. §§ 2201 and 2202 On behalf of the Plaintiffs and the Class Members**

75. Plaintiffs incorporate by reference paragraphs 1 – 62 as though fully set forth herein.

76. Under 28 U.S.C. §§ 2201 and 2202, this Court may declare the rights and other legal relations of the parties in dispute whether or not further relief is or could be sought.

77. An actual and bona-fide controversy exists between the Plaintiffs, the Class members and the Underwriter Defendants as to the rights and obligations under the policy coverage for business income loss in that:

- a. Plaintiffs and the Class members were forced to close their premises or substantially reduce their business operations due to COVID-19 and the measures put in place by civil authorities to stop the spread of COVID-19, specifically through human-to-human and surface-to-human contact;
- b. Plaintiffs contend that the pandemic and these measures are Covered Causes of Loss that trigger coverage for business income loss and extra expense under the standard all-risk commercial property insurance policy because the policy does not include an exclusion for a pandemic or measures put in place to stop the spread of a pandemic;
- c. Plaintiffs further contend that the orders from civil authorities to close their premises or reduce business operations triggers additional coverages under the policies; and
- d. The Underwriter Defendants deny and dispute that the standard business income loss and extra expense coverage in the all-risk policy provides coverage in this instance.

78. Plaintiffs seek a Declaratory Judgment on behalf of themselves and all Class members that the standard all-risk commercial property insurance policy provides coverage for business income losses and extra expenses because the policy does not contain an exclusion for a pandemic or for measures put in place to stop the spread of a pandemic.

79. Plaintiffs also seek a Declaratory Judgment on behalf of themselves and all Class members that the forced closures of their premises due to orders from state or local civil authorities is a prohibition of access to their premises and covered as defined in the insurance policies.

80. Federal Rule of Civil Procedure 57 permits the Court to determine the existence or non-existence of any right, duty, power, liability, privilege, or of any fact upon which the parties' legal relations depend.

81. The declaration sought with regard to the instant controversy is of a justiciable nature, does not amount to an advisory decree, and will settle the controversy between the parties and on behalf of all Class members because of the uniform nature of the Underwriter Defendants' insurance policies and standard terms contained in the policies.

**WHEREFORE** Plaintiffs request that this Court enter a Declaratory Judgment declaring that the standard all-risk commercial property insurance policy provides coverage for business income losses and extra expense losses incurred due to the measures taken by civil authorities to present the spread of COVID-19.

**COUNT II**  
**ANTICIPATORY BREACH OF CONTRACT**

82. Plaintiffs incorporate by reference paragraphs 1 – 62 as though fully set forth herein.

83. Plaintiffs and each Class member have standard all-risk commercial property insurance policies issued by the Underwriter Defendants that use common standard terms at issue

in this case.

84. Plaintiffs and all similarly situated Class members have performed all their obligations as specified by the policy including the payment of all premiums due.

85. Plaintiffs and the Class members' insurance policies all contain standard provisions within the policy or by way of endorsement that provide coverage for business income losses and extra expense.

86. The policies provide that the Underwriter Defendants will pay for the actual loss of business income due the "suspension" of "operations," which by definition applies when there is a reduction in operations.

87. The policies also provide that the Underwriter Defendants will pay for any necessary expenses that Plaintiffs and the Class members incur that they would not have incurred had there been no physical loss of or damage to their property.

88. Plaintiffs' and the Class members' standard all-risk commercial property insurance policies further provide coverage for suspension of business operations due to closures caused by the action of civil authorities.

89. As stated above, Plaintiffs and Class members were forced to close their premises to the public and cease or substantially reduce their operations due to the measures put in place by civil authorities to stop the spread of COVID-19 through human to human and surface to human transmission.

90. Upon information and belief, the Underwriter Defendants intend to refuse performance under the insurance policies. Specifically, the Underwriter Defendants intend to deny or refuse to provide coverage for business income losses or extra expense incurred due to the measures put in place by civil authorities to stop the spread of COVID-19.

91. As a result of the Underwriter Defendants' repudiation or anticipatory breach of the insurance policies, Plaintiffs and the Class members have suffered actual damages.

**WHEREFORE**, Plaintiffs, on behalf of themselves and all similarly situated Class members seek compensatory damages resulting from the Underwriter Defendants' repudiation or anticipatory breach of contract and further seek all relief deemed appropriate by this Court, including attorneys' fees and costs.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs, on behalf of themselves and all similarly situated individuals, demand judgment against the Defendants as follows:

(1) Declaring this action to be a proper class action maintainable pursuant to Rule 23(a) and Rule 23(b)(3) of the Federal Rules of Civil Procedure and declaring Plaintiffs and their counsel to be representatives of the Class;

(2) Issuing a Declaratory Judgment declaring the Parties' rights and obligations under the insurance policies;

(3) Awarding Plaintiffs and the Class compensatory damages from the Underwriter Defendants' anticipatory breach of the insurance policies in an amount to be determined at trial, together with appropriate prejudgment interest at the maximum rate allowable by law;

(4) Awarding Plaintiffs and the Class costs and disbursements and reasonable allowances for the fees of Plaintiffs' and the Class's counsel and experts, and reimbursement of expenses; and

(5) Awarding such other and further relief the Court deems just, proper, and equitable.

**DEMAND FOR A JURY TRIAL**

Plaintiffs and the Class request a jury trial for any and all Counts for which a trial by jury is permitted by law.

Respectfully submitted July 6, 2020.

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