

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT

SERVICE PROPERTIES TRUST (f/k/a
HOSPITALITY PROPERTIES TRUST),

Plaintiff,

v.

ALLIED WORLD ASSURANCE CO., (U.S.) INC.;
AXIS SURPLUS INSURANCE COMPANY;
CERTAIN UNDERWRITERS AT LLOYD'S,
LONDON SUBSCRIBING TO POLICY NO. (UMR)
B08019467U19;

CONTINENTAL CASUALTY COMPANY;
EVEREST INDEMNITY INSURANCE COMPANY;
IRONSHORE SPECIALTY INSURANCE
COMPANY;

LEXINGTON INSURANCE COMPANY;
THE PRINCETON EXCESS AND SURPLUS LINES
INSURANCE COMPANY;

and

TOKIO MARINE AMERICA INSURANCE
COMPANY,

Defendants.

Civil Action No. 22-0420

**COMPLAINT AND REQUEST FOR DECLARATORY JUDGMENT,
COMPENSATORY DAMAGES, AND OTHER APPROPRIATE RELIEF**

Service Properties Trust (f/k/a Hospitality Properties Trust) ("SVC"), by and through its undersigned attorneys, makes this Complaint for Declaratory Judgment, compensatory damages and other appropriate relief against Allied World Assurance Co., (U.S.) Inc., Axis Surplus Insurance Company, Certain Underwriters at Lloyd's, London, Continental Casualty Company,

Everest Indemnity Insurance Company, Ironshore Specialty Insurance Company, Lexington Insurance Company, The Princeton Excess and Surplus Lines Insurance Company, and Tokio Marine America Insurance Company (collectively, the “Insurers”) in this Court under the provisions in the relevant insurance policy and states as follows:

I. INTRODUCTION

1. SVC is a real estate investment trust whose portfolio includes hotel properties located across the country, including the hotel properties at issue (collectively, the “Hotel Properties”). The Hotel Properties include mid-scale to upscale select-service and extended-stay hotels, and upscale and luxury full-service hotels. The hotels are typically located in urban or high-density suburban locations and are generally intended to be convenient for business travelers. During the Policy period, SVC owned more than 300 Hotel Properties with thousands of rooms or suites.

2. At the Hotel Properties, many staff members provide services to guests, including meal, fitness, housekeeping, spa, and venue and banquet services.

3. The Hotel Properties are generally open and provide services to guests all day, every day.

4. Defendants insured the Hotel Properties under a broad, “all-risk” Commercial Property Policy with up to \$250,000,000 in limits (the “Policy”).¹ Each Defendant shares in part of the Policy, which includes a common policy form and Defendant-drafted endorsements.

5. The Policy has an effective period of June 30, 2019, to June 30, 2020, and an Extended Period of Recovery of up to 365 days.

¹ Unless otherwise indicated, terms initial- or all-capitalized, in boldface, or set off by quotation marks are taken from the Policy.

6. The Policy provides maximum coverage for Business Interruption losses caused by “direct physical loss, damage or destruction” to the Hotel Properties “by a peril insured by this Policy.”

7. The Hotel Properties sustained direct physical loss and damage commencing in March 2020 and continuing to present, by a peril insured by the Policy.²

8. Symptomatic, pre-symptomatic, and asymptomatic guests and staff members infected with COVID-19 (a highly contagious and potentially deadly communicable disease) have been on-site at each of the Hotel Properties on a frequent, regular and consistent basis over the course of the pandemic.

9. Specifically, since March 2020, more than 182 guests and staff members at the Hotel Properties have been diagnosed with COVID-19, many of whom were on-site before, during and in the immediate aftermath of their diagnosis.

10. While on-site, the infected individuals shed SARS-CoV-2 (the causative agent of COVID-19) through normal breathing, talking, and other ways, into the indoor air and onto surfaces throughout the Hotel Properties. Both COVID-19 and SARS-CoV-2 are physical substances. The physical alteration of the content of the air by introduction of these highly infectious physical substances is damage.

11. Once shed, the infectious particles remain in and travel through the air. They then settle on surfaces, adhering through gravitation and electrostatic forces. This physical alteration of the surfaces also is damage.

² This case is not about purely economic losses incurred as a result of governmental orders.

12. This caused direct physical loss and damage to the Property Insured (as defined below) in several ways, including the following:

(a) Individuals infected with COVID-19 shedding SARS-CoV-2 directly, physically and tangibly change, alter and transform the content of the indoor air and the composition of the surfaces throughout the buildings and structures at the Hotel Properties—such that now these contain a concentration of SARS-CoV-2 infectious particles (whereas before they did not).

(b) The physically changed and altered air and surfaces caused by the presence and intrusion of COVID-19 and SARS-CoV-2 onto the Hotel Properties render the properties unfit for their insured use—hospitality properties for guests—and deprive SVC of the full insured use of these properties. This loss of fitness and utility, caused by the intrusion of a dangerous and potentially lethal physical substance, is direct physical loss. This is precisely the impact that ammonia, airborne asbestos fibers, toxic fumes (including carbon monoxide), pervasive odors and/or wildfire smoke have on property—all of which have been found by courts to cause direct physical loss or damage to property.

13. From the outset of the pandemic, COVID-19 has had a substantial effect on the hotel industry. The industry has been severely crippled, and occupancy at the Hotel Properties has significantly decreased. Although the Hotel Properties operated at reduced levels through the COVID-19 pandemic, they were and remain at high risk for COVID-19 and SARS-CoV-2 spreading among the facilities, the guests, and the staff.

14. Since March 2020, the Hotel Properties have taken extraordinary measures to address COVID-19 and SARS-CoV-2 on-site and their associated physical impact by, among

other things, closing certain operations and services, substantially modifying others, restricting access to many of the Hotel Properties, enforcing physical distancing, and undertaking extensive efforts to continue their business operations as nearly normal as practicable while simultaneously working to repair and restore the facilities to their pre-COVID-19 and SARS-CoV-2 physical operating condition (a process which is ongoing).

15. However, due to the volume of guests at the Hotel Properties on a daily basis and the prevalence of infection among the guests and staff members at the Hotel Properties, COVID-19 and SARS-CoV-2 have been consistently present at, and are constantly being reintroduced to, the Hotel Properties. Even applying a modest community prevalence rate, there have been hundreds (if not thousands) of infected guests on-site at the Hotel Properties since the outset of the pandemic.

16. As a result, COVID-19 and infectious SARS-CoV-2 particles have been pervasive and omnipresent at the Hotel Properties over the course of this pandemic, and their complete elimination from the real and personal property at the Hotel Properties, including indoor air and surfaces, has been impossible.

17. The actual presence of COVID-19 and SARS-CoV-2 on-site at each of the Hotel Properties caused physical loss and damage, and has further caused SVC to experience significant Business Interruption losses and to incur Extra Expenses (among other damages), which continue as the properties have not been restored to pre-pandemic physical operating conditions despite best efforts.

18. Separately and independently by endorsement, the Policy also covers communicable disease even when there is no “direct physical loss, damage or destruction,” under ENDORSEMENT NO. 6: COMMUNICABLE DISEASE CONTAMINATION.

19. The foregoing provisions are clearly triggered under the current circumstances, yet the Insurers predetermined that they would not cover SVC's COVID-19 claim ("Claim"). Therefore, the Insurers failed to conduct a meaningful investigation of the Claim, concertedly refused to acknowledge that the presence of COVID-19 at the Hotel Properties satisfied the Policy, misled SVC about the coverage afforded under the Policy, forced SVC to engage in time-consuming and onerous information-gathering and communications to substantiate the Claim, failed to act reasonably upon SVC's communications with respect to the Claim, and denied coverage for the Claim without reasonable justification.

20. The Insurers' "investigation" into the Claim was a sham from the start. In response to Plaintiff's June 3, 2020, notice, the Insurers' designated adjuster, McLarens Young International ("McLarens"), sent SVC a boilerplate reservation of rights letter on June 17, 2020, accompanied by two pages of questions, several of which McLarens knew were impossible to answer and were solely designed to lead to one result: denial of the Claim. The Insurers did not even bother to analyze the Policy or the facts of the Claim before sending the initial reservation. Tellingly, the Insurers' June 17 letter did not identify any potential policy provisions or defenses to coverage with specificity.

21. By letter dated September 30, 2020, SVC confirmed "physical loss, damage or destruction" to insured property due to the presence of COVID-19 and SARS-CoV-2 on-site at the Hotel Properties, which "causes tangible, demonstrable alteration to [SVC's] property by, among other things, contaminating surfaces and indoor air."

22. Even though the Insurers had not yet identified to SVC any policy provisions that might apply to bar or limit coverage, SVC also pre-emptively explained to the Insurers in the September 30 letter that the pollution-related exclusions in the Policy clearly and obviously do

not apply for multiple reasons, including that COVID-19 (an idiopathic disease) and SARS-CoV-2 (its causative agent) in common parlance are not “pollutants,” and they most certainly do not involve the “release, discharge, escape or dispersal” of pollutants, which define the limited and narrow scope of the exclusion.

23. The Insurers did not respond for months, despite repeated prodding by SVC. Finally, on December 15, 2020, the Insurers (except Ironshore Specialty Insurance Company) responded, refusing to confirm or deny coverage and requesting more information. The Insurers wrote again on March 24, 2021, to request still more information.

24. By additional letter dated June 28, 2021, SVC provided the Insurers with extensive information about the presence of guests and staff members infected with COVID-19 at the Hotel Properties and SVC’s associated Business Interruption losses. This information demonstrated that, as of March 31, 2021, at least 182 guests and staff members across 47 Hotel Properties had been positively diagnosed with COVID-19 and that SVC had incurred more than \$138 million of Business Interruption losses at these locations.

25. By letter dated October 29, 2021, SVC submitted to the Insurers detailed information that SVC had incurred more than \$438,000 in COVID-19 cleanup, removal, repair and restoration costs at the Hotel Properties.

26. For more than a year, the Insurers deceived SVC into thinking that they were actively investigating the Claim and would give due weight to the information SVC provided. The Insurers’ conduct was all for show. Ultimately, they denied all claims and refused to pay any part of SVC’s Claim under any coverage provision, including the coverage provisions that specifically and undeniably apply to communicable disease contamination losses.

27. The Insurers' conduct summarized above constitutes a breach of contract, breach of the covenant of good faith and fair dealing and bad faith and improper claims handling in violation of Massachusetts General Laws ("M.G.L.") c. 93A, § 11, and c. 176D, § 3, warranting an award of compensatory and punitive damages, plus legal fees and costs, which are automatic where (as here) there has been a violation of Chapter 93A.

II. JURISDICTION AND VENUE

28. Plaintiff SVC seeks a declaratory judgment pursuant to M.G.L. c. 231A, § 1, because an actual controversy exists between SVC and the Insurers as to their respective rights and obligations under the Policy. More particularly, SVC is insured under the Policy issued and subscribed to by the Insurers and seeks a declaratory judgment that the Policy's coverage extends to losses sustained by SVC.

29. SVC also seeks a judgment against the Insurers for breach of contract and violation of their respective and collective obligations to investigate and cover SVC's claims in good faith pursuant to common law and M.G.L. c. 93A, § 11, and c. 176D, § 3.

30. Jurisdiction over the subject matter of this action lies with this Court pursuant to M.G.L. c. 212, § 3, and M.G.L. c. 231A, § 1.

31. Jurisdiction over the Defendants in this action is proper in this Court because each of the Insurers regularly transacts business in the Commonwealth. The Insurers also agreed contractually, through the Policy, to "submit to the exclusive jurisdiction" of a court in "any applicable state in the United States." (Exhibit A at SVC_COMPLAINT_000037; see also

Exhibit H at SVC_COMPLAINT_000675 (“each party agrees to submit to the exclusive jurisdiction of the court of the USA”)).³

32. Venue for this action is proper in this Court under M.G.L. c. 223, §§ 1, 8, because certain of the Defendant Insurers are Massachusetts companies that have a usual place of business in this County.

III. PARTIES

33. SVC is a publicly traded real estate investment trust (“REIT”) that, among other things, acquires and invests in Hotel Properties located across the United States. SVC was formerly known as Hospitality Properties Trust. SVC was formed under Maryland REIT law and has a principal place of business at Two Newton Place, 255 Washington Street, Newton, Massachusetts. For purposes of federal diversity jurisdiction, SVC has the citizenship of each and every one of its shareholders including, without limitation, shareholders in Arizona, Delaware, Illinois, Massachusetts, New Jersey, New York, and Pennsylvania.

34. Upon information and belief, Defendant Allied World Assurance Co., (U.S.) Inc. (“AWAC”) is a corporation incorporated under the laws of Delaware, with its principal place of business located in New York. AWAC maintains a usual place of business in Boston, Massachusetts, with an address at 160 Federal Street, 6th Floor, Boston, Massachusetts. AWAC

³ Attached as Exhibits A through I are true and correct copies of the subscription insurance policies that each Insurer sold to SVC to evidence that Insurer’s subscription to and participation in the Policy. For clarity, quotations to the Policy herein are to the subscription insurance policy issued by Tokio Marine America Insurance Company attached as Exhibit A, which incorporates the common policy form also included in the other Insurers’ respective subscription insurance policies. References to other Insurers’ subscription insurance policies (including endorsements) are supplied where relevant. The term “Policy” as used herein refers to the collection of all Insurers’ subscription policies together.

is, among other things, in the business of issuing insurance policies to companies such as SVC. AWAC is authorized to conduct business within Massachusetts.

35. Upon information and belief, Defendant Axis Surplus Insurance Company (“Axis”) is a corporation incorporated under the laws of Illinois, with its principal place of business located at 111 South Wacker Drive, Suite 3500, Chicago, Illinois. Axis is, among other things, in the business of issuing insurance policies to companies such as SVC. Axis is a foreign insurance corporation authorized to conduct business within Massachusetts.

36. Upon information and belief, Defendant Certain Underwriters at Lloyd’s, London Subscribing to Policy No. (UMR) B08019467U19 (“Certain Underwriters” or “Lloyd’s”) is an unincorporated entity comprising numerous Syndicates and Companies that each contracted to share in a portion of Certain Underwriters’ coverage obligation to SVC. The Syndicates and Companies here include Lloyd’s Underwriter Syndicate No. 3268 AGR; Lloyd’s Underwriter Syndicate No. 1414 ASC; Lloyd’s Underwriter Syndicate No. 1729 DUW; Aviva Insurance Limited, LIRMA V2001; Lloyd’s Underwriter Syndicate No. AFB 2623; Lloyd’s Underwriter Syndicate No. AFB 623; Lloyd’s Underwriter Syndicate No. 2987 BRIT; Houston Casualty Company (UK Branch), LIRMA H5100; and Lloyd’s Underwriter Syndicate No. 2001 AML. Each Syndicate, in turn, consists of an unidentified number of Names who bear the ultimate liability. On further information and belief, some of the Names are citizens and residents of multiple states in the United States of America, including, but not limited to, Massachusetts. Certain Underwriters is, among other things, in the business of issuing insurance policies to companies such as SVC. Certain Underwriters is a foreign insurance corporation authorized to conduct business within Massachusetts, with an address of 1 Lime Street, London, EC3M 7HA United Kingdom.

37. Upon information and belief, Defendant Continental Casualty Co. ("Continental") is a corporation incorporated under the laws of Illinois, with its principal place of business located at 151 N. Franklin Street, Chicago, Illinois. Continental is, among other things, in the business of issuing insurance policies to companies such as SVC. Continental is a foreign insurance corporation authorized to conduct business within Massachusetts.

38. Upon information and belief, Defendant Everest Indemnity Insurance Company ("Everest") is a corporation incorporated under the laws of Delaware, with its principal place of business located at Westgate Corp Center, 477 Martinsville Road, Warren, New Jersey. Everest is, among other things, in the business of issuing insurance policies to companies such as SVC. Everest is a foreign insurance corporation authorized to conduct business within Massachusetts.

39. Upon information and belief, Defendant Ironshore Specialty Insurance Company ("Ironshore") is a corporation incorporated under the laws of Arizona, with its principal place of business located at 175 Berkeley Street, Boston, Massachusetts. Ironshore is, among other things, in the business of issuing insurance policies to companies such as SVC.

40. Upon information and belief, Defendant Lexington Insurance Company ("Lexington") is a corporation incorporated under the laws of Delaware, with its principal place of business located at 99 High Street, Boston, Massachusetts. Lexington is, among other things, in the business of issuing insurance policies to companies such as SVC.

41. Upon information and belief, Defendant The Princeton Excess and Surplus Lines Insurance Company ("Princeton") is a corporation incorporated under the laws of Delaware, with its principal place of business located at 555 College Road East, Princeton, New Jersey. Princeton is, among other things, in the business of issuing insurance policies to companies such

as SVC. Princeton is a foreign insurance corporation authorized to conduct business within Massachusetts.

42. Upon information and belief, Defendant Tokio Marine America Insurance Company (“TMAIC”) is a corporation incorporated under the laws of New York, with its principal place of business located at 1221 Avenue of the Americas, Suite 1500, New York, New York. TMAIC is, among other things, in the business of issuing insurance policies to companies such as SVC. TMAIC is a foreign insurance corporation authorized to conduct business within Massachusetts.

IV. COVERAGE UNDER THE POLICY

A. The Policy covers physical loss or damage.

43. The Insurers sold SVC the Policy for the period from June 30, 2019, to June 30, 2020 (“Policy Period”) with an Extended Period of Recovery of up to 365 days, in exchange for SVC’s payment of significant insurance premiums. SVC is a First Named Insured on the Policy.

44. SVC’s manager in Massachusetts procured the Policy. The Policy consists of a common policy form and a series of Defendant-drafted endorsements.

45. The Policy provides \$250 million in coverage against “all risks of direct physical loss, damage or destruction” to the “type of property insured hereunder . . . except as hereinafter excluded.” (Exhibit A at SVC_COMPLAINT_000038.)

46. In this grant of coverage, the term “loss” is separate and distinct from, and has an independent meaning than, the phrases “damage” or “destruction” under the Policy.

47. The Policy does not define the individual terms “loss,” “damage,” or “destruction” or the entire phrase “direct physical loss, damage or destruction.”

48. Moreover, the Policy does not require a “structural” alteration to trigger coverage. Nonetheless, negative physical alterations (including physical alterations to buildings and structures) as described herein have occurred at the Hotel Properties.

49. In addition, the Policy does not require a “permanent” impact to trigger coverage. Rather, the physical impacts described herein at the Hotel Properties are ongoing and persistent, require repairs and restoration efforts and cannot be remedied by cleaning and/or disinfecting as described below.

50. The “Property Insured” under the Policy means the “insurable interest of the Insured [SVC] in all real and personal property . . . at a ‘location’ or within 1000 feet thereof.” (Id. SVC_COMPLAINT_000038.) “Location,” means a “site listed on the most recent statement of values on file with the Insurer” and further includes surrounding buildings or yards bounded by “public streets [or] clear land space . . . each not less than fifty feet wide.” (Id. SVC_COMPLAINT_000076.)

51. The Hotel Properties each are “Locations.”

52. SVC’s real and personal property, including the Hotel Properties, their respective buildings, structures, yard areas and the contents at those Locations (including the indoor air and surfaces, such as fixtures, equipment, furniture, etc.) are “Property Insured” under the Policy. (See id.)

53. The Policy lists certain categories of real or personal property that are excluded. The list includes crops, timber, land, water, animals, watercraft, aircraft, motor vehicles, off-shore property, satellites and spacecraft, underground mines and mining equipment, waterborne shipments, property sold under conditional sale, and transmission and distribution lines, none of

which are at issue here. (Id. SVC_COMPLAINT_000046-47.) The excluded property list does not include either indoor air or surfaces.

B. The Policy covers Business Interruption, Extra Expenses, Communicable Disease Contamination, and other losses and expenses.

54. The Policy affords coverage for Business Interruption loss up to \$250,000,000. (Id. SVC_COMPLAINT_000030.) It insures “loss resulting from the necessary interruption or reduction of business operations conducted by the Insured and caused by direct physical loss, damage or destruction, of the property of the type insured hereunder, by a peril insured by this Policy.” (Id. SVC_COMPLAINT_000047.)

55. The loss recoverable is “‘Actual Loss Sustained’ by the Insured during the Period of Recovery resulting from the interruption or reduction of operations.” (Id. SVC_COMPLAINT_000048.) “Actual Loss Sustained” is defined as “the reduction in ‘Business Interruption Gross Earnings’ less charges and expenses that do not necessarily continue during the interruption or reduction of the business operations.” (Id.)

56. The Period of Recovery for Time Element coverage is “such length of time required with the exercise of due diligence and dispatch to rebuild, repair or replace lost, damaged or destroyed property and to make such property ready for operations under the same or equivalent physical and operating conditions that existed prior to the loss[.]” (Id. SVC_COMPLAINT_000054.) The Policy does not define the terms “rebuild, repair or replace” in this provision or elsewhere.

57. The Policy’s Declarations indicate that the Period of Recovery is extended (regardless of the end of the Policy Period) up to “365 [c]onsecutive days.” (Id. SVC_COMPLAINT_000033.)

58. The 365-day Extended Period of Recovery affords coverage during the period that the Insured takes to return the business to its pre-loss business condition. Coverage under this provision is available without any physical loss or damage and, in fact, does not even begin to apply until the property is free of all physical loss or damage.

59. The 365-day Extended Period of Recovery begins after the Period of Recovery has terminated and continues, up to 365 days, “to restore the Insured’s business to the condition that would have existed had no ‘Time Element’ loss occurred.” (Id. SVC_COMPLAINT_000055.) The Policy does not define the term “restore” in this provision or elsewhere.

60. The Policy also affords various other relevant coverages (with different sublimits) that may apply either in addition to or as an alternative to “Time Element” coverage, including the following:

61. It provides \$100 million of coverage for **Extra Expense**, which is defined as “the reasonable and necessary extra costs incurred by the Insured during the Period of Recovery to temporarily continue as nearly normal as practicable the conduct of the Insured’s business and extra costs of temporarily using property of the Insured.” (Id. SVC_COMPLAINT_000051.)

62. It provides \$15 million of coverage for **Attraction Property**, which insures the “actual business income loss sustain[ed] by the Insured and extra expense caused by the direct physical loss or damage by a covered cause of loss to property of the type insured under this policy that attracts business to a covered location, pro[v]ided that such property is within the distance [five miles] from the covered location as shown in the Limits of Liability under Attraction Property.” (Id. SVC_COMPLAINT_000031; SVC_COMPLAINT_000054.) The

subscription insurance policy Certain Underwriters sold to SVC provides \$100,000 of coverage for **Attraction Property**. (Exhibit H at SVC_COMPLAINT_000677.)

63. The Policy provides \$25 million of coverage for **Contingent Time Element**, which insures the “actual loss sustained by the Insured” with respect to “direct physical loss or damage to real or personal property of a direct supplier or direct customer of the Insured” which: “a. wholly or partially prevents any direct supplier to the Insured from supplying their goods and/or services to the Insured, or b. wholly or partially prevents any direct customer of the Insured from accepting the Insured’s goods and/or services.” (Exhibit A at SVC_COMPLAINT_000056.)

64. It provides \$250 million of coverage for **Ingress/Egress**, which insures the “loss sustained during the period of time when, as a result of direct physical loss, damage or destruction by a peril insured by this Policy within five (5) miles of an insured ‘location,’ normal business operations are interrupted or reduced because ingress to or egress from that ‘location’ is prevented or impaired.” (Id. SVC_COMPLAINT_000057.) The subscription insurance policy that Certain Underwriters sold to SVC contains a geographic limit of one mile. (Exhibit H at SVC_COMPLAINT_000679.)

65. It provides \$250 million of coverage for **Interruption by Civil or Military Authority**, which insures the “loss sustained during the period of time when, as a result of direct physical loss, damage or destruction or imminent loss by a peril insured by this Policy within five (5) miles of an insured ‘location,’ normal business operations are interrupted or reduced because access to that ‘location’ is prevented or impaired by order of civil or military authority.” (Exhibit A at SVC_COMPLAINT_000057.) The subscription insurance policy that Certain

Underwriters sold to SVC contains a geographic limit of one mile. (Exhibit H at SVC_COMPLAINT_000679.)

66. It provides \$2.5 million of coverage for **Communicable Disease Contamination**, which insures communicable disease extra expenses and losses that SVC incurs based on a separate and independent coverage trigger: “an order of the health authority during the policy period that results in a partial or total suspension of your business operations at your covered location.” (Id. SVC_COMPLAINT_000084.) The subscription insurance policies that Axis and Certain Underwriters sold to SVC do not cover Communicable Disease Contamination. (Exhibit C at SVC_COMPLAINT_000210; Exhibit H at SVC_COMPLAINT_000677.)⁴

(a) In this coverage, communicable disease means “Illness sustained by any person who is or was at the insured location resulting from . . . any human infectious or human contagious disease [], an outbreak of which the competent local authority has stipulated shall be notified to them.” (Exhibit A at SVC_COMPLAINT_000085.)

(b) Order of the health authority means “a written order partially or totally suspending your business operations due to the presence of a communicable disease[] at your covered location issued by a governmental health authority having jurisdiction over such business operations.” (Id. SVC_COMPLAINT_000084.)

(c) Communicable disease extra expense means “reasonable and necessary extra expenses” to “[c]leanup, remove and dispose of any property at your covered location that is contaminated by the presence of a communicable disease,” and to “[r]estore [the Hotel Properties] to [their] original condition...” (Id.)

⁴ Defendants Certain Underwriters’ and Axis’s omission of Communicable Disease Contamination coverage has no effect on (and, specifically, does not reduce) the \$2.5 million sublimit stated in the Policy and payable in full by the other Insurers.

C. The Policy shares its \$250,000,000 limit among multiple carriers.

67. The \$250,000,000 limit of the Policy is shared among a group of Insurers that each contracted to accept responsibility for a designated percentage share of the Policy's overall limit of coverage. That is, the Insurers subscribed to "quota shares" within the Policy at designated participation levels.

68. Each Insurer executed a subscription insurance policy with SVC to effectuate its participation in the Policy at its designated subscription level. Each Insurer's subscription insurance policy with SVC incorporates the common policy form that the Insurer modified with Insurer-drafted endorsements that apply to that particular Insurer's subscription insurance policy. The Policy provides uniform coverage to SVC unless modified by these Insurer-drafted endorsements.

69. The several subscription insurance policies are part of and collectively compose the Policy.

70. The following chart identifies the percentage share of the Policy that each Insurer sold to SVC, along with the policy number each Insurer assigned to its subscription insurance policy with SVC.⁵

⁵ The subscription insurance policy that Insurer XL Bermuda sold to SVC requires the parties to resolve disputes about performance through arbitration or mediation. As a result, SVC has not named XL Bermuda as a defendant here. Further, the subscription insurance policy that Insurer Endurance American Specialty Insurance Company ("Endurance") sold to SVC contains a Communicable or Infection Disease Exclusion discussed in more detail below. As a result, SVC has not named Endurance as a defendant here.

<u>THE SVC POLICY</u>				
-\$250 Million-				
Layer	Carrier	Number	Percentage Participation	Coverage Afforded
\$25M, excess of deductibles	Certain Underwriters	B08019467U19	23%	\$5.75M
	Endurance	GPH30001144000	20%	\$5M
	TMAIC	LCP6481218-00	20%	\$5M
	Lexington	021565829	14%	\$3.5M
	AWAC	0311-9212-1A	10%	\$2.5M
	Axis	EAF639524-19	8%	\$2M
	Continental	6073110920	5%	\$1.25M
\$75M, excess of \$25M excess of deductibles	Princeton	78-A3-XP-0000606-00	50%	\$37.5M
	TMAIC	LCP6481218-00	20%	\$15M
	Lexington	021565829	14%	\$10.5M
	Ironshore	004123100	8.5%	\$6.375M
	Everest	RP8CF00070-191	7.5%	\$5.625M
\$150M, excess of \$100M excess of deductibles	XL Bermuda	XLPRP 2155026 19	86%	\$129M
	Lexington	021565829	14%	\$21M

71. The following coverage chart depicts the same information about the several Insurers subscribing to and participating in the Policy. The dollar values along the y-axis reflect the attachment points of the Insurers' subscription insurance policies with SVC. The percentage share in each coverage square is the Insurer's participation in the Policy at an identified layer. All percentages across the x-axis add up to 100%.

\$250M	XL Bermuda 86.0%					Lexington 14.0%
\$100M	Princeton 50%		Seafair 0.5%	Everest 7.5%	Windsor 3.5%	Lexington 14.0%
\$50M	Princeton 50%		Seafair 0.5%	Everest 7.5%	Windsor 3.5%	Lexington 14.0%
\$25M	AWAC 10.0%	Certain Underwriters 23.0%	Continental 5.0%	Endurance 20.00%	Windsor 3.5%	Lexington 14.0%
Various Deductibles Incl. \$500K All other perils						

D. COVID-19/SARS-CoV-2 caused physical loss and damage covered by the Policy.

72. Since the onset of the pandemic in March 2020, at least 182 guests and staff members of the Hotel Properties were diagnosed with COVID-19.

73. Most of the guests and staff members with positive COVID-19 diagnoses were on-site near in time to their diagnosis.

74. As a result, COVID-19 (the communicable disease) and SARS-CoV-2 (its causative agent) have been continually present (and regularly reintroduced) at each of the Hotel Properties since March 2020 through the present.

75. These COVID-19 positive individuals constantly shed infectious SARS-CoV-2 particles into the indoor air and onto surfaces throughout the Hotel Properties. The indoor air and surfaces are real and personal property in which SVC has an insured interest under the Policy and neither are excluded.

76. Shedding SARS-CoV-2 into the indoor air and onto surfaces throughout the Hotel Properties physically and tangibly changes, alters, and transforms the content of the indoor air and the composition of the surfaces throughout the buildings and structures—such that now they contain concentrations of SARS-CoV-2 infectious particles (whereas, before they did not). This physical alteration of the content of the air and of the surfaces is direct physical damage to the insureds’ interests in real and personal property at the Hotel Properties as covered under the Policy.

77. The presence and intrusion of COVID-19 and SARS-CoV-2 at the Hotel Properties has rendered the physical operations unfit for their insured use—fully operational hotel and hospitality operations—and, thus, it has deprived SVC of the full operation of its property for its insured purpose. This loss of fitness and utility caused by the intrusion of a dangerous and potentially lethal physical substance is direct physical loss of the insureds’ interests in real and personal property at the Hotel Properties as covered under the Policy.

78. This presence and intrusion of COVID-19 and SARS-CoV-2 at the Hotel Properties happened by chance, rather than by design; it was, thus, an unfortunate event and “fortuitous” for insurance-coverage purposes.

79. The physical changes to the content of the indoor air and the composition of the surfaces throughout the buildings and structures at each Hotel Property have been pervasive and omnipresent over time in light of the number of infected individuals shedding SARS-CoV-2 particles on-site and the constant reintroduction of those particles.

80. Cleaning of surfaces is a means of repairing the damage caused by COVID-19 and SARS-CoV-2 to surfaces; it is not possible to effectively clean air. However, even cleaning of surfaces does not altogether eliminate the damage or end the physical loss. Some surfaces and

objects retain residual infectious virus even after cleaning, and aerosolized infectious particles will attach to surfaces after cleaning. Cleaning does nothing to guard against property continually being reinfected as soon as COVID-19 again enters the space. In short, cleaning is temporary at best -- a surface and object remain infectious if an aerosol is present, HVAC system is operational or if another infected person visits the space after cleaning. This intrusion will provide a constant modality for infection to people.

81. The Hotel Properties have been unable to eradicate COVID-19 and SARS-CoV-2 from the real and personal property at the Hotel Properties despite their efforts to eliminate both and to repair and restore the property to its pre-pandemic physical operating condition.

82. The Hotel Properties have taken extraordinary and robust measures to repair the physical impact, change, alteration, damage and loss from COVID-19 and SARS-CoV-2. The Hotel Properties have had to, among other things, reduce capacity, close or suspend certain operations and services, substantially modify others, and introduce intensive and costly protocols to continue their business operations as nearly normal as practicable despite ongoing physical loss and damage to portions of their property, and undertake efforts to repair and restore the facilities to their pre-COVID-19 and SARS-CoV-2 physical operating condition (a process which is ongoing).

E. SVC's physical loss and damage trigger multiple coverages under the Policy.

1. Time Element coverage

83. Time Element coverage is triggered by "direct physical loss, damage or destruction, of the property" resulting in "the necessary interruption or reduction of business operations conducted by the Insured . . . by a peril insured by this Policy." (Exhibit A at SVC_COMPLAINT_000047.)

84. As alleged above, the physical alteration and change to the content of the indoor air and the composition of the surfaces throughout the buildings and structures at each Hotel Property as a result of individuals infected with COVID-19 shedding SARS-CoV-2 particles is direct physical damage of insured property (including indoor air and surfaces).

85. As alleged above, the unplanned intrusion of COVID-19 and SARS-CoV-2 onto the property causing it to be unfit for and unable to be used for its full insured use is direct physical loss of the insured property.

86. This direct physical loss of and damage to insured property has resulted in “the necessary interruption or reduction” of SVC’s business operations at the Hotel Properties.

87. This direct physical loss and damage of insured property was caused by the introduction of COVID-19 and SARS-CoV-2, perils insured by the “all-risk” Policy, and not within any coverage exclusions.

88. Because the Hotel Properties sustained direct physical loss and damage of insured property caused from COVID-19 and SARS-CoV-2, perils insured under the Policy, and because the direct physical loss and damage of insured property from these perils resulted in the necessary interruption or reduction of SVC’s business operations, the Policy’s Time Element coverage has been triggered.

89. In June 2021, SVC identified to the Insurers that, as of March 2020, it had incurred more than \$138 million in Business Interruption losses at the Hotel Properties where 182 guests and staff members had positive COVID-19 diagnoses. These Business Interruption losses are due to the facts as alleged in the preceding paragraphs (and elsewhere herein).

90. These Business Interruption losses are ongoing as efforts to repair and restore the property to its pre-pandemic physical operating condition continue.

2. Other relevant coverages

91. **Extra Expense** coverage is triggered by the same direct physical loss and damage at the Hotel Properties as Time Element coverage.

92. Because the Time Element coverage is triggered as discussed above, the Extra Expense coverage is also triggered, and permits SVC to recover “the reasonable and necessary extra costs incurred by the Insured during the Period of Recovery to temporarily continue as nearly normal as practicable the conduct of the Insured’s business and extra costs of temporarily using property of the Insured.” (Id. SVC_COMPLAINT_000051.)

93. **Attraction Property** coverage is triggered by the direct physical loss and damage caused by COVID-19 and SARS-CoV-2 (in the same manner that it causes physical loss or damage at the Hotel Properties) at properties that directly attract business to the Hotel Properties.

94. Because properties that directly attract business to the Hotel Properties sustained direct physical loss or damage caused by COVID-19 and SARS-CoV-2, the Policy’s Attraction Property coverage has been triggered.

95. **Contingent Time Element** coverage is triggered by the direct physical loss or damage caused by COVID-19 and SARS-CoV-2 (in the same manner that it causes physical loss and damage at the Hotel Properties) at properties of suppliers and customers of the Hotel Properties.

96. Because properties of suppliers and customers of the Hotel Properties sustained direct physical loss or damage caused by COVID-19 and SARS-CoV-2, the Policy’s Contingent Time Element coverage has been triggered.

97. **Ingress/Egress** coverage is triggered by the prevention of direct ingress to and egress from the Hotel Properties caused by direct physical loss and damage caused by COVID-19 and SARS-CoV-2 at the Hotel Properties.

98. Because direct physical loss and damage caused by COVID-19 and SARS-CoV-2 prevented direct ingress to and egress from the Hotel Properties, the Policy's Ingress/Egress coverage has been triggered.

99. **Interruption by Civil or Military Authority** coverage is an alternative coverage that is triggered when, as a result of direct physical loss, damage or destruction due to a covered peril at a location other than a Hotel Property (and within a five-mile radius), civil or military authorities issue orders that prevent access to the Hotel Properties, impacting normal business operations at the Hotel Properties. The requisite civil or military orders need not be directed to SVC specifically.

100. Because the Hotel Properties sustained necessary interruption to their business directly resulting from civil authority orders prohibiting or limiting access to the Hotel Properties because of direct physical loss, damage or destruction at any location within five miles of the Hotel Properties, the Policy's Interruption by Civil or Military Authority coverage has been triggered.

F. The presence of COVID-19 at SVC's covered locations triggers the endorsed Communicable Disease coverage.

101. **Endorsement No. 6: Communicable Disease Contamination** coverage is triggered by the presence of communicable disease on-site and health-authority orders suspending or limiting business operations at the Hotel Properties. This coverage provides for recovery for resulting business interruption losses and communicable disease extra expense in the absence of "direct physical loss, damage or destruction."

102. Because SVC had COVID-19 (indisputably a communicable disease) on-site at the Hotel Properties, and because each Hotel Property was subject to health-authority orders restricting business operations at the Hotel Properties because of COVID-19, the Policy's

Communicable Disease Contamination coverage has been triggered. The requisite health-authority orders do not need to be directed to SVC specifically.

G. The pollution-related exclusions and biological-related exclusions do not apply.

1. The POLLUTION, CONTAMINATION exclusion in the common policy form.

103. The Policy contains a “POLLUTION, CONTAMINATION” exclusion that addresses property loss and damage “caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of ‘contaminants or pollutants,’ all whether direct or indirect, proximate or remote or in whole or in part arising from any cause whatsoever.” (Id. SVC_COMPLAINT_000060.)

104. The Policy defines “[c]ontaminants or pollutants” as “any material that after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use of property insured by this Policy, including, but not limited to, bacteria, virus, or [specified] hazardous substances” (Id.)

2. The corresponding exclusions in the Lexington, AWAC, Axis, and Continental subscription policies.

105. The subscription insurance policy that Lexington sold to SVC (“Lexington Subscription Policy”) replaces the POLLUTION, CONTAMINATION exclusion with a Lexington-specific POLLUTION, CONTAMINATION, DEBRIS REMOVAL EXCLUSION ENDORSEMENT. The Lexington provision excludes loss or damage “caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy.” (Exhibit G at SVC_COMPLAINT_000663.)

106. The Lexington Subscription Policy defines CONTAMINANTS or POLLUTANTS to mean any “solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, fungi, virus, or [specified] hazardous substances. . . . Waste includes materials to be recycled, reconditioned or reclaimed.” (Id.)

107. The subscription insurance policy that AWAC (“AWAC Subscription Policy”) sold to SVC also replaces the POLLUTION, CONTAMINATION exclusion with an AWAC-specific POLLUTION, CONTAMINATION, DEBRIS REMOVAL EXCLUSION ENDORSEMENT that is identical in relevant part to the same exclusion in the Lexington Subscription Policy. (Exhibit B at SVC_COMPLAINT_000186.)

108. The subscription insurance policy that Axis sold to SVC (“Axis Subscription Policy”) replaces the POLLUTION, CONTAMINATION exclusion with an Axis-specific POLLUTANTS AND CONTAMINANTS EXCLUSION. The Axis provision excludes coverage for “[l]oss or damage caused by, resulting from, contributed to or made worse by actual alleged or threatened release, discharge, escape or dispersal of pollutants or contaminants.” (Exhibit C at SVC_COMPLAINT_000284.)

109. The definition of “Pollutants or Contaminants” in the Axis Subscription Policy is identical in relevant part to the CONTAMINANTS or POLLUTANTS definition in the Lexington and AWAC Subscription Policies. (Id.)

110. The subscription insurance policy that Continental sold to SVC (“Continental Subscription Policy”) replaces the POLLUTION, CONTAMINATION exclusion in the Policy

with an insurer-specific Contaminants or Pollutants Exclusion Endorsement. The Continental Subscription Policy excludes “loss, cost or expense to covered property” caused by “the actual, alleged or threatened release, discharge, or dispersal of toxic or hazardous substances,

Contaminants or Pollutants” (Exhibit D at SVC_COMPLAINT_000390.)

111. The Continental Subscription Policy defines Contaminants or Pollutants as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.” (Id.) The definition of Contaminants or Pollutants in the Continental Subscription Policy does not include the term “virus.”

112. The subscription insurance policy that Everest sold to SVC (“Everest Subscription Policy”) replaces the POLLUTION, CONTAMINATION exclusion with an Everest-specific SEEPAGE AND/OR POLLUTION AND/OR CONTAMINATION EXCLUSION endorsement. The Everest Subscription Policy excludes “loss, damage, costs or expenses in connection with any kind or description of seepage and/or pollution and/or contamination, direct or indirect, arising from any cause whatsoever.” (Exhibit E at SVC_COMPLAINT_000484.)

113. The Everest Subscription Policy does not define “seepage and/or pollution and/or contamination.” Furthermore, the Everest-specific SEEPAGE AND/OR POLLUTION AND/OR CONTAMINATION EXCLUSION does not include the term “virus.” (Id.)

3. Biological terrorism exclusion in the Axis Subscription Policy.

114. The Axis Subscription Policy also includes an insurer-drafted exclusion that address losses from terrorism or other intentional or malicious acts involving biological or chemical material or agents. The NUCLEAR, CHEMICAL AND BIOLOGICAL EXCLUSION ENDORSEMENT bars coverage for “loss or damage resulting directly or indirectly from the

dispersal, application or release of, or exposure to, chemical, or biological materials or agents that are harmful to property or health” (Exhibit C at SVC_COMPLAINT_000292.)

4. None of the pollution-related or biological-terrorism exclusions applies.

115. The Insurers have not (and cannot) meet their heavy burden of demonstrating that the pollution-related exclusions listed above or the biological terrorism exclusion in the Axis Subscription Policy clearly and unmistakably apply to the Claim and are not subject to any other reasonable interpretation.

116. To the contrary, none of the exclusions in the Policy applies to the Claim because the Claim does not involve any “release, discharge, escape or dispersal” of specified material, contaminants or pollutants (or similar language)—the common requirement of all of the exclusions.

117. The POLLUTION, CONTAMINATION exclusion in the Policy and the alternate pollution-related exclusions in the subscription insurance policies sold by Lexington, AWAC, and Axis, Continental and Everest each preclude coverage only for the “release, discharge, escape or dispersal” of specified material that causes “loss, damage or destruction.” (Exhibit A at SVC_COMPLAINT_000060; Lexington Subscription Policy, Exhibit G at SVC_COMPLAINT_000663; AWAC Subscription Policy, Exhibit B at SVC_COMPLAINT_000186; Continental Subscription Policy, Exhibit D at SVC_COMPLAINT_000390; Everest Subscription Policy, Exhibit E at SVC_COMPLAINT_000484.) The NUCLEAR, CHEMICAL AND BIOLOGICAL EXCLUSION ENDORSEMENT in the Axis Subscription Policy similarly requires the “dispersal, application or release of, or exposure to, chemical, or biological materials or agents.” (Exhibit C at SVC_COMPLAINT_000292.)

118. COVID-19 and SARS-CoV-2 are not the kind of material the pollution-related and biological-terrorism exclusions address. The material in the pollution-related exclusions, including the POLLUTION, CONTAMINATION exclusion in the Policy and alternatives in the various Insurers' subscription insurance policies, is reasonably limited to environmental contamination, such as discharge or seepage of hazardous waste or similar environmental-pollution liabilities, and not to a communicable disease (COVID-19) and its causative agent (SARS-CoV-2). The "biological materials or agents" in the NUCLEAR, CHEMICAL AND BIOLOGICAL EXCLUSION ENDORSEMENT are reasonably limited to weaponized materials used for malicious purposes.

119. Further, there never was damage, loss or destruction resulting from a "release, discharge, escape or dispersal" of COVID-19 and of SARS-CoV-2 from SVC's insured property. COVID-19 is an idiopathic pandemic that spreads through modes of viral transmission (i.e., shedding). No legitimate medical journal has referred to the process of human shedding of infectious SARS-CoV-2 particles as a "release, discharge, escape or dispersal of 'contaminants or pollutants.'"

120. In addition, the pollution-related exclusions outlined above cannot apply because they directly conflict with an affirmative coverage grant in the Policy, namely the Communicable Disease Contamination coverage.⁶

121. The Communicable Disease Contamination coverage provides coverage for certain costs linked to the presence of a communicable disease on-site and health-authority orders regarding the same.

⁶ The subscription insurance policies that Axis and Certain Underwriters sold to SVC do not cover Communicable Disease Contamination.

122. The Policy cannot simultaneously provide coverage for Communicable Disease Contamination (indisputably including, but not limited to, the communicable disease COVID-19), yet purport simultaneously to exclude coverage for its causative agent (SARS-CoV-2) under environmental pollution-related exclusions, including the POLLUTION, CONTAMINATION exclusion in the Policy and alternatives in the various Insurers' subscription insurance policies, on the theory that SARS-CoV-2 is an excluded "[c]ontaminant[]" or pollutant[]" under the Policy.

123. Further, nowhere do the Communicable Disease Contamination coverage provisions provide that they are exceptions or exemptions from the POLLUTION, CONTAMINATION exclusion (or any alternatives). To the contrary, the Communicable Disease Contamination Endorsement provides, "[a]ll other terms and conditions of the Policy remain the same." (Exhibit A at SVC_COMPLAINT_000086.)

124. Nor does the POLLUTION, CONTAMINATION exclusion (or any alternative) provide that the Communicable Disease Contamination coverage provisions are an exception or exemption from the exclusion(s).

125. The Policy does, however, use exceptions from exclusions in other instances. For example, the POLLUTION, CONTAMINATION exclusion contains an express exception for the enforcement of laws applicable to the cleanup of pollution. (Exhibit A at SVC_COMPLAINT_000060.) Similarly, the POLLUTION, CONTAMINATION exclusion and MOLD, MILDEW OR FUNGUS exclusion each contains an express exception when the pollution, contamination, mold, mildew or fungus loss is caused by a Listed Peril. (Id. at SVC_COMPLAINT_000060-61.)

126. Likewise, the Policy uses exceptions to limit certain coverages. For example, the BOILER AND MACHINERY coverage expressly excepts coverage for loss or damage caused by lightning. (Exhibit A at SVC_COMPLAINT_000072-73.)

127. The words of the Policy must be read in a manner that gives meaning to all language and leaves no provision without force and effect. This is particularly the case here, where the words chosen for the POLLUTION, CONTAMINATION exclusion (and any alternatives) must be read strictly and narrowly, while the words chosen for the grant of Communicable Disease Contamination coverage must be read broadly and in favor of SVC.

128. Nor can the words be read in a way that renders coverage illusory or that makes no sense.

129. Thus, consistent with these rules of construction and interpretation, the pollution-related exclusions, including the POLLUTION, CONTAMINATION exclusion in the Policy and alternatives in the various Insurers' subscription insurance policies, cannot be read in a way that would void the coverage afforded under the Communicable Disease Contamination coverage or render some coverage provisions mere surplusage.

130. To the extent the Insurers contend that the pollution-related exclusions, including the POLLUTION, CONTAMINATION exclusion in the Policy and alternatives in the various Insurers' subscription insurance policies bar coverage for loss caused by COVID-19 or SARS-CoV-2, the Policy is, at best, ambiguous because it is susceptible to more than one reasonable interpretation and, therefore, must be construed in favor of coverage.

131. There are exclusions in common usage in the insurance industry that the Insurers could have included in the Policy to unambiguously exclude losses caused by communicable

diseases, viruses, and pandemics. The insurance industry has known the risks associated with pandemics for decades. These risks have been even more pronounced and evident to the Insurers in recent decades due to the first SARS, Ebola, MERS, H1N1, and Zika.

132. One of the insurers that subscribed to the Policy, Endurance, included such an express exclusion in its Subscription Policy, titled the COMMUNICABLE OR INFECTIOUS DISEASE EXCLUSION. It provides: “This policy does not apply to any loss, demand, claim, occurrence, direct physical loss or damage, expense or suit arising out of or related in any way to Communicable or Infectious disease, condition or sickness, including but not limited to: 1. any causative agent of any such condition, disease, or sickness regardless of whether such agent gives rise to any such condition, disease, or sickness, or 2. any actual or attempted testing for, containing, detoxifying, mitigating, monitoring or neutralizing of, responding to, or assessing the effects of any communicable or infectious disease, condition or sickness or causative agent.” In light of this express Communicable or Infectious Disease Exclusion, SVC has not included Endurance as a defendant in this action.

133. The Insurers other than Endurance decided not to include any such exclusions in the Policy. To the contrary, the Policy contains an express grant of coverage for Communicable Disease Contamination.

VI. INSURERS’ BAD FAITH

A. Insurers failed to investigate.

134. When SVC submitted its claim for COVID-19 losses at and around the Hotel Properties on June 3, 2020, the Insurers already intended to deny coverage. The Insurers then engaged in conduct that was intended to hide their predetermination and give the impression that

they were actively investigating and considering the Claim, which wasted extraordinary amounts of SVC's time and money.

135. In response to SVC's June 2020 notice of claim, the Insurers' designated adjuster, McLarens, did not undertake any analysis of the Policy or the facts of the Claim. Instead, McLarens sent SVC a list of questions by letter dated June 17, 2020, several of which were impossible to answer, conflicted with the plain language of the Policy, did not apply to the operations at the Hotel Properties and were solely designed to lead to one result: denial of the Claim.

136. For example, the McLarens questionnaire asked SVC whether "COVID-19 [had] been reported at any of your locations" and asked for non-confidential details including "the date(s) when someone with COVID-19 was believed to have been present at your location." In June 2020, when this request was made, McLarens and the Insurers knew or should have known that the first "discovery" of on-site COVID-19 would have been anecdotal at that point in time and otherwise impossible to discern; no test kits for surfaces (or air for that matter) were readily available to the general public; and the only way to test for "contagious" viral particles would have been to utilize the services of a BSL-3 lab, which was not feasible for private testing of this nature. Furthermore, McLarens and the Insurers knew that PCR testing of individuals was done on an extremely limited basis (generally only in the healthcare setting) and antigen testing was not yet commercially available.

137. The letter accompanying the June 17, 2020, questionnaire advised SVC that the Insurers "will investigate" the Claim but was silent on the Insurers' position about the Claim, the implicated coverages at issue under the Policy, or any pertinent terms or conditions. Instead, the Insurers purported to reserve "all rights, privileges, and defenses under the Policies, at law, or

otherwise,” based on grounds for limitation or disclaimer of coverage “including but not limited to exclusions for communicable disease contamination and biological materials contained in some Insurers’ Policies.” But those exclusions are not in all of the Insurers’ respective subscription policies, nor are they applicable to these circumstances, as outlined above. The June 17, 2020, correspondence, like the attached questionnaire, made clear that the Insurers had undertaken no analysis of the Policy or the facts pertinent to the Claim.

138. Notably, on or about the same time as McLarens sent its initial questionnaire to SVC, it sent verbatim questionnaires to SVC’s manager in its separate role as manager for other companies’ insurance programs. This shows that McLarens and the Insurers did not undertake even a cursory study of the Policy or the unique facts pertinent to the Claim before distributing their standard information request and reservation letter.

139. By letter dated September 30, 2020, SVC confirmed for the Insurers the presence of COVID-19 and SARS-CoV-2 on-site at the Hotel Properties. SVC further advised the Insurers that “the presence of COVID-19 [on-site] causes tangible, demonstrable alteration to [SVC’s] property by, among other things, contaminating surfaces and indoor air.” SVC also explained how SARS-CoV-2 infectious particles “attach[] to and can be transmitted through surfaces.” SVC simultaneously disputed that the “POLLUTION, CONTAMINATION” exclusion in the Policy or any variations barred coverage for the Claim, as set forth above.

B. Insurers ignored SVC’s initial submission.

140. Months later, after SVC had sent multiple pleas for the Insurers to engage on the Claim, on December 15, 2020, McLarens and the Insurers (except for Ironshore) issued a supplemental reservation of rights letter to SVC that still failed to reflect any reasonable investigation into the facts pertinent to the Claim and entirely disregarded the detailed information that SVC had provided in its September 30 communication. The Insurers stated that

the Policy requires “direct physical loss, damage or destruction” to insured property, but took no position whether the Claim could trigger coverage.

141. Instead, the Insurers summarily asserted that the POLLUTION, CONTAMINATION exclusion in the Policy bars coverage because it includes the word “virus.” The December 15 letter mentioned in passing the variations of the pollution-related exclusion found in Insurer-specific endorsements to the common Policy form, but did not offer any analysis regarding their application, including whether the lack of the word “virus” in some of the provisions would lead to a different result. Nor did the Insurers attempt to refute SVC’s prior position that those pollution-related exclusions obviously do not apply for multiple reasons, including that COVID-19 (an idiopathic disease) and SARS-CoV-2 (its causative agent), although “viruses,” are not “contaminants or pollutants” in common parlance, and they are not the result of “release, discharge, escape or dispersal.”

142. On March 24, 2021, the Insurers (through McLarens) wrote to request still more information.

C. Insurers prompted SVC to submit additional information, which the Insurers also disregarded.

143. Even though the Insurers had predetermined that they would not cover the Claim, they required SVC in their March 24 letter to engage in time-consuming and costly efforts to gather and submit more claim documentation, and stated that they would consider it “without prejudice” to their already-announced coverage denial. The Insurers meant to give the impression that they were investigating the Claim and evaluating coverage in good faith, and would be willing to reconsider the Claim if SVC submitted additional information. But in reality, the Insurers merely intended to create burdensome work for SVC, to discourage SVC

from pursuing the Claim and to paint an inaccurate picture that SVC was somehow delaying the Insurers' investigation or not cooperating.

144. By letter dated June 28, 2021, SVC provided the Insurers with detailed and comprehensive information showing that at least 182 guests and staff members across 147 Hotel Properties had positive COVID-19 diagnoses, such that the SARS-CoV-2 virus had actually been present on-site. SVC also identified more than \$138 million in Business Interruption loss that it had incurred at the Hotel Properties.

5. The Insurers deny coverage.

145. By letter dated October 26, 2021, certain of the Insurers denied coverage. At no time before issuing their October 26, 2021, correspondence, nor at any time after, did the Insurers or McLarens even request an opportunity to visit and test a single Hotel Property for the presence of COVID-19 and SARS-CoV-2. Nor did the Insurers or McLarens engage any expert or consultant to make a physical inspection of the Hotel Properties to determine whether COVID-19 or SARS-CoV-2 was present. By separate letter, also dated October 26, 2021, others of the Insurers again requested more information for their coverage determination.

146. On October 27, 2021, three Insurers—Everest, Ironshore, and Princeton—notified SVC that they have no intention of honoring the Communicable Disease Contamination Coverage in their respective subscription policies and in the Policy to the extent those policies attach above \$2.5 million.

147. On October 29, 2021, SVC submitted additional, significant financial information showing that it had incurred more than \$438,000 in “communicable disease extra expenses,” such as additional and enhanced cleaning, sanitation, restoration materials and labor costs, at the Hotel Properties.

148. On January 24, 2022, certain Insurers reiterated their denial.

149. SVC replied to this letter on February 9, 2022.

150. For nearly two years, then, the Insurers have pursued extraneous and never-ending information requests designed to mask their pretense of a claim investigation and pre-ordained coverage denial. By continuing to demand additional information at the same time as they reject or find insufficient the significant information that SVC has submitted to date, and by willfully refusing to accept and acknowledge the presence of COVID-19 at the Hotel Properties, the Insurers seek to hide the fact that they always intended to deny coverage regardless of SVC's responses to their information requests.

151. As a result of the Insurers' single-minded focus on denying the Claim no matter what information SVC provides in support, among other things, the Insurers have failed to reach a prompt, fair, and equitable settlement of the Claim, have engaged in conduct designed to deprive SVC of its full policy benefits, and have forced SVC to pursue this litigation to recover the insurance owed.

COUNT I
(Declaratory Relief)

152. SVC repeats and realleges the allegations in the preceding paragraphs.

153. The Policy described above is a valid and enforceable insurance contract. The specific duties and obligations of the Insurers that subscribed to the Policy are set forth in the subscription insurance policies identified above. Each of the subscription insurance policies is a valid and enforceable insurance contract.

154. SVC performed all of the obligations and conditions precedent to coverage under the Policy and under each of the subscription insurance policies. Any conditions or requirements of the Policy and of each subscription insurance policy, including the payment of all premiums, have been satisfied, waived, excused, or are otherwise inapplicable.

155. The Policy provides maximum coverage for, among other things, physical loss, damage or destruction to the Hotel Properties, SVC's Business Interruption losses, and extra expenses that SVC incurred as a result of the physical loss and damage to SVC's property.

156. The Policy also provides sublimited coverage for business income loss and communicable disease extra expenses due to an order of the health authority resulting in the partial or total suspension of SVC's business even where there is no physical loss, damage, or destruction.

157. SVC submitted a claim for loss as a direct result of a covered cause of loss. SVC was denied coverage, or the Insurers effectively repudiated their obligations to provide coverage, under the Policy based on the Insurers' improper position that, among other things, SVC has not suffered any direct physical loss, damage or destruction to its insured properties—the Hotel Properties—as a result of the actual presence of COVID-19 and that any claim for loss or damage due to COVID-19/SARS-CoV-2 is excluded under the Policy.

158. An actual, justiciable controversy exists between SVC and the Insurers concerning the availability and amount of coverage under the Policy for the Claim.

159. The controversy between the Insurers and SVC is ripe for judicial review.

160. As a result, SVC seeks a declaration from the Court that: (a) the Claim triggers the various coverage provisions identified above; (b) the Policy covers the Claim; (c) SVC sustained direct physical loss, damage or destruction to insured interests in real or personal property from a covered cause of loss under the Policy; (d) no exclusion applies to bar or limit coverage for the Claim; and (e) granting any other declaratory relief useful to resolving the dispute between the parties.

COUNT II
(Breach of Contract)

161. SVC repeats and realleges the allegations in the preceding paragraphs.

162. The Policy described above is a valid and enforceable insurance contract. The specific duties and obligations of the Insurers that subscribed to the Policy are set forth in the subscription insurance policies identified above. Each of the subscription insurance policies is a valid and enforceable insurance contract.

163. SVC performed all of the obligations and conditions precedent to coverage under the Policy, and under each of the subscription insurance policies. Any conditions or requirements of the Policy and of each subscription insurance policy have been satisfied, waived, excused, or are otherwise inapplicable.

164. The Insurers breached the Policy and their subscription insurance policies by improperly denying coverage for the Claim or by otherwise repudiating their respective and collective obligations to cover SVC's losses and expenses as expressly required under the Policy.

165. SVC has sustained and continues to sustain damages as a result of the Insurers' breach of the Policy and their subscription insurance policies.

166. SVC is entitled to damages as a result of the Insurers' breaches in an amount to be determined at trial, including compensatory and consequential damages, pre-judgment and post-judgment interest, attorneys' fees, and costs, and any other costs and relief that this Court deems appropriate.

COUNT III
(Breach of the Covenant of Good Faith and Fair Dealing)

167. SVC repeats and realleges the allegations in the preceding paragraphs.

168. Each of the Insurers is required to act in good faith, abstain from deception, and practice honesty and equity in all dealings with its policyholders, including SVC, under the insurance policies it sells.

169. Each of the Insurers owes a covenant of good faith and fair dealing to SVC in light of the insurance relationship created by the Policy and the subscription insurance policies.

170. The covenant of good faith and fair dealing obligates each party to the contract to refrain from taking any action that would deprive the other of the benefits of the contract or to cause undue hardship or harm to the other party. It also requires insurers to exert at least an equal degree of attention and concern for the interests of the insured as it would for its own interests in any matter.

171. The Insurers' conduct described in this Complaint and otherwise in investigating, handling, and denying the Claim under the Policy and the subscription insurance policies constitutes bad faith and improper claims handling.

172. The Insurers denied the Claim without reasonable justification for the refusal despite having actual knowledge of the facts establishing coverage for SVC's losses. The Insurers willfully or recklessly ignored facts and information demonstrating that the Claim was within the coverage of the Policy, and adopted unsupported bases to deny coverage.

173. The Insurers' denials were arbitrary and capricious.

174. The Insurers acted in bad faith by misrepresenting to SVC that the Policy does not cover communicable disease-related losses in whole or in part, when that is precisely the coverage that the Policy provides.

175. Furthermore, the Insurers acted in bad faith with respect to SVC by and through the Insurers' unreasonable failure to adequately investigate the Claim and their failure to act with reasonable justification in denying SVC the benefits to which it is entitled under the Policy.

176. The Insurers' reaction to the Claim was to press SVC to respond to overly burdensome, premature, or unnecessary information requests in an attempt to create time-consuming and costly work, to dissuade SVC from pursuing the Claim, and to paint an inaccurate picture that SVC was somehow delaying the Insurers' investigation or not cooperating and that the Insurers were investigating the Claim and evaluating coverage in good faith. The unreasonable nature of those tactics is further demonstrated by the fact that, because the Insurers deny that the presence of COVID-19/SARS-CoV-2 amounts to physical loss and damage to insured property, the Insurers always intended to deny coverage regardless of SVC's responses to the Insurers' inquiries.

177. In other words, the Insurers sought to hide their true position—that they had already decided to deny all COVID-19 claims, including the Claim—by going through the motions of a mock investigation and requesting immaterial and burdensome information time and again.

178. In violation of their duties to SVC, the Insurers acted in bad faith by, among other acts and omissions:

- (a) denying without reasonable justification their respective and collective obligations to pay Policy benefits or by repudiating their respective and collective obligations to pay benefits to SVC when they knew or should have known they had an obligation to provide insurance coverage;

(b) failing to exert as least an equal degree of attention and concern for SVC's interests in recovering insurance benefits under the Policy as the Insurers had for denying coverage;

(c) failing to conduct an adequate, complete, and proper investigation of the Claim and instead instituting a mock investigation process to hide their true position that they had already intended to deny coverage for all COVID-19 claims, including the Claim;

(d) misrepresenting the contents of and coverage afforded by the Policy;

(e) dragging their feet during the claims-handling and evaluation process by imposing unnecessary and burdensome information requests and pretending to consider them before proposing even more onerous information requests; and

(f) breaching their promise of security to SVC by unreasonably and without justification reneging on the all-risk commercial property insurance policy benefits they promised to provide SVC, leaving SVC without the benefits of its insurance assets to operate its business during a pandemic.

179. Upon information and belief, the Insurers' bad-faith conduct and improper claims practices described above were perpetrated to withhold from SVC the rights and benefits to which it is entitled under the Policy.

180. Therefore, SVC further requests that the Court award SVC damages to account for the Insurers' breach of the covenant of good faith and fair dealing and improper claims practices, as described above, including compensatory and consequential damages, punitive damages, pre- and post-judgment interest, attorneys' fees and costs, and any other costs and relief that this Court deems appropriate.

181. As a result of the Insurers' bad faith breach of its obligations under the Policy and their improper claims handling practices, SVC has suffered and will continue to suffer substantial damages in an amount to be proven at trial, including additional loss of business income and extra expense that it would not otherwise have needed to pay had the Insurers promptly made full payment of SVC's losses covered under the Policy.

182. SVC further requests that the Court award the amount equal to the attorneys' fees and costs incurred by SVC for the prosecution of this coverage action against the Insurers, which amount will be proved at or after trial.

COUNT IV
(Violation of M.G.L. c. 93A, § 11, and/or c. 176D, § 3)

183. SVC repeats and realleges the allegations in the preceding paragraphs.

184. Massachusetts General Laws c. 93A, § 2, prohibits the use or employment of unfair or deceptive acts or practices in the conduct of trade or commerce.

185. The conduct of the Insurers related to the Claim took place primarily and substantially in the Commonwealth of Massachusetts. The Insurers are all engaged in the business of insurance in Massachusetts. Certain of the Insurers have their usual places of business in Massachusetts, and, thus, directed their conduct with respect to the Claims from Massachusetts. SVC has its principal place of business in Massachusetts; its legal department and certain executives and officers responsible for coordinating the Claim also have their usual place of business in Massachusetts. Moreover, SVC submitted the Claim to the Insurers through its manager in Massachusetts, and received communications and conduct from the Insurers regarding the Claim through the Massachusetts-based manager, as well.

186. The Insurers had a duty to act in good faith when handling the Claim.

187. The Insurers had a statutory duty to engage in fair settlement practices under M.G.L. c. 93A.

188. The Insurers' systematic and summary denial of the Claim violated their duty of good faith and their statutory duty to engage in fair settlement practices.

189. In particular, the Insurers violated their statutory obligations by engaging in, *inter alia*, the following acts or practices related to the Claim:

- (a) misrepresenting pertinent facts or insurance Policy provisions relating to coverages at issue;
- (b) failing to act reasonably upon communications with respect to the Claim;
- (c) failing to adopt and implement reasonable standards for the prompt investigation of claims;
- (d) refusing to pay claims without conducting a reasonable investigation based upon all available information;
- (e) failing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
- (f) compelling SVC to institute this litigation to recover amounts due under the Policy; and
- (g) failing to provide a reasonable explanation of the basis in the Policy in relation to the facts or applicable law for the denial of the Claim.

190. The Insurers' acts, conduct, and omissions occurred in such a manner as to appear to constitute their general business practice in the handling of such claims.

191. The Insurers' acts, conduct, and omissions constitute unfair or deceptive acts and practices in violation of Chapter 93A and/or Chapter 176D, § 3.

192. As a direct, foreseeable, and proximate result of the Insurers' unfair and deceptive acts and practices, SVC has sustained actual damages, including, but not limited to, the following:

- (a) the amount of the Claim, which is continuing;
- (b) expenses incurred after the Insurers' breach of the Policy while pursuing the Claim, including attorneys' fees; and
- (c) interest on the aforesaid damages.

193. The Insurers' violations of M.G.L. c. 93A, § 11, and/or c. 176D, § 3, have caused and will continue to cause harm to SVC, entitling SVC to an award of actual damages, plus attorneys' fees.

194. The Insurers' violations of M.G.L. c. 93A, § 11, and/or c. 176D, § 3, were knowing and willful, entitling SVC to an award of multiple damages.

WHEREFORE, Plaintiff respectfully requests that the Court:

1. Declare that:
 - (a) the Claim triggers the various coverage provisions identified in this Complaint;
 - (b) the Policy covers the Claim;
 - (c) SVC sustained direct physical loss or damage from a covered cause of loss under the Policy;
 - (d) no exclusion applies to bar or limit coverage for the Claim; and
 - (e) granting any other declaratory relief useful to resolving the dispute between the parties;
2. Order the Insurers to provide coverage for the Claim under the Policy;

3. Award damages, including actual, compensatory, statutory, consequential, special, exemplary, and punitive damages, against the Insurers in an amount to be determined at trial, multiplied due to Defendants' willful and knowing violation of M.G.L. c. 93A;
4. Award pre-judgment, post-judgment, and statutory interest;
5. Award attorneys' fees and costs of suit incurred; and
6. Grant such and further other relief, including any equitable relief, as the Court deems just and proper.

WHEREFORE, Plaintiff respectfully requests a jury trial on all issues so triable.

Dated: February 24, 2022

HUNTON ANDREWS KURTH LLP

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