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Attorneys for Plaintiff

Keystone PF Acquisition, LLC,
2010 State Road
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Plaintiff,

v.

AFFILIATED FM INSURANCE COMPANY,
P.O. Box 7500
Johnston, RI 02919,

Defendant.

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

COMMERCE PROGRAM

February Term, 2021

No. _____

JURY TRIAL DEMANDED

This is NOT an Arbitration Case.
Filed and Attested by the
Office of Judicial Records
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G. IMPERATO



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NOTICE

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AVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted tiene veinte (20) dias de plazo al partir de la fecha de la demanda y la notificacion. Hace falta ascantar una comparencia escrita o en persona o con un abogado y entregar a

objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint of for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

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la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notificacion. Ademas, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perder dinero o sus propiedades u otros derechos importantes para usted.

Lleve esta demanda a un abogado inmediatamente. Si no tiene abogado o si no tiene el dinero suficiente de pagar tal servicio. Vaya en persona o llame por telefono a la oficina cuya direccion se encuentra escrita abajo para averiguar donde se puede conseguir asistencia legal.

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COMPLAINT – CIVIL ACTION

INTRODUCTION

1. This is an action for damages arising out of Defendant Affiliated FM Insurance Company's ("AFM") bad faith refusal to reimburse Plaintiff Keystone PF Acquisition, LLC ("National Fitness Partners") under an AFM "all risk policy" for tens of millions of dollars in business interruption losses caused by the novel coronavirus.

2. As the Pennsylvania Supreme Court declared in the early stages of the pandemic: "The COVID-19 pandemic is, by all definitions, a natural disaster and a catastrophe of massive proportions." *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 889 (Pa. 2020). The omnipresence of the virus throughout the United States, the dangerous conditions it creates when virus droplets spread in indoor environments, and the ensuing government stay at home orders issued by state and local authorities, have stripped many businesses of the ability to use their properties for income generating purposes. This is particularly true for gyms and fitness centers, whose business models depend on the ability to welcome customers who want to exercise indoors in a communal environment.

3. Plaintiff Keystone PF Acquisition, LLC ("National Fitness Partners") operates approximately eighty (80) Planet Fitness branded fitness centers in Pennsylvania, Delaware, North Carolina, and South Carolina. The COVID-19 pandemic has prevented National Fitness Partners from operating its properties for their intended purpose: welcoming members to work out, run on treadmills, lift weights, take fitness classes, and use Planet Fitness's custom-built locker rooms, showers, and restrooms.

4. While some government restrictions that were imposed on fitness centers last year were lifted, new restrictions have been imposed in some locations due to a renewed rise in cases of COVID-19. Additionally, as states continue to report record numbers of COVID-19 cases,

restrictions could be reimposed in other locations, which may require National Fitness Partners to again completely shutter a substantial number of its facilities.

5. National Fitness Partners has attempted to mitigate its losses by opening certain locations with severe capacity restrictions and other protective measures at great expense, and it has lost tens of millions of dollars because of the damage caused when physical virus droplets spread inside its facilities, onto its equipment, and within the surrounding communities its fitness centers serve. National Fitness Partners will likely incur additional significant losses as the virus spreads in record numbers throughout the winter and new governmental orders restrict or prohibit access to gyms and fitness centers.

6. Before the COVID-19 pandemic hit, National Fitness Partners bought one of the broadest business interruption insurance policies available in the market from Defendant AFM to protect itself against the risk of business interruption losses resulting from natural disasters and other perils. AFM self-describes its proVision policy form as “broad all-risk coverage.”¹ AFM’s all risk “ProVision” insurance policy insures National Fitness Partners against “ALL RISKS OF PHYSICAL LOSS OR DAMAGE,” except those specifically excluded (the “Policy”). (See Exhibit 1.) This Policy also guarantees coverage for “Business Interruption loss” resulting from physical loss or damage, as well as coverage for extra expenses that National Fitness Partners incurs to mitigate business interruption losses.

7. Unlike business interruption policies sold by other insurance companies, the AFM Policy does not exclude coverage for business interruption losses resulting from a virus or a

¹ See AFM, PROVISION POLICY, available at <https://www.affiliatedfm.com/property-coverage/provision-policy> (last visited Nov. 13, 2020).

pandemic, even though the insurance industry developed exclusions designed to limit exposure to communicable diseases nearly two decades ago in the wake of the 2003 SARS epidemic.

8. In the wake of the COVID-19 pandemic, some reinsurers and insurers have added specific COVID-19 exclusions to their policies to clearly and unmistakably exclude coverage for risks arising out of the COVID-19 pandemic, but the AFM policy has no such exclusions.

9. Notwithstanding the extremely broad coverage provided by the AFM policy, and the lack of a virus exclusion applicable to business interruption losses, AFM denied coverage for National Fitness Partners' insurance claim for two reasons. First, AFM took the wrongful position that the presence of the coronavirus in fitness centers and the surrounding community cannot cause physical loss or damage to property. Second, AFM also denied coverage based on its wrongful determination that a contamination exclusion in the Policy bars coverage, even though AFM's contamination exclusion on its face does not apply to business interruption losses.

10. AFM's coverage denial cannot be reconciled with AFM's separate promise in the Policy to provide coverage for losses resulting from communicable disease, which confirms that a virus can cause physical loss or damage to property.

11. Moreover, AFM denied coverage for National Fitness Partners' losses without conducting a proper investigation of those losses, in keeping with AFM's corporate strategy of issuing blanket coverage denials for COVID-19 related business interruption claims without conducting proper claims investigations. To make matters worse, AFM made misrepresentations about the scope of the contamination exclusion in its coverage denial letters, in violation of Pennsylvania law.

12. Through its actions in denying National Fitness Partners' business interruption claim for COVID-19 related losses, AFM has breached its promise to provide coverage for

National Fitness Partners' losses, and in doing so, AFM has violated its obligation to conduct a reasonable, good faith investigation of its policyholder's insurance claim. Accordingly, National Fitness Partners seeks damages for AFM's breach of the insurance policy, as well as damages for AFM's bad faith conduct in handling this claim.

ALLEGATIONS

PARTIES

13. Plaintiff Keystone PF Acquisition, LLC ("National Fitness Partners") is a Delaware limited liability company with its principal place of business in Camp Hill, Pennsylvania.

14. Defendant Affiliated FM Insurance Company is incorporated under the laws of Rhode Island, with a principal place of business in Johnston, Rhode Island. AFM is authorized to do business in and issue insurance policies in the Commonwealth of Pennsylvania and the States of Delaware, North Carolina, and South Carolina.

JURISDICTION & VENUE

15. This Court has subject matter jurisdiction under 42 Pa.C.S. § 911(a), and there is no federal subject matter jurisdiction under 28 U.S.C. § 1332 because the parties lack complete diversity.

16. An investor in a limited partnership of which National Fitness Partners is an indirect subsidiary is a non-profit corporation incorporated in Rhode Island and has a principal place of business in Rhode Island.

17. This Court has personal jurisdiction over AFM under Pennsylvania's long-arm statute, 42 Pa.C.S. § 5322, because AFM is authorized to do business in the Commonwealth of Pennsylvania and issued an insurance policy to a company that conducts business and owns property in the Commonwealth.

18. Venue is proper in this Court under 231 Pa. Code § 2179(b) because some of the insured property upon which National Fitness Partners brings this action is located in Philadelphia County.

FACTUAL BACKGROUND

A. National Fitness Partners' Operations

19. National Fitness Partners owns and operates approximately eighty (80) Planet Fitness locations in Pennsylvania, Delaware, North Carolina, and South Carolina.

20. Through its Planet Fitness locations, National Fitness Partners aims to enhance people's lives by providing a high-quality fitness experience in a welcoming, non-intimidating environment, which Planet Fitness calls the "Judgment Free Zone."

21. National Fitness Partners' Planet Fitness locations are typically 20,000 square feet in size, and contain a large selection of high-quality, purple, and yellow Planet Fitness-branded cardio, circuit-, and weight-training equipment, and friendly staff trainers who offer unlimited free fitness instruction to all its members in small groups.

22. Central to the Planet Fitness business model is the creation of a community atmosphere—a place where you do not need to be fit before joining and where progress toward achieving your fitness goals (big or small) is supported and applauded by its staff and fellow members.

23. Accordingly, National Fitness Partners' business depends on the ability to operate a physical space where its members can gather together and exercise indoors.

B. National Fitness Partners' Insurance Policy

24. National Fitness Partners purchased the Policy—an “all risk” “proVision”® policy (Policy No. IA202)—from Defendant AFM. The Policy provides up to \$100,000,000 in insurance coverage. (Policy, at 1 of 10).

25. AFM drafted the Policy.

26. The AFM Policy is written on AFM’s “proVision 4100 Policy form.”

27. The Policy identifies as the Named Insured “Keystone PF Acquisition, LLC, and its wholly or majority owned subsidiaries and any interest which may now exist or hereinafter be created or acquired which are owned, controlled or operated by any one or more of those named insureds.” (*Id.*, at 1 of 10).

28. The Policy contains a “Location Schedule” that identifies National Fitness Partners’ Planet Fitness locations as insured locations. These insured locations are referred to as “described locations” in the Policy.

29. The premium that AFM charged for the Policy was based on the nature of National Fitness Partners’ business, which as stated above, is operating physical locations where individuals can exercise together indoors.

30. Through the Policy, AFM promised to insure “property, as described in this Policy, against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded.” (*Id.*). Thus, all risks not otherwise excluded are covered causes of loss.

31. The Policy does not define the words “physical loss or damage.”

32. Likewise, the Policy does not define the words “property damage.”

33. The Policy also contains numerous additional coverages in addition to all risks property coverage.

34. For example, AFM promised to provide coverage for Business Interruption loss as follows:

This Policy insures Business Interruption loss, as provided in the Business Interruption Coverage, as a direct result of physical loss or damage of the type insured:

1. To property as described elsewhere in this Policy and not otherwise excluded by this Policy;
2. Used by the Insured;
3. While at a location or while in transit as provided by this Policy; and
4. During the Period of Liability as described elsewhere in this Policy.

This Policy also covers expenses reasonably and necessarily incurred by the Insured to reduce the loss otherwise payable under this Policy. The amount of such recoverable expenses will not exceed the amount by which the loss is reduced.

(*Id.*, at 19 of 44).

35. The Business Interruption Coverage section of the Policy also covers “recoverable Extra Expense loss,” which includes “the reasonable and necessary extra expense incurred by the Insured” during the “Period of Liability” to “[t]emporarily continue as close to normal the conduct of the Insured’s business.” (*Id.*, at 22 of 44).

36. In addition, the Policy contains numerous Business Interruption Coverage extensions that provide additional coverage when the coronavirus causes losses away from the locations covered under the Policy.

37. The policy provides up to \$100,000 in Attraction Property Coverage, which covers the Business Interruption Coverage loss incurred directly resulting from physical loss of the type insured to property of the type insured that attracts business to a “described location” and is within one mile of the “described location.” (*Id.*, at 24 of 44).

38. The Policy also provides up to 30 days of Civil or Military Authority Coverage, which provides as follows: “This Policy covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability if an order of civil or military authority prohibits access to a location provided such order is the direct result of physical damage of the type insured at a location or within five (5) statute miles of it.” (*Id.*, at 24 of 44).

39. The Policy also provides up to \$100,000 in coverage for “Communicable Disease – Business Interruption,” stating as follows:

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

- a) An order of an authorized governmental agency regulating such presence of communicable disease; or
- b) A decision of an Officer of the Insured as a result of such presence of communicable disease,

This Policy covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability at such described location with such presence of communicable disease.

This coverage is subject to the Qualifying Period in the Declarations section of this Policy.

Communicable Disease - Business Interruption Exclusions: As respects Communicable Disease - Business Interruption, the following additional exclusions apply:

(*Id.*, at 25 of 44).

40. “Communicable Disease” is defined in the Policy as, among other things, “disease which is: . . . [t]ransmissible from human to human by direct or indirect contact with an affected individual or the individual’s discharges.” (*Id.*, at 42 of 44).

41. The Policy also provides Ingress/Egress coverage, which “covers the Business Interruption Coverage loss incurred by the Insured due to the necessary interruption of the

Insured's business when ingress to or egress from a described location(s) is physically prevented, either partially or totally, as a direct result of physical loss or damage of the type insured to property of the type insured whether or not at a described location." (*Id.*, at 27 of 44).

42. "Location" is defined as "a location described in the Insurance Provided clause of the Declarations section or included as Newly Acquired Property or Unnamed Property coverages," and includes all Planet Fitness locations that is the subject of this Complaint. (*Id.*, at 1-2 of 10).

43. When National Fitness Partners purchased the Policy from AFM, National Fitness Partners expected the Policy—which provides coverage for "all risks" not specifically excluded—to insure it against a variety of losses, including business income losses at its Planet Fitness locations caused by the presence of a virus or the shutdown of its Planet Fitness locations due to a pandemic in close proximity to its businesses.

44. The Policy contains three different groups of exclusions: Group I, Group II, and Group III.

45. The exclusions limit coverage provided elsewhere in the Policy.

46. Some of the exclusions apply to "loss or damage" caused by specified causes or events.

47. Some exclusions in the Policy do not apply to "loss."

48. Some exclusions in the Policy do not apply to "damage."

49. None of the exclusions contained in the policy bar coverage for business interruption losses resulting from the novel coronavirus, COVID-19, or natural disasters like the COVID-19 pandemic.

50. After the SARS epidemic of 2003, the Insurance Services Office (“ISO”) promulgated a form virus exclusion (“CP 01 40 07 06”) for use in commercial property policies. That exclusion states as follows: “We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.”

51. In promulgating CP 01 40 07 06, the ISO noted that although there are exclusions that purport to encompass contamination and in fact use the term contaminant in addition to other terminology, losses arising from viral and bacterial contamination were specific types of exposure warranted particular attention.

52. AFM did not include CP 01 40 07 06 in its Policy.

53. The AFM Policy does not include a virus or communicable disease exclusion that applies to business interruption losses arising out of the COVID-19 pandemic.

C. The COVID-19 Pandemic, the Spread of the Virus, and the Ensuing Government Shutdown Orders

54. On March 11, 2020, the World Health Organization (“WHO”) declared that the emerging threat from the novel coronavirus, which causes COVID-19, constituted a global pandemic.

55. The Center for Disease Control (“CDC”) and WHO have explained that COVID-19 spreads through physical droplets and particles released by an infected person through talking, sneezing, coughing, or even breathing. Evidence shows these particles and droplets are airborne, can travel more than six feet, and can remain suspended in the air for hours.

56. Research has also shown that the novel coronavirus is a physical substance that may live on hard surfaces for hours or days, rendering any surface exposed to an infected person potentially unsafe and dangerous for continued use.

57. Thus, the presence of the novel coronavirus causes a physical alteration of the insured property, rendering the insured property unsafe and unusable.

58. Research also shows that the novel coronavirus can be pulled into air circulation systems. This creates particular risks for a business that operates indoors. Indeed, the CDC has published a study concluding that an outbreak among diners at an air-conditioned restaurant was caused by “droplet transmission . . . prompted by air-conditioned ventilation.” The same concerns exist for National Fitness Partners, a business that operates indoor fitness facilities.

59. A recent research paper in *Nature* identifies fitness facilities as one of the types of businesses most likely to lead to the spread of COVID-19 in the absence of stay-at-home orders or capacity constraints. *See* Chang, Serina, et al., *Mobility Network Models of COVID-19 Explain Inequities and Inform Reopening*, *NATURE* (preview publ’d online, Nov. 10, 2020), *available at* <https://doi.org/10.1038/s41586-020-2923-3>.

60. Planet Fitness’s members come to Planet Fitness’s facilities to exercise, which increases people’s heartrates and causes people to breathe harder.

61. Harder breathing increases the radius of aerosolized coronavirus droplets expelled by individuals, which is the main way in which the novel coronavirus spreads.

62. Thus, the physical presence of the novel coronavirus in the air at a fitness facility renders the property uninhabitable and/or unfit for its normal use. While some of National Fitness Partners’ centers have been able to reopen since the onset of the pandemic, they have only been able to do so after implementing significant capacity restrictions, expensive cleaning regimens, and requiring, among other things, that customers wear masks to limit the spread of the virus from individuals to the air and surfaces inside Planet Fitness locations.

63. Research also indicates that people contract COVID-19 through “community spread,” a phenomenon in which the virus easily spreads throughout a geographic area, and the persons infected are not able to pinpoint where, when, or from whom they contracted the disease.

64. This community spread has resulted in COVID-19 being present throughout the United States, including throughout the communities in Pennsylvania, Delaware, North Carolina, and South Carolina in which National Fitness Partners operates its Planet Fitness franchises.

65. In response to the growing threat from the pandemic and high degree of contagiousness of COVID-19, the Pennsylvania, Delaware, North Carolina, and South Carolina governments issued orders requiring the closure of, among other things, gyms and fitness centers. Although some of the restrictions imposed by those orders expired permitting National Fitness Partners to operate in a limited capacity, the rise of cases during the fall and winter has led some state and local governments to reimpose restrictions, including the full closure of gyms and fitness centers. As COVID-19 continues to spread at a record pace, stricter restrictions in other locations may also be imposed.

66. More specifically, on or around March 6, 2020, Governor Tom Wolf of Pennsylvania “proclaimed the existence of a disaster emergency throughout the Commonwealth,” and subsequently encouraged non-life-sustaining businesses, including gyms, to close.

67. On or around March 19, 2020, Governor Wolf cited his authority to “control ingress and egress to and from a disaster area and the movement of persons within it and the occupancy of premises therein” and issued an order mandating: “No person or entity shall operate a place of business in the Commonwealth that is not a life sustaining business regardless of whether the business is open to members of the public.” Gyms and fitness centers were not considered to be

“a life sustaining business” under the terms of the order. Regarding his executive order, Governor Wolf stated, “This virus is an invisible danger that could be present everywhere.”

68. Additionally, the Pennsylvania Supreme Court recently explained that the COVID-19 pandemic qualifies as a “natural disaster” under Pennsylvania’s Emergency Code because, like the disasters specifically enumerated in the definition of “natural disaster” in the code—*e.g.*, hurricane, tornado, explosion—the COVID-19 pandemic causes “substantial damage to property, hardship, suffering, or possible loss of life.” *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 888-89 (Pa. 2020).

69. On or around March 13, 2020, Governor Henry McMaster of South Carolina declared a State of Emergency in response to the “determination that COVID-19 posed an imminent public health emergency for the State of South Carolina.”

70. On March 23, 2020 Governor McMaster issued Executive Order No. 2020-13 “authorizing and directing law enforcement officers of the State, or any political subdivisions thereof, to, *inter alia*, prohibit or disperse any congregation or gathering of people, unless authorized or in their homes, in groups of three (3) or more people, if any such law enforcement official determines, in their discretion, that any such congregation or gathering of people powers, or could pose, a threat to public health.”

71. On March 31, 2020, Governor McMaster issued Executive Order No. 2020-17, which stated, in part “I hereby order and direct that effective Wednesday, April 1, 2020, at 5:00 p.m., the following ‘non-essential’ businesses, venues, facilities, services and activities shall be closed to non-employees and shall not be open for access or use by the public—to include members, if access or use is ordinarily restricted to or based on membership—or shall not take place, as applicable[.]” The list of “non-essential” businesses included “[f]itness and exercise

centers and commercial gyms[.]” “[g]roup exercise facilities, to include yoga, barre, and spin studios or facilities[.]” and “[a]ctivities that require the use of shared sporting apparatus and equipment[.]”

72. The Order states, “[t]he health, welfare, and safety of the lives and property of the people are beyond question matters of public concern, and reasonable regulations and laws designed to preserve and protect the same are clearly contained in the police power inherent in the sovereign.”

73. The Order draws upon the authority of the governor during a state of emergency to, among other things, “order and direct any person or group of persons to do any act which would in his opinion prevent or minimize danger to life, limb or property, or prevent a breach of the peace” and “order any person or group of persons to refrain from doing any act or thing which would, in his opinion, endanger life, limb or property.”

74. The Order further provides: “This Order is effective immediately and shall remain in effect for the duration of the State of Emergency unless otherwise modified, amended, or rescinded by subsequent Order. Further proclamations, orders, and directives deemed necessary to ensure the fullest possible *protection of life and property* during this State of Emergency shall be issued orally by the undersigned and thereafter reduced to writing and published for dissemination within the succeeding 24-hour period.” (emphasis added).

75. On March 10, 2020, Governor Cooper of North Carolina declared a State of Emergency “to coordinate the State’s response and protective actions to address the Coronavirus Disease 2019 (COVID-19) public health emergency and to provide for the health, safety, and welfare of residence and visitors located in North Carolina.”

76. On March 27, 2020, Governor Cooper issued Executive Order No. 121, which stated, in part “non-essential business and operations must cease.” The Order further provided “All businesses and operations in the State, except COVID-19 Essential Businesses and Operations as defined below, are required to cease all activities within the State except Minimum Basic Operations, as defined below.” Gyms and fitness centers were not on the list of COVID-19 Essential Businesses and Operations.

77. In issuing this Order, Governor Cooper drew upon his authority to “to prohibit and restrict activities which may be reasonably necessary to maintain order and *protect lives and property* during a state of emergency.” (emphasis added).

78. As set forth in the order, Governor Cooper issued Executive Order No. 121 in part because “the undersigned has determined that local control of the emergency is insufficient to assure adequate protection *for lives and property* of North Carolinians.” (emphasis added).

79. As set forth in the order, Governor Cooper also issued Executive Order No. 121 because “the area in which the emergency exists spreads across local jurisdictional boundaries and the legal control measures of the jurisdictions are conflicting or uncoordinated to the extent that efforts to *protect life and property* are, or unquestionably will be, severely hampered,” among other reasons. (emphasis added).

80. On March 12, 2020, Governor John Carney of Delaware issued a State of Emergency “due to the public health threat of COVID-19.”

81. On March 16, 2020, Governor Carney issued the Second Amended Modification to the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat, mandating that, “Effective March 19, 2020 at 8:00 a.m. EDT, owners and operators of bowling

alleys, concert events, movie theaters, sports facilities, fitness centers, and health spas shall cease operations.”

82. In the months following the initial orders that closed gyms and fitness center in each state, these closures were extended multiple times and other restrictions placed on gyms and fitness centers.

83. In addition, many counties and municipalities where National Fitness Partners operates have issued overlapping orders and restrictions on National Fitness Partners’ ability to operate its locations due to the harmful conditions created by the spread of the coronavirus, particularly inside indoor environments.

84. And even though some gyms and fitness centers have recently been able to reopen, they still face occupancy and other restrictions impairing their business operations.

85. In re-opening certain locations at reduced capacity, National Fitness Partners has incurred substantial extra expenses, including the installation of hand sanitizer locations, touchless check-in stations, and cleaning stations, additional cleaning, and additional training for National Fitness Partners employees.

86. New COVID-19 cases have risen across the country in recent months, reaching record levels of more than 200,000 new cases per day by the end of last year. To combat this accelerating spread of the virus, some state and local governments reimposed stricter restrictions, including fully closing gyms and fitness centers, in some locations where National Fitness Partners had previously reopened its gyms and fitness centers after enacting substantial modifications. As health experts have warned that cases will continue to rise throughout the winter, restrictions in other locations may follow.

87. Specifically, on November 20, 2020, Mayor Jim Kenney of Philadelphia issued an “Emergency Order Concerning Additional Limitations on Visiting, Gatherings, Events and Businesses For Fall/Winter 2020-21, Establishing Additional Safety Measures to Prevent the Spread of the 2019 Novel Coronavirus (COVID-19) and Continuing to Advise that Philadelphians Are Safer at Home,” in response to “a recent, significant uptick in percent positivity among those tested for COVID-19.” The Order said that “[t]o the extent any aspect of this Order is more restrictive than any such previous order or requirement, or in the event of a conflict between any such orders and this Order, this Order controls.” The Order specifically applied to fitness facilities like the Planet Fitness locations that National Fitness Partners operates: “Gyms and all other indoor facilities for physical exercise and training are prohibited from operating.”

88. The Order provided that it would remain in effect until “the end of January 1, 2021, unless otherwise rescinded, superseded, or amended by further Order.”

89. On December 20, 2020, Mayor Kenney extended the Order until January 15, 2021, but allowed gyms and indoor exercise facilities to resume operations, albeit with significant restrictions, on January 4, 2021.

90. On December 10, 2020, Governor Carney issued a “Fourth Revision to the Twenty-Seventh Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat” effective December 13, 2020, stating that “Delaware continues to see an increase in new daily COVID-19 cases and Delaware’s COVID-19 related hospitalizations and COVID-19 Intensive Care Unit (ICU) census have more than doubled over the past four weeks.” The Revision said that it “shall in no way modify, alter or amend the remaining terms of the Omnibus Modification, all of which shall remain in full force.” The Revision specifically applied to limit certain fitness operations, such as at the Planet Fitness locations that National Fitness

Partners operates in Delaware: “Group exercise classes are limited to a maximum of ten (10) individuals (excluding staff).”

91. The Revision provided that it would remain in effect “until January 11, 2021, unless expressly extended.”

92. On January 8, 2021, Governor Carney issued a “Fifth Revision to the Twenty-Seventh Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat” effective January 11, 2021, stating that “Delaware continues to see an increase in new daily COVID-19 cases and in the past week has had the highest daily case rate and highest number of hospitalizations to date.” The Revision said that it “shall in no way modify, alter or amend the remaining terms of the Omnibus Modification, all of which shall remain in full force.”

93. Governor Carney’s Revision continues to apply “until further notice.”

94. On December 12, 2020, Governor Wolf issued an “Order of the Governor of the Commonwealth of Pennsylvania Directing Limited-Time Mitigation,” completely closing many businesses throughout Pennsylvania because “the Commonwealth is now recording daily COVID-19 cases and hospitalizations in greater numbers than any other time during this pandemic.” The Order “suspends and supersedes any provisions of [the Governor’s] prior Orders and Advisories that are in conflict with its requirements.” The Order specifically applies to fitness facilities like the Planet Fitness locations that National Fitness Partners operates in Pennsylvania: “Indoor operations at gyms and fitness facilities are prohibited.”

95. The Order remained in effect until “8:00 a.m. on January 4, 2021.”

D. National Fitness Partners Incurred Losses Covered Under the Policy

96. The novel coronavirus that causes COVID-19 is a physical, tangible substance that infects the air and surfaces.

97. Every Planet Fitness location that National Fitness Partners owns and operates has suffered direct physical loss or damage due to the spread and presence of the novel coronavirus.

98. Since the onset of the COVID-19 pandemic, National Fitness Partners has not been able to operate its insured premises for their normal and intended purpose due to the physical presence of the novel coronavirus.

99. National Fitness Partners has specific knowledge of twenty-two (22) National Fitness Partners employees at nearly twenty (20) different locations who have tested positive for COVID-19 since March. These employees almost certainly physically carried the virus to National Fitness Partners' insured locations.

100. Moreover, National Fitness Partners has received calls from members who notified National Fitness Partners that they have contracted COVID-19 and, therefore, likely brought the novel coronavirus that causes COVID-19 to National Fitness Partners' fitness facilities.

101. These known examples of COVID-19 positive individuals at National Fitness Partners' insured locations exemplify the concern that necessitated National Fitness Partners to close its insured locations. And, the asymptomatic members and/or employees who unknowingly had COVID-19 and did not know they were contagious also almost certainly brought the novel coronavirus to National Fitness Partners' fitness facilities.

102. Indeed, there are likely instances where the novel coronavirus was physically present at National Fitness Partners' insured premises, but the individual infected with COVID-19

was pre-symptomatic. However, during the virus’s incubation period infected persons can still be contagious and transmit the virus.

103. Health officials, including at the CDC and in the states in which National Fitness Partners operates, have expressed concern due to rapidly increasing case counts that “community spread” of COVID-19—where the illness is being transmitted through unknown sources, not from known areas of infection—is occurring.

104. The rampant community spread of the virus and the more than 2 million *confirmed* cases of COVID-19 in the four states in which National Fitness Partners operates—approximately 855,000 in Pennsylvania; 770,000 in North Carolina; 450,000 in South Carolina; and 80,000 in Delaware—renders it virtually certain that the novel coronavirus was physically present at all of National Fitness Partners’ insured locations, not to mention the surrounding communities that National Fitness Partners serves.

105. The prevalence of the virus throughout the communities in which National Fitness Partners operates also resulted in direct physical loss or damage to property within five (5) miles of each National Fitness Partners location, resulting in governmental orders issued in each state in which National Fitness Partners operates that prohibited access to all of the National Fitness Partners fitness facilities.

106. The presence of the novel coronavirus at National Fitness Partners’ fitness facilities—including physically present on hard surfaces and in the air—rendered the facilities unfit for occupancy or use and prevented National Fitness Partners from conducting normal business operations at its insured premises.

107. Likewise, the government orders that prohibited and continue to prohibit access to the insured premises due to the physical loss or damage to property caused by the presence of the

novel coronavirus within five (5) miles of the insured locations also rendered the fitness facilities unfit for occupancy or use and prevented National Fitness Partners from conducting normal business operations at its insured premises.

108. Thus, the novel coronavirus has stripped National Fitness Partners of the ability to safely operate its gyms for revenue producing activities and has required National Fitness Partners to freeze hundreds-of-thousands of memberships because its members were unable to access the premises.

109. Due to the physical presence of the novel coronavirus at National Fitness Partners' insured premises, the community spread of the virus, and government closure orders issued due to physical loss and damage caused by the presence of the novel coronavirus in the local communities, National Fitness Partners closed all of its fitness facilities between March 13, 2020 and March 17, 2020.

110. National Fitness Partners' inability to operate its Planet Fitness locations because of the COVID-19 pandemic constitutes a physical loss of property.

111. During the closures, National Fitness Partners froze all memberships, resulting in millions of dollars of lost revenues. National Fitness Partners also lost the ability to derive in-facility revenue from the use of its property.

112. Notwithstanding the dangerous conditions created by the spread of the novel coronavirus, and in an effort to mitigate its losses, National Fitness Partners worked diligently with safety teams and legal teams to reopen its fitness facilities.

113. National Fitness Partners has invested and continues to invest significant sums of money into cleaning, testing, personal protective equipment ("PPE"), and other remedial measures that have allowed it to reopen its fitness facilities in a limited capacity.

114. On a location-by-location basis, National Fitness Partners gradually reopened each of its facilities between May 21, 2020 (when it reopened two (2) facilities) and September 1, 2020 (when it reopened twenty-six (26) facilities) based on local conditions and application laws and regulations; however, its fitness facilities continue to operate at a limited capacity.

115. Due to a rise of COVID-19 cases during the fall and early winter leading to new governmental orders, National Fitness Partners closed fourteen (14) locations and froze nearly 100,000 memberships in Pennsylvania in December 2020 until early January 2021. Although the Philadelphia order allowed gyms and indoor fitness centers to reopen with significant restrictions on January 4, 2021, and the Pennsylvania order expired on January 4, 2021, new orders may be imposed if the spread of COVID-19 remains an imminent threat. In addition, other state and local governments may also reimpose stricter restrictions that preclude access to National Fitness Partners' Planet Fitness locations and renders them useless.

116. National Fitness Partners' losses continue to accrue, as many members have kept their memberships frozen or canceled memberships due to their inability to exercise at Planet Fitness properties due to the dangers posed by the physical presence of the novel coronavirus.

117. The presence of the virus has also impeded National Fitness Partners' ability to attract new members, further amplifying the business income losses.

118. National Fitness Partners purchased the Policy with an expectation that it would provide coverage in the event of business interruption and extended expenses, such as those suffered by National Fitness Partners as a result of the presence of COVID-19 at its fitness center premises and the ensuing government shutdown orders based on the presence of COVID-19 in the local communities.

119. Additionally, National Fitness Partners had a reasonable expectation that the Policy's business interruption coverage would apply when a civil or governmental authority forced the closure of its insured properties, thereby barring access to the properties, due to an issue of public safety in the immediate area surrounding the properties.

D. AFM Denies National Fitness Partners' Claim in Bad Faith

120. When the COVID-19 pandemic caused National Fitness Partners to close its fitness facilities, it timely submitted notice of a claim to AFM under the Policy.

121. Because the AFM policy does not exclude COVID-19 business interruption losses, National Fitness Partners had a reasonable expectation that the Policy would provide coverage for its losses.

122. On or around March 20, 2020, AFM called National Fitness Partners in response to National Fitness Partners' claim notice. During that call, National Fitness Partners explained that the overwhelming presence of the virus and the ensuing government shut down orders had rendered National Fitness Partners' insured premises useless for their intended purpose and had forced National Fitness Partners to close its doors.

123. During that call, National Fitness Partners also explained that a member had called to cancel his membership because he believed he had contracted COVID-19, and this member had worked out at one of National Fitness Partners' fitness facilities the night before. National Fitness Partners could not confirm whether this customer had, in fact, tested positive for COVID-19, notwithstanding contacting the South Carolina Department of Health, because the Health Insurance Portability and Accountability Act (HIPAA) prevents sharing this member's private medical information.

124. On April 16, 2020, AFM denied all coverage for National Fitness Partners' losses, specifying that no coverage is available under the business interruption coverage part or any of its coverage extensions, such as the civil authority coverage extension or the communicable disease coverage extension. (*See Exhibit 2.*)

125. National Fitness Partners responded on May 14, 2020, explaining that AFM misconstrued National Fitness Partners' statements from March 20, 2020 phone call, that the novel coronavirus had been present at its insured premises, and that none of the purported coverage limitations that AFM raised in its letter had any merit. (*See Exhibit 3.*)

126. AFM reaffirmed its coverage denial in a letter dated June 30, 2020. (*See Exhibit 4.*) Even though National Fitness Partners' May 14, 2020 letter provided additional facts relating to the presence of the novel coronavirus at insured premises and pointed to pertinent Policy provisions that AFM had misconstrued in its initial denial letter, AFM responded with a boilerplate form letter that did not address any of the additional information supplied by National Fitness Partners, and denied all coverage under the business interruption, civil authority, communicable disease, and extra expense coverage parts.

127. Based on information and belief, in the early days of the COVID-19 pandemic, AFM and its parent company FM Global adopted and devised a scheme to deny all policyholders' claims arising from the COVID-19 pandemic, regardless of the facts giving rise to each policyholder's loss.

128. As policyholders started to submit claims, senior executives in the FM Global claims department issued an internal memo to AFM's claim handlers titled "Talking Points on the 2019 Novel Coronavirus (2019-nCoV)" (the "Talking Points Memo"). (*See Exhibit 5.*) Upon information and belief, AFM's claim handling department was instructed to use the Talking Points

Memo to guide the handling of COVID-19 claims, to provide responses to basic questions regarding coverage of such claims, and to shoehorn coverage for COVID-19 related losses into the communicable disease section of its Policies, based on the false assertion that all other coverage for COVID-19 related loss is excluded under Policy.

129. For example, the Talking Points Memo advises that if an Insured's employee has a confirmed medical diagnosis of COVID-19 at an insured location, it would be considered the "actual presence" of the disease under the communicable disease section of the Policy.

130. Although the Talking Points Memo suggests that some policyholders might be able to obtain coverage under the communicable disease coverage section of FM Global and AFM policies, the memo contains blanket instructions to deny coverage under other coverage parts without conducting a claims investigation.

131. Indeed, without considering a policyholder's individual circumstances or the specific law of the various jurisdictions where policyholders might do business—the Talking Points Memo conclusively states that "[a] virus will *typically* not cause physical damage" (emphasis added), the presence of a communicable disease does not constitute physical damage, and the presence of a virus falls within the contamination exclusion.

132. FM Global hardly tries to disguise the purpose of the Talking Points Memo: to limit all coverage arising from the COVID-19 pandemic to the sublimited communicable disease coverage, even though AFM's proVision policy does not otherwise contain any exclusion for business interruption losses resulting from the coronavirus.

133. Here, however, AFM failed in bad faith to recognize coverage under the communicable disease coverage extension when it evaluated the claim submitted by National Fitness Partners. Instead, AFM denied coverage under *all* sections of the Policy, even though (1)

National Fitness Partners has established the presence of the novel coronavirus at insured locations; and (2) there is no exclusion in the broad all risk policy that AFM issued that would otherwise bar or limit business interruption coverage for pandemic-related losses.

134. The Talking Points Memo acknowledges that a COVID-19 positive individual's presence at an insured location demonstrates the actual presence of a communicable disease, and it further recognizes that in some jurisdictions the policyholder will not be able to access the medical records of an individual who contracted COVID-19 without that individual's consent.

135. Nevertheless, in its effort to avoid coverage for National Fitness Partners' loss, AFM insisted that National Fitness Partners had no actual presence of the novel coronavirus at its insured premises, even though National Fitness Partners informed AFM that a member called to report that he had COVID-19 and had visited one of National Fitness Partners' fitness facilities the night before, but that further details could not be provided for privacy reasons.

136. Thus, AFM disregarded even the overly restrictive guidelines it unilaterally set in the Talking Points Memo—as well as the plain terms of the Policy. In doing so, AFM improperly placed its own financial interests ahead of the interests of its insured.

137. Furthermore, AFM knowingly and intentionally failed to conduct a meaningful investigation or perform reasoned analysis as to National Fitness Partners' claim for coverage under all potential coverage sections under the Policy that may respond to the substantial losses National Fitness Partners has suffered during the COVID-19 pandemic, as illustrated by AFM's failure to consider coverage under the Attraction and Ingress/Egress Business Interruption Coverage Extensions and its failure to recognize that the contamination exclusion in the Policy does not apply to business interruption losses.

CAUSES OF ACTION

COUNT I

(Request for Declaratory Judgment)

138. National Fitness Partners realleges and incorporates by reference, as if fully set forth herein, the allegations in all prior paragraphs.

139. An actual controversy has arisen between National Fitness Partners and AFM concerning the rights and obligations of the parties under the express terms of the Policy.

140. The parties specifically dispute whether AFM is obligated to reimburse National Fitness Partners for the business interruption losses and extra expenses incurred as a result of the physical loss and damage inflicted to National Fitness Partners' insured locations due to the spread and presence of the novel coronavirus, as well as due to the governmental orders restricting access to the insured locations issued because of physical loss or damage to property caused by the presence of COVID-19 within five (5) miles of each insured location.

141. This dispute is properly addressed in a declaratory judgment action because a declaratory judgment will serve the useful purpose of clarifying and settling the legal relations at issue.

142. A declaratory judgment is also proper because it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to this proceeding.

143. A judicial declaration is necessary and appropriate so that the parties to this action may ascertain their rights and duties under the Policy.

144. Under the Policy, AFM promised to reimburse National Fitness Partners for losses arising from "all risks" of physical loss and damage, including business interruption and extra expense losses.

145. National Fitness Partners has suffered physical loss and damage at and around its properties due to the spread and presence of the novel coronavirus that causes COVID-19 and has also incurred business interruption loss and extra expense as a direct result of that physical loss and damage.

146. National Fitness Partners has also incurred business interruption losses due to the governmental shutdown orders issued because of the physical loss or damage caused within five (5) miles of National Fitness Partners' insured premises.

147. Accordingly, National Fitness Partners seeks a declaration from this Court that, under the Policy, AFM is obligated to reimburse National Fitness Partners for the losses and expenses it has incurred arising from physical loss and damage to its properties and the governmental shutdown orders.

148. The Court's ruling on these issues will clarify and settle the legal relations at issue, and it will terminate and affect relief from the uncertainty, insecurity, and controversy as to all interested parties.

149. A judicial determination is necessary and appropriate, so the parties may ascertain their respective rights and duties as to one another and may conduct themselves accordingly now and in the future.

Prayer for Relief for Count I

WHEREFORE, National Fitness Partners requests a trial by jury and that the Court enter judgment in its favor as follows:

(1) Declaring that under the Policy, AFM is obligated to reimburse National Fitness Partners for business interruption and extra expense losses arising as a direct result of the physical

loss and damage caused by the presence of the novel coronavirus that causes COVID-19 at the insured locations;

(2) Alternatively, declaring that under the Policy, AFM is obligated to reimburse National Fitness Partners for business interruption and extra expense losses arising as a result of the governmental shutdown orders issued because of the physical loss or damage caused within five (5) miles of National Fitness Partners' insured premises;

(3) Awarding National Fitness Partners the damages it has incurred or will incur;

(4) Awarding National Fitness Partners its attorneys' fees and litigation costs; and

(5) Awarding National Fitness Partners such other and further different relief that this Court deems just and proper.

COUNT II

(Breach of Contractual Duty to Reimburse National Fitness Partners for Business Interruption and Extra Expense Losses)

150. National Fitness Partners realleges and incorporates by reference, as if fully set forth herein, the allegations in all prior paragraphs.

151. The Policy is a valid and enforceable contract between National Fitness Partners and AFM.

152. National Fitness Partners has performed under the terms of the Policy, including paying significant premiums in exchange for the coverage afforded under the Policy.

153. Under the Policy, AFM promised to reimburse National Fitness Partners for losses arising from "all risks" of physical loss and damage, including business interruption and extra expense losses.

154. National Fitness Partners has suffered physical loss and damage at and around its properties due to the presence of the novel coronavirus and has also incurred business interruption loss and extra expense as a direct result of that physical loss and damage.

155. National Fitness Partners also has incurred losses due to the governmental shutdown orders issued because of COVID-19 related physical loss or damage within five (5) miles of National Fitness Partners' insured premises.

156. National Fitness Partners also has incurred losses due to COVID-19 related physical loss or damage at Attraction properties.

157. By refusing to reimburse National Fitness Partners, AFM has breached the promises it made to National Fitness Partners when it issued the Policy.

158. As a result of AFM's breach, National Fitness Partners has suffered millions of dollars in damages, as well as damages resulting from AFM's improper withholding of insurance benefits that are due and owing under the Policy, and attorney's fees in this action.

Prayer for Relief for Count II

WHEREFORE, National Fitness Partners requests a trial by jury and that the Court enter judgment in its favor as follows:

(1) Finding that AFM has breached its contractual obligation by refusing to reimburse National Fitness Partners for business interruption and extra expense losses arising as a direct result of the physical loss and damage caused by the presence of COVID-19 at the insured locations;

(2) Finding that AFM has breached its contractual obligation by refusing to reimburse National Fitness Partners for business interruption and extra expenses losses arising as a result of

the governmental shutdown orders issued because of the physical loss or damage caused within five (5) miles of National Fitness Partners' insured premises;

- (3) Awarding National Fitness Partners the damages it has incurred or will incur;
- (4) Awarding National Fitness Partners its attorneys' fees and litigation costs; and
- (5) Awarding National Fitness Partners such other and further different relief that this

Court deems just and proper.

COUNT III

(Bad Faith)

159. National Fitness Partners realleges and incorporates by reference, as if fully set forth herein, the allegations in all prior paragraphs.

160. Throughout the handling of this claim, AFM has consistently ignored information National Fitness Partners has supplied in support of its claim, National Fitness Partners' coverage arguments, and even its own internal guidelines. The blatant disregard for National Fitness Partners' rights under the Policy constitutes bad faith.

161. By way of example, AFM has misconstrued and mischaracterized information supplied by National Fitness Partners during telephone calls regarding this insurance claim in a deliberate attempt to support its improper coverage denial.

162. Similarly, despite National Fitness Partners sending a thorough coverage letter to AFM in May 2020 explaining why its losses were covered under the Policy, AFM sent a form letter back to National Fitness Partners that failed to address any of the additional information supplied in National Fitness Partners' letter and that misrepresented pertinent provisions of the Policy.

163. National Fitness Partners also provided AFM with a detailed description of a customer calling to report a suspected case of COVID-19 the day after that customer visited an insured location, as well as additional facts relating to the presence of COVID-19 at insured premises. AFM ignored these facts and, contrary to the facts supplied by National Fitness Partners, denied coverage on the basis that “COVID-19 was not actually present at a described location owned, leased or rented by you,” which is untrue.

164. AFM also has misrepresented language in its insurance policy, such as the contamination exclusion in the Group III Exclusions of the Policy, to support its flawed argument that loss arising from a pandemic is excluded from the broad all risk coverage that AFM promised to provide. Despite AFM’s position, there is no exclusion in the Policy that bars coverage for Business Interruption loss resulting from the spread of the novel coronavirus.

165. Although its policyholders, including National Fitness Partners, are facing substantial losses in the wake of the COVID-19 pandemic, upon information and belief AFM has been using the Talking Points Memo it drafted to guide its claims handling, without evaluating coverage based on the individualized facts of each policyholder and the law of the state that applies to the given policy. The Talking Points Memo states that its own recommendations (which are overbroad and incorrect in the first place) may not apply to every situation, yet AFM staunchly applied these guidelines that are not part of the Policy in a calculated attempt to break its promises to National Fitness Partners at a time when National Fitness Partners is struggling to keep its doors open.

166. Even worse, with respect to National Fitness Partners’ claim, AFM has repeatedly ignored the facts relevant to National Fitness Partners’ Claim and regurgitated form, blanket denials to escape its clear coverage obligations.

167. Moreover, AFM's wrongful coverage denial plainly disregards the law of Pennsylvania where the Policy was issued, which does not require structural damage or physical alteration to property to establish physical damage *or* physical loss.

168. As demonstrated through its apparent reliance on the Talking Points Memo, as well as the protracted course of dealing between the parties, AFM knows that it has no reasonable basis for denying National Fitness Partners' claim and it has recklessly disregarded its policy obligations to its policyholder.

169. As a result of AFM's bad faith, National Fitness Partners has suffered and will continue to suffer damages, and was left with no option but to incur attorney's fees to vindicate its rights under the Policy.

170. National Fitness Partners is entitled to damages as a result of AFM's bad faith in an amount to be proven at trial, including any special, punitive, treble, consequential, exemplary, statutory, or other damages available as a result of AFM's bad faith, as well as its attorneys' fees and litigation costs.

Prayer for Relief for Count III

WHEREFORE, National Fitness Partners requests a trial by jury and that the Court enter judgment in its favor as follows:

- (1) Finding that AFM has repudiated its coverage obligations and refused to fulfill its obligations to National Fitness Partners in bad faith;
- (2) Awarding National Fitness Partners the damages it has incurred or will incur;
- (3) Awarding National Fitness Partners its attorneys' fees and litigation costs;

(4) Awarding National Fitness Partners any special, punitive, treble, exemplary, consequential, statutory, or other damages available to National Fitness Partners as a result of AFM's bad faith; and

(5) Awarding National Fitness Partners such other and further different relief that this Court deems just and proper.

Dated: February 5, 2021

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