

STATE OF RHODE ISLAND  
PROVIDENCE, S.C.

SUPERIOR COURT

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TAUBMAN COMPANY, LLC and TAUBMAN REALTY GROUP, LLC	:	C.A. No. _____
	:	
Plaintiffs,	:	
v.	:	
	:	
FACTORY MUTUAL INSURANCE COMPANY	:	
	:	
Defendant.	:	
	:	

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**ORIGINAL COMPLAINT AND JURY DEMAND**

Plaintiffs Taubman Company, LLC and Taubman Realty Group, LLC (collectively, “Taubman”) complains of Defendant Factory Mutual Insurance Company (hereinafter “Factory Mutual”) and alleges upon knowledge as to its own acts and upon information and belief as to the acts and omissions of others as follows:

**NATURE OF THIS ACTION**

1. Taubman and its insured subsidiaries own, manage and/or lease 21 premier regional, super-regional and outlet shopping malls across 13 states, including Puerto Rico.

2. By this Action, Taubman seeks to collect bargained-for coverages under its all-risks commercial property policies (“Policies”) for losses suffered due to the Coronavirus<sup>1</sup> pandemic and the related governmental actions (including the various governmental stay-at-home and business closure orders) across several states. Taubman’s operations have been and continue

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<sup>1</sup> The terms “Coronavirus” and “COVID-19” are often used interchangeably in common parlance and are used interchangeably in this Complaint.

to be suspended and threatened by the ongoing and increasingly dangerous conditions created by the Coronavirus pandemic. Starting in mid-March 2020, Taubman has been forced to suspend or reduce its business operations at all of its covered premises.

3. Befitting the top dollar that Taubman paid for best-in-class insurance coverage, the Policy promises to afford broad protections against the risks of pandemic-related losses. Among other coverages, the Policies provide distinct coverages for (1) property loss, “Time Element” (business interruption) loss, Extra Expense, Rental Income losses, Contingent Time Element and Attraction Properties losses resulting from the “risks” associated with the pandemic; and (2) “Communicable Disease Response” and “Interruption by Communicable Disease” coverages for certain narrow specified amounts incurred in response to an identified incident of a communicable disease at Taubman properties.

4. Factory Mutual has not honored the terms of its Policy in responding to the Taubman’s coverage claim. Specifically, Factory Mutual contends that its coverage is limited only to the “Communicable Disease Response” and “Interruption by Communicable Disease” coverages in the Policy, and moreover, that such coverages are not triggered by Taubman’s losses absent the “actual presence” of Coronavirus on Taubman’s premises. More broadly, Factory Mutual has failed to pay for the physical loss of or damage to property and business interruption that Taubman has incurred and continues to incur because of the risks caused by Coronavirus, even though the Policies expressly provide coverage for such risks.

5. In total, each of the Policies provides coverage of up to \$1 billion per occurrence for precisely the types of losses incurred by Taubman and at issue in this Action. But Factory Mutual indicated that it intends to strictly limit coverage to the \$1 million aggregate sublimit for Communicable Disease coverage, and stated that such coverage is not even triggered.

6. The insuring agreement in the Policies covers property “against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded.” (emphasis original). Under the Policies’ express terms, coverage is provided to Taubman where, among other circumstances, Taubman’s use of its property is prevented, diminished or restricted to prevent the spread of Coronavirus and resulting loss or damage to the covered premises. Due to the Coronavirus pandemic, Taubman’s covered premises have been rendered unusable in the way that they had been used before the onset of the pandemic, depriving Taubman of traditional physical use of the insured premises.

7. Taubman has incurred substantial losses resulting from the dangers posed to property and persons at Taubman locations by the physical prevalence of Coronavirus. These risks have rendered covered premises, at least temporarily, unreasonably dangerous, uninhabitable and/or unfit for their intended purposes.

8. Contrary to its promise to cover such risks, Factory Mutual has failed to honor its coverage obligations under the Policies. Taubman thus seeks the relief addressed below in this Complaint.

### **JURISDICTION AND VENUE**

9. This court has jurisdiction pursuant to Rhode Island Superior Court Rules of Civil Procedure 57 and R.I.G.L. § 9-30-2.

10. This matter is subject to the jurisdiction of this Court, as Defendant is a resident of the State of Rhode Island and does business in the State of Rhode Island, and the value of the Plaintiffs’ claims exceed the jurisdictional requirement.

11. This Court has personal jurisdiction over Defendants because Defendant does business within the State of Rhode Island.

12. Venue is proper in this county as the Defendant was, at all relevant times, a resident of Providence County, in the State of Rhode Island.

### **THE PARTIES**

13. Taubman Company, LLC (“Taubman Company”) is a Delaware limited liability company with its principal place of business and headquarters in Bloomfield Hills, Michigan.

14. Taubman Realty Group, LLC (“Taubman Realty”) is a Michigan limited liability company with its principal place of business and headquarters in Bloomfield Hills, Michigan. As of December 29, 2020, Taubman Realty is the successor by conversion to Taubman Realty Group, L.P., one of the Named Insureds under the Policies.

15. Factory Mutual Insurance Company is a Rhode Island corporation with its principal place of business in Johnston, Rhode Island, and is licensed to transact, and is regularly transacting, business in Rhode Island.

16. At all times relevant hereto, Taubman maintained insurance to protect its property and business in the event of various losses.

### **TAUBMAN’S SHOPPING MALLS**

17. Taubman Company is a property management company that contracts with single purpose vehicles (“SPVs”) which are owners of shopping malls. Taubman Company and the SPVs are subsidiaries of Taubman Realty. Each of the shopping malls are insured locations under the Policies.

18. Before and during the pandemic, Taubman Company has contracted with shopping mall owners in California, Colorado, Connecticut, Florida, Hawaii, Michigan, Missouri, New Jersey, Puerto Rico, South Carolina, Tennessee, Utah and Virginia.

19. Taubman Company’s revenue under the management contracts is based on rental revenue derived by the SPVs from lease agreements between the SPVs and individual mall tenants (including temporary tenants and specialty retailers).

20. Taubman Realty owns direct or indirect beneficial interests in the SPVs, which derive revenue from lease agreements between the SPVs and individual mall tenants.

### **THE FACTORY MUTUAL INSURANCE POLICIES**

21. As a large international property-only insurer, Factory Mutual, part of the FM Global Group, directs substantial annual resources to studying risks and those that may in the future cause loss to policyholders and deciding which risks it is willing to cover and those that it intends to avoid.<sup>2</sup>

22. In marketing its Global Advantage® All-Risk Policy, Factory Mutual advertises that, “As an FM Global client, you get an insurance policy based on engineering and research, not just on actuarial formulas. If you need the ability to scale policy options to fit your actual properties and exposures, you’ll appreciate our Business Interruption Coverage. It protects against loss of income following a disaster, wherever you operate, or however indirect your connection to the loss.”<sup>3</sup>

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<sup>2</sup> See <https://www.fmglobal.com/about-us/why-fm-global> (“You’ll discover that our approach to claims is different, too. We work closely with you *before*, *during* and *after* a loss—no matter where in the world that loss occurs. And we ground our recommendations in world-class scientific research and on-the-ground engineering services”) (emphasis original) (last visited March 9, 2021); see also <https://www.fmglobal.com/products-and-services/our-approach> (“Where other insurance companies rely primarily on actuarial tables, we use a hands-on, engineering-based approach. The result? Property insurance coverage based on the realities of your business and your particular property risk management challenges.”) (last visited March 11, 2021).

<sup>3</sup> See <https://www.fmglobal.com/products-and-services/products/the-fm-global-advantage-all-risk-policy> (last visited March 11, 2021).

23. In addition to Factory Mutual's knowledge of the retail property business in general, and in connection with providing coverage to Taubman, Factory Mutual engaged, or had reasonable opportunities to engage in, an extensive underwriting investigation and to become familiar with and knowledgeable about the nature and scope of Taubman's business and the nature of the risks against which it was insuring.

24. In exchange for substantial premiums, Factory Mutual sold to Taubman policy number 1051105 effective from April 1, 2019, to April 1, 2020. A true and correct copy of policy number 1051105 is attached hereto as **Exhibit A** and incorporated by reference.

25. Upon expiration of policy number 1051105, in exchange for substantial premiums, Factory Mutual sold to Taubman policy number 1063820 effective from April 1, 2020, to April 1, 2021. A true and correct copy of policy number 1063820 is attached hereto as **Exhibit B** and incorporated by reference. Policy numbers 1051105 and 1063820 are referred to collectively herein as the "Policies."

26. The applicable coverages provided by the Policies include but are not limited to the following:

- a. **Property Loss/ Time Element Losses Resulting from the Risks of Physical Loss or Damage:** Each of the Policies provides coverage of up to \$1 billion per occurrence for "ALL RISKS OF PHYSICAL LOSS OR DAMAGE" to covered property, as well as "TIME ELEMENT loss" "directly resulting from physical loss or damage of the type insured."
- b. **Additional Time Element Losses Resulting from the Risks of Physical Loss or Damage:** Each of the Policies provides coverages for Extra Expense, Rental Insurance, Contingent Time Element, and Attraction Properties losses, as set forth herein, subject to the applicable limits stated by the Policies.
- c. **Response Costs/Time Element Losses Due to the Actual Presence of Communicable Disease at Taubman Locations:** Each of the Policies provides up to \$1,000,000 or more for cleanup, removal and/or disposal of the actual presence of communicable disease from insured property and interruption/time-element losses due to the actual presence of such communicable disease.

27. The Policies contain sublimits for certain losses, but others are subject to the full \$1 billion policy limit. As sought by Taubman, the limit of liability for property loss and Time Element (business interruption) at covered locations is the full \$1 billion per occurrence limit.

28. The Insuring Agreement in each of the Policies states: “This Policy covers property, as described in this Policy, against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded, while located as described in this Policy.”

29. Therefore, the Policies expressly insure against the “risks,” such as, threats of physical loss or damage to property.

30. If the Policies do not expressly exclude a particular cause of a risk of physical loss of or damage to property, then the non-excluded peril triggers coverage.

31. The Policies cover the “risks of” direct physical “loss” *or* “damage” to Taubman’s property. Even if Taubman’s property did not suffer physical “damage,” the Policies still provide coverage for the risk of Taubman’s physical “loss” regarding its property.

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

33. The Policies do not define “physical.”

34. The Policies do not define “loss.”

35. The Policies do not define “physical loss.”

36. The Policies do not define “damage.”

37. The Policies do not define the phrase “physical loss or damage.”

38. The Policies do not define the terms “risks” or “risks of.”

39. The Policies do not define the phrase “risks of physical loss or damage.”

40. When undefined, the phrases “physical loss or damage” and “risks of physical loss

or damage” are susceptible to more than one reasonable interpretation.

41. When the undefined phrases “physical loss or damage” and “risks of physical loss or damage” are susceptible to more than one reasonable interpretation, they should be construed against the drafter (which, here, is Factory Mutual).

42. Dictionary definitions of “loss” include:

- a. “Deprivation.” Loss, Merriam-Webster, <https://www.merriam-webster.com/dictionary/loss>
- b. “[D]ecrease in amount, magnitude, or degree.” Loss, Merriam-Webster, <https://www.merriam-webster.com/dictionary/loss>
- c. “The fact that you no longer have something or have less of something.” Loss, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/loss?q=Loss>
- d. “Having less than before.” Loss, Macmillan Dictionary, <https://www.macmillandictionary.com/us/dictionary/american/loss>
- e. “[T]he state of no longer having something or as much of something.” Loss, Oxford Advanced Learner’s Dictionary, <https://www.oxfordlearnersdictionaries.com/us/definition/english/loss?q=loss>

43. At minimum, Taubman suffered “deprivation,” “decrease,” or “having less” of its covered property due to this Coronavirus pandemic.

44. Taubman faced and continues to face the imminent “risk” of physical loss or damage to its property because of the ongoing and increasingly dangerous Coronavirus pandemic.

45. Over forty courts have already concluded that insureds have properly alleged or are in fact entitled to coverage for Coronavirus-related business interruption loss or damage. Upon information and belief, Factory Mutual is aware of these court decisions. Because numerous courts agree that Coronavirus may cause “direct physical loss or damage” to property, Taubman’s belief that the Policy provides coverage is at least reasonable even if Factory Mutual claims that it believes there is no coverage.



**THE INSURANCE INDUSTRY AND FACTORY MUTUAL SPECIFICALLY  
KNEW OF THE RISKS AND DANGERS OF THE PANDEMIC**

46. Insurers, such as Factory Mutual, were repeatedly warned, and have been aware for years, of the potential impact of pandemics. In fact, there were many publicly available reports about the risk of pandemics – and what insurers should do – in the months and years before the Coronavirus pandemic. For example:

- a. One article noted in March 2018: “Even with today’s technology, a modern severe pandemic would cause substantive direct financial losses to the insurance community. In addition, indirect losses would be severe, most notably on the asset side of the balance sheet.”<sup>4</sup>
- b. The Insurance Library Association of Boston (founded 1887) lists on its website at least 15 articles, reports, and white papers available to insurers from early 2007 through 2018.<sup>5</sup> The Association states on its website: “The past 20 years has seen the rise of a number of pandemics. Slate recently published an article on what has been learned about treating them in that time. We thought it might be apt for us to take a look back and see what the insurance industry has learned as well.” The webpage then lists various articles and reports discussing the risks and impacts of pandemics on the insurance industry. For example, an article stated in 2014 that pandemics “can have a significant impact on life and health insurance portfolios, and, depending on contract terms, could also affect other lines such as workers’ compensation, business interruption, travel and event cancellation and disability insurance.”<sup>6</sup>

47. Moreover, over the course of decades, courts have held that the presence of a hazardous substance at or on a property, including the airspace inside buildings, constitutes property damage. Many courts have also held that the closure of property due to imminent risk of

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<sup>4</sup> See “What the 1918 Flu Pandemic Can Teach Today’s Insurers,” *AIR* (Mar. 29, 2018), <https://www.air-worldwide.com/publications/air-currents/2018/What-the-1918-Flu-Pandemic-Can-Teach-Today-s-Insurers/> (last visited March 11, 2021).

<sup>5</sup> See <https://insurancelibrary.org/2020/02/07/pandemics-and-insurance/> (last visited March 11, 2021).

<sup>6</sup> See Nita Madhav, “Travel Sickness: Pandemic Risk Models Show Diseases Move More Quickly and with Greater Impact in our Connected World,” *Best’s Review*, 115 no. 8 (Dec. 1, 2014).

physical loss or damage or danger to inhabitants constitutes physical loss of property. Upon information and belief, insurers, including Factory Mutual, have been and continue to be aware of these court decisions.

48. Factory Mutual itself previously argued in court filings that mold infestation in the clean room of a laboratory caused physical loss or damage—despite not causing a structural alteration of the property—and was therefore covered. *See Factory Mut. Ins. Co. v. Federal Ins. Co.*, Case No. 1:17-cv-00760 (D.N.M. Nov. 11, 2019), ECF No. 127 (attached hereto as **Exhibit C**). In support, Factory Mutual asserted that “numerous courts have concluded that loss of functionality or reliability under similar circumstances constitutes physical loss or damage,” and cited case law as referenced in paragraph 47 above. Factory Mutual also argued that another insurer’s failure to define “physical loss or damage” made that term “susceptible of more than one reasonable interpretation,” rendered the policy “ambiguous,” and “must be construed against” that insurer.

49. In 2006, ISO considered the need to draft an exclusion that would bar coverage for losses caused by a virus, and in July 2006 ISO prepared a circular as part of its filing with state insurance regulators of a standard exclusion of loss due to human disease-causing viruses and bacteria. In that circular, ISO cited “rotavirus, SARS, [and] influenza” and observed that “[t]he universe of disease-causing organisms is always in evolution.”

50. ISO’s circular further recognized that “Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property.”

51. ISO also expressly warned of a need for its exclusion because “the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that

insurers employing [property] policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.”

52. With its circular ISO thus acknowledged that (i) the presence of a human disease causing virus could give rise to physical loss or damage to property; (ii) such damage could trigger coverage under property policies for property losses, including business interruption losses; and (iii) absent addition of ISO’s exclusion, the existing language in property policies, like that issued by Factory Mutual here, did not clearly and unambiguously bar coverage for such losses.

53. ISO therefore introduced with its circular a standard-form exclusion that it entitled “Exclusion Of Loss Due To Virus Or Bacteria” (form CP 01 40 07 06 and, in certain jurisdictions, form CP 01 75 07 06). As noted in the circular, the purpose of this standard form language was to allow those insurers that chose to use it in their insurance policies, to attempt to protect themselves from coverage for loss or damage resulting from infectious material and pandemic.

54. Accordingly, since 2006 insurers have had the opportunity to incorporate, and have incorporated, this standard virus exclusion in certain of their policies in an effort to avoid covering loss due to a disease such as COVID-19.

55. Factory Mutual nonetheless chose to not include the ISO or other more express pandemic or similar exclusion(s) in the Policy.

56. By expressly providing coverage for certain narrow categories of loss or expense incurred for an incident of communicable disease at a covered property, Factory Mutual recognized that communicable diseases may cause physical loss or damage. In addition to such limited coverage for the “actual” presence of communicable disease (and related business interruption loss), the Policy provides coverage for “all risks” of property loss from communicable disease, i.e., coverage for the *threat* to property caused by communicable disease.

57. In fact, Factory Mutual chose to utilize this “all risks” language, instead of more restrictive policy language drafted by the insurance industry and utilized by various insurers since in or about 2013.

58. Prior to 2013, ISO’s standard “Businessowners Coverage Form” such as ISO form BP 00 03 01 10, defined “Covered Causes of Loss” as “[r]isks of direct physical loss unless the loss is...[e]xcluded...or [l]imited....” In 2013, ISO issued revised Businessowners coverage forms, such as ISO form BP 00 03 07 13, which redefined “Covered Cause of Loss,” by removing the term “risks of.” ISO now defines “Covered Causes of Loss” as “[d]irect physical loss unless the loss is excluded or limited....”

59. ISO issued a “Notice to Policyholders” that insurers using the form could issue to its insureds to explain the changes in policy wording. The notice expressly states that “the term ‘risk of’ is removed from the Covered Cause of Loss provision.”

60. Accordingly, since at least 2013, insurers have had the opportunity to incorporate, and have incorporated, an insuring agreement that deletes “risk of.” For example, Cincinnati Insurance Company, in revising its standard property policy form number FM 101, issued a “Notice to Policyholders” in 2016 stating, “As ISO has done in reaction to court decisions, we are deleting the word ‘Risks’ from the preamble to the Covered Causes of Loss section of FM 101.”

61. Factory Mutual did not remove the term “risks of” from the insuring agreement in the Policies that it sold to Taubman for a very substantial premium.

### **THE CORONAVIRUS PANDEMIC**

62. In December 2019, the first instance of a respiratory illness caused by a novel coronavirus was identified in Wuhan, China. In a matter of weeks, the virus quickly spread across Asia, the United States and most of the world.

63. In January 2020, the first reported case of Coronavirus occurred in the United States.

64. On February 11, 2020, the International Committee on Taxonomy of Viruses named this novel coronavirus “severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2)” (the “Coronavirus”). The same day, the World Health Organization (“WHO”) named the disease caused by the Coronavirus, “COVID-19.”

65. On March 11, 2020, the WHO declared the Coronavirus outbreak a worldwide pandemic<sup>7</sup> and noted its deep concern “by the alarming levels of spread and severity [of the Coronavirus].” According to numerous public health authorities, *everyone* is at risk of exposure to Coronavirus and falling ill with COVID-19. Due to its highly contagious and easily transmitted nature, a single instance of Coronavirus in a community can (and as time has progressed, does) quickly and exponentially grow into a massive, uncontrollable outbreak.

66. Coronavirus has rapidly spread and continues to spread throughout the United States and the world. It is present in viral fluid particles in the air, as well as on surfaces (*e.g.*, walls, furniture, doors, fixtures, countertops and touch screens). It is highly contagious and easily transmitted from person to person, from airspace to person, or from surface to person.

67. Coronavirus has several modes of transmission. According to the WHO and the Centers for Disease Control and Prevention (“CDC”), Coronavirus can spread from person to person through physical droplets from the nose or mouth that are spread when an infected person sneezes, coughs or exhales. The physical droplets then remain in and contaminate the air, and also

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<sup>7</sup> See World Health Organization, *WHO Director-General’s opening remarks at the media briefing on COVID-19 - 11 March 2020* (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (last visited March 11, 2021).

land on and contaminate nearby objects and surfaces, where Coronavirus remains active and dangerous (even while in the air and on inert objects and surfaces) for long periods of time. People “catch” Coronavirus by being in the vicinity of a person who has Coronavirus and breathing in shed droplets, or by touching objects or surfaces on which droplets landed and then touching their own eyes, nose or mouth. Those people then further spread Coronavirus throughout their environments and communities in the same manner.

68. Coronavirus has spread widely in this manner, in Rhode Island and nationwide, including through interactions with physical property inside premises, and encounters with airborne particles within premises.

69. Importantly, even asymptomatic infected persons (*i.e.*, those who have no sign of illness) can and do spread Coronavirus.<sup>8</sup> In fact, studies have estimated that over 40% of infected individuals may never develop symptoms, yet still spread Coronavirus through physical droplets.<sup>9</sup>

70. According to a report in *The New York Times*, “[a]n infected person talking for five minutes in a poorly ventilated space can also produce as many viral droplets as one infectious cough.”<sup>10</sup> And, one human sneeze can expel droplets that can travel up to 27 feet at nearly a

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<sup>8</sup> See World Health Organization, *Coronavirus disease 2019 (COVID-19) Situation Report – 73* (Apr. 2, 2020), [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7\\_2](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_2) (last visited March 11, 2021).

<sup>9</sup> See, e.g. Erika Edwards, *Asymptomatic COVID-19 Cases May Be More Common Than Suspected* (May 27, 2020, 1:43 PM), <https://www.nbcnews.com/health/health-news/asymptomatic-covid-19-cases-maybe-more-common-suspected-n1215481> (last visited March 11, 2021).

<sup>10</sup> See Yuliya Pashina-Kottas, *et al.*, *This 3-D Simulation Shows Why Social Distancing Is So Important*, *The New York Times* (April 14, 2020), available at <https://www.nytimes.com/interactive/2020/04/14/science/coronavirus-transmission-cough-6-feet-ar-ul.html> (last visited March 11, 2021).

hundred miles an hour.<sup>11</sup> Thus, the WHO has reported that airborne transmission of Coronavirus may be possible in certain circumstances, and “is different from droplet transmission as it refers to the presence of microbes within droplet nuclei, which...[can] be transmitted to others over distances greater than 1 m.”<sup>12</sup>

71. Respiratory droplets expelled from infected individuals remain in the air, and land on, attach, and adhere to surfaces and objects. In doing so, they physically change the airspace of the relevant premises and the property and its surface by becoming a part of that surface. As a result of this physical alteration, contact with that previously safe, airspace, and inert surfaces (*e.g.*, walls, tables, countertops) has been made unsafe.

72. At the time Factory Mutual evaluated Taubman’s claim for coverage, numerous scientific studies had documented that Coronavirus can physically remain in and alter a premises’ airspace and property for extended periods of time. For example:

- a. A study documented in the *New England Journal of Medicine* found that Coronavirus is detectable in aerosols (*i.e.*, fine solid particles in air) for up to three hours, on copper for up to four hours, on cardboard up to 24 hours and on plastic or stainless steel for ***up to two to three days***.<sup>13</sup>
- b. Another study found that human coronaviruses, such as SARS-CoV and MERS-CoV, can remain infectious on inanimate surfaces at room

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<sup>11</sup> See Sarah Gibbens, “See how a sneeze can launch germs much farther than 6 feet,” *National Geographic* (April 17, 2020), <https://www.nationalgeographic.com/science/2020/04/coronavirus-covid-sneeze-fluid-dynamics-in-photos/> (last visited March 11, 2021).

<sup>12</sup> See World Health Organization, *Modes of Transmission of Virus Causing COVID-19: Implications for IPC* (Mar. 29, 2020, updated on July 9, 2020), <https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations> (last visited March 11, 2021).

<sup>13</sup> See News Release, *New Coronavirus Stable for Hours on Surfaces*, NAT’L INSTS. OF HEALTH (Mar. 17, 2020), available at <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last visited March 11, 2021).

temperature for *up to nine days*.<sup>14</sup>

- c. A peer-reviewed article published in *Virology Journal* on October 7, 2020 found that Coronavirus can survive on surfaces for *up to 28 days* at ambient temperature and humidity (20 °C [68 °F] and 50% RH).<sup>15</sup> The article concludes that Coronavirus “can remain infectious for significantly longer time periods than generally considered possible.”

73. Accordingly, because an individual with no symptoms can spread Coronavirus simply by breathing or talking, and because droplets containing Coronavirus can remain in the air and land and remain infectious on surfaces for many days, *the risks* posed by Coronavirus are not temporary. Even when the air and surfaces inside a building are thoroughly and effectively cleaned, each time an infected person enters that space the cycle renews such that infectious Coronavirus is likely (if not certain) to be present wherever people are located or congregate. The world has seen communities shut down and reopen, only to be shut down again following another outbreak. Until recently, with the advent and administration of COVID-19 vaccines to people across the country and world, the risk of spread of COVID-19 wherever people gathered (whether indoors or outdoors) was a near certainty. The virtually guaranteed risk of significant harm and damage to persons and property (including its airspace) prior to the widespread administration of the vaccine is why it became necessary to close or strictly limit the use of indoor and outdoor spaces like those used by Taubman; and it is why in some instances those closures and restrictions

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<sup>14</sup> See G. Kampf *et al.*, *Persistence of Coronaviruses on Inanimate Surfaces and Their Inactivation with Biocidal Agents*, J. HOSPITAL INFECTION (Feb. 6, 2020), available at [https://www.journalofhospitalinfection.com/article/S0195-6701\(20\)30046-3/fulltext](https://www.journalofhospitalinfection.com/article/S0195-6701(20)30046-3/fulltext) (last visited March 11, 2021).

<sup>15</sup> See S. Riddell, *et al.*, *The effect of temperature on persistence of SARS-CoV-2 on common surfaces*, 17 *Virology J.*, Art. No. 145 (2020), available at <https://virologyj.biomedcentral.com/articles/10.1186/s12985-020-01418-7> (last visited March 11, 2021).



continued to remain necessary for a wholly unforeseen and extended period. This chain of events created great risk to Taubman of physical loss or damage to covered property, in addition to actual physical loss or damage to property.

74. The actual and/or threatened presence of Coronavirus particles at Taubman's premises rendered physical property within the premises damaged, unusable, uninhabitable, unfit for intended function, dangerous, and unsafe. It impaired and diminished the value, utility and normal function of the premises (including the airspace and physical property contained within). Similarly, the presence at Taubman's premises of individuals infected with Coronavirus, or carrying Coronavirus particles on their body (including their clothing and any other objects on their body), rendered and/or created the risk of the premises, including the airspace within those premises unusable, damaged and unsafe. These circumstances caused and/or created the risk of physical loss and damage to the covered premises and property. And, as to premises where Coronavirus was not in fact specifically identified, given the nature of the disease, the risk of such consequences was near certain, if not certain.

75. The Policies expressly insure against the "risks" of Coronavirus making Taubman's properties, among other things, unusable, damaged or unsafe.

**TAUBMAN AND GOVERNMENTAL PUBLIC HEALTH  
RESPONSES TO THE PANDEMIC**

76. The Coronavirus pandemic has resulted in an unprecedented series of governmental orders by national, state, and local authorities in the United States. Beginning in and after mid-March 2020, and continuing to the present date, state and local governments in the United States have imposed, relaxed, and in many cases re-imposed strict limits on gatherings of persons, operations of businesses, and occupancy of indoor and outdoor spaces in response to the actual presence and risk of spread of the Coronavirus in their jurisdictions.

77. In requiring the closure of nonessential businesses and issuing other orders restricting the operations of businesses at various times throughout the Coronavirus pandemic, governmental authorities throughout the United States, including in localities where Taubman’s insured properties are located, have recognized that Coronavirus causes direct physical loss and damage to property. For example:

- a. The State of Colorado issued a Public Health Order indicating that “[Coronavirus]...physically contributes to property loss, contamination and damage...”;<sup>16</sup>
- b. Broward County, Florida issued an Emergency Order acknowledging that Coronavirus “is physically causing property damage”;<sup>17</sup>
- c. The City of Los Angeles issued an Order in response to the Coronavirus pandemic “because, among other reasons, the COVID-19 virus [*i.e.* Coronavirus] can spread easily from person to person and it is physically causing property loss or damage due to its tendency to attach to surfaces for prolonged periods of time”;<sup>18</sup>
- d. The City of San Francisco issued multiple orders “during this emergency ... because of the propensity of the virus to spread person to person and also because the virus physically is causing property loss or damage due to its proclivity to attach to surfaces for long periods of time”;<sup>19</sup>

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<sup>16</sup> State of Colorado Dep’t of Public Health & Environment Fourth Updated Public Health Order 20-24 (Apr. 9, 2020), *available at* <https://cha.com/wp-content/uploads/2020/04/Fourth-Updated-Public-Health-Order-Authorized-Business.pdf>.

<sup>17</sup> Broward County, Florida Administrator’s Emergency Order 20-01 (Mar. 22, 2020), *available at* <https://www.broward.org/CoronaVirus/Documents/BerthaHenryExecutiveOrder20-01.pdf>.

<sup>18</sup> City of Los Angeles, Public Order Under City of Los Angeles Emergency Authority (Subject: Safer At Home) (March 19, 2020) (revised April 10, 2020), *available at* <https://www.lamayor.org/sites/g/files/wph446/f/page/file/SaferAtHomeAPR10.pdf>.

<sup>19</sup> San Francisco Ninth Supplement to Mayoral Proclamation (Apr. 10, 2020), *available at* <https://sfmayor.org/sites/default/files/NinthMayoralSupplement.pdf>.

- e. The State of New Jersey issued an Executive Order requiring closures of certain “brick-and- mortar facilities” and businesses in order to minimize “contact with common surfaces.”<sup>20</sup>

78. Commencing in March 2020, as a result of the risks associated with the Coronavirus pandemic, including physical loss or damage to covered property, and in compliance with government guidance and orders, Taubman limited, reduced or suspended operations at its covered premises.

79. Between March 18, 2020 and March 20, 2020, Taubman was forced to close each of its United States shopping centers. Some individual stores within the malls, such as Apple, had already begun to close by March 14, 2020.

80. As a result of the closure of the shopping centers and the individual stores within the malls, Taubman suffered substantial losses, including a substantial loss of rental revenue and revenue under its management contracts.

81. These initial government-ordered closures required Taubman to remain closed for various periods of time, depending on the locality. For example, Taubman was not able to reopen City Creek Center until May 6, 2020 following the State of Utah’s lifting of certain restrictions. Taubman began reopening its shopping malls located in other states on a staggered basis beginning in early May 2020, and continuing through June.

82. At various times since the pandemic began, Taubman shopping malls in the United States have been reopened subject to reduced capacity and significant other restrictions. For example, stores in certain localities have been open for curbside pick-up only. In addition, a

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<sup>20</sup> State of New Jersey Executive Order No. 104 (March 16, 2020), *available at* <https://nj.gov/infobank/circular/eocc104.pdf>

number of reopened malls were required to close entirely again for periods of time after confirmed cases of Coronavirus at covered locations and in compliance with further government orders.

83. In order to prevent further direct physical loss of or damage and to stay open and continue operating its shopping malls in a safe and compliant manner, Taubman also has had to employ many measures to protect against the risks of the Coronavirus. These measures include but are not limited to increased cleaning measures, provision of personal protective equipment and other safety equipment, performance of contact tracing, reduced shopping mall hours (such as reduced holiday shopping hours), and installation of new HVAC filters.

### **THE IMPACT OF CORONAVIRUS**

84. The impact of the Coronavirus pandemic has been massive and devastating to people, businesses, and local governments.

85. As of March 12, 2021, Coronavirus has been detected in nearly every country. Total reported cases top 119 million people, and more than 2.63 million people have died. In the United States alone, more than 29.3 million people have tested positive for COVID-19, and more than 530,000 people have died as a result of it.

86. The states', cities' and counties' attempt at phased re-openings in the summer and fall of 2020 did not help matters. As some visitors cautiously returned to patronize businesses, so did Coronavirus – leading many localities to reimpose restrictions on businesses, to combat later surges.

87. For these reasons, it was virtually certain during the heights of the pandemic that Coronavirus presented an ongoing risk of physical loss or damage to Taubman's covered premises. Each time any person entered a place of business, so did the risks associated with Coronavirus.

88. Indeed, if Taubman had conducted business as usual, the disease and virus spread

would have been inevitable, as well as its resulting impact on persons and property. Under these circumstances, Taubman’s property could not be used according to its intended function.

**THE FACTORY MUTUAL INSURANCE POLICY APPLIES TO  
TAUBMAN’ CORONAVIRUS LOSSES**

89. The risk of and actual spread of Coronavirus causes physical loss or damage to property, and the Policies include no enforceable exclusion that would preclude coverage for such risks of loss or damage to covered property.

**The Policies’ Property Coverage Applies**

90. Each of the Policies provides coverage of up to \$1 billion per occurrence for “all risks of physical loss or damage” to Real Property and/or Personal Property (as defined in the Policies), unless such property is excluded or results from an excluded cause of loss.

91. Taubman faced and continues to face the imminent “risk” of, and actual, physical loss or damage to their property because of the ongoing and increasingly dangerous Coronavirus pandemic.

92. Accordingly, the Policies have been triggered, and Taubman’s loss or damage to their property is covered by the Policies.

93. Taubman is entitled to recover their covered losses with respect to physical loss or damage to their property up to the full \$1 billion per occurrence limits provided in the Policy.

**The Policies’ Time Element Coverages Apply**

94. Each of the Policies provides coverage for up to \$1 billion per occurrence for “TIME ELEMENT loss” “directly resulting from physical loss or damage of the type insured” to covered Property during the “Periods of Liability” described.

95. The term “physical loss or damage of the type insured” means “all risks of physical loss or damage” to covered property. The Policies therefore provide business interruption

coverage when the insured suffers an interruption of its business activities due to the “risks” of the Coronavirus pandemic causing physical loss or damage to covered property, in addition to any actual loss or damage.

96. Taubman limited or ceased their operations at covered premises because of the imminent “risk” that Coronavirus would cause physical loss or damage to covered property.

97. Accordingly, the Policies’ “Time Element” coverage is triggered, and Taubman’s business interruption losses are covered by the Policies’ Time Element coverage.

98. Taubman is entitled to recover its covered Time Element losses up to the full \$1 billion per occurrence limits provided in the Policies.

99. As part of the Time Element coverage, the Policies cover as “Extra Expense” the “extra expenses to temporarily continue as nearly normal as practicable the conduct of the Insured’s business” and “extra costs of temporarily using property or facilities of the Insured or others,” among other expenses, during the Period of Liability.

100. Taubman incurred Extra Expenses, as that term is defined by the Policies.

101. Accordingly, the Policies’ “Extra Expense” coverage is triggered. Taubman is entitled to recover its Extra Expenses incurred up to the applicable limits provided by the Policies.

102. As part of the Time Element coverage, the Policies also provide “Rental Insurance” coverage. Such “Rental Insurance” coverage insures against the losses sustained by the Insured due to, among other things, a loss of rental income from rented portions of the Insureds’ property, measured as follows:

#### **RENTAL INSURANCE**

Measurement of Loss:

The recoverable RENTAL INSURANCE loss is the Actual Loss Sustained by the Insured of the following during the PERIOD OF LIABILITY:

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

all not to include noncontinuing charges and expenses.

103. Taubman's loss of rental revenue, and revenue under its management contracts, constitutes Actual Loss Sustained recoverable under the Rental Insurance coverage set forth above.

104. As an extension of Time Element coverage, the Policies provide "Contingent Time Element" coverage for Taubman's losses and extra expense incurred during the Period of Liability resulting from physical loss or damage at a "contingent time element location."

105. The term "contingent time element location" is defined to include "any location: 1) of a direct, customer, supplier, contract manufacturer or contract service provider to the Insured; 2) of any company under a royalty, licensing fee or commission agreement with the Insured."

106. Taubman incurred business interruption loss and extra expense because physical locations of such contingent time element locations, specifically including but not limited to customers and tenants under agreements with Taubman, were closed due to the actual and/or threatened presence of Coronavirus.

107. Accordingly, the Policies' "Contingent Time Element" coverage is triggered. Taubman is entitled to recover its time element and extra expense losses incurred up to the applicable limits provided by the Policies.

108. As an extension of Time Element coverage, the Policies provide “Attraction Properties” coverage for Taubman’s losses and extra expense incurred during the Period of Liability resulting from “physical loss or damage of the type insured to property of the type insured that attracts business to an insured location and is within 1 statute mile/1.6 kilometres of the insured location.”

109. Taubman incurred business interruption loss and extra expense because physical locations of nearby businesses that normally attract business to Taubman’s shopping malls incurred physical loss or damage from the actual and/or threatened presence of Coronavirus, which limited operations at Taubman’s properties.

110. Accordingly, the Policies’ “Attraction Properties” coverage is triggered. Taubman is entitled to recover its time element and extra expense losses incurred up to the applicable limits of the Policies.

**The Policies’ Communicable Disease Coverages Apply**

111. As an additional coverage, each of the Policies provides up to \$1,000,000 or more for response costs incurred as a result of the “*actual* not suspected” presence of communicable disease such as Coronavirus or COVID-19

112. The relevant language of each of the Policies describing this coverage includes the following:

**COMMUNICABLE DISEASE RESPONSE**

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

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



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

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

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

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

113. Furthermore, each of the Policies provides up to \$1,000,000 or more for business interruption as a result of the "**actual** not suspected" presence of communicable disease such as Coronavirus or COVID-19. The \$1,000,000 limit is an aggregate limit for Communicable Disease Response and Interruption by Communicable Disease combined.

114. The relevant language of the Policy describing the Interruption by Communicable Disease coverage includes the following:

#### **INTERRUPTION BY COMMUNICABLE DISEASE**

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

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

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

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

115. The term "**communicable disease**" is defined as:

disease which is:

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

B. Legionellosis.

116. Coronavirus or COVID-19 qualifies as a "communicable disease" under the Policy.

117. The actual presence of Coronavirus or COVID-19 has been confirmed at Taubman's locations.

118. These locations have incurred costs for the cleanup, removal and disposal of the actual not suspected presence of Coronavirus or COVID-19 from insured property.

119. These locations have incurred interruption/time element losses as a result of the actual not suspected presence of Coronavirus or COVID-19 at insured property.

120. These costs are covered under the Policies, up to the limits of such Communicable Disease coverage.

121. Nonetheless, the "Communicable Disease Response" and "Interruption by Communicable Disease" coverages provide coverage for the limited circumstance of where a business must respond to the "actual presence" of a disease causing agents, and the consequent "*costs*" (i.e., not "loss") for the clean-up, remediation, public relations effects, and coverage for lost profits (i.e., "loss") is available only to the extent that the remediation/cleanup requires a brief shutdown. But the nature of Taubman's losses is not limited to such remediation-type costs, but instead, as set forth more fully above, also includes lost rental revenues and profits because of an inability to use, or restrictions on the use of, Taubman's properties. The Policies therefore provide coverage for such losses up to the full \$1 billion per occurrence limits under each of the Policies.

122. Moreover, neither the "Communicable Disease Response" nor the "Interruption by Communicable Disease" coverage part requires or even mentions the risk of physical loss of

or damage to property to trigger coverage. To the extent Taubman’s property and business interruption *losses* did not result from the need to respond to, clean up, and/or remediate the “actual” presence of a communicable disease, but instead resulted from the “risk” of physical loss of or damage to covered property, and/or the actual physical loss or damage to property from Coronavirus, the Policies provide coverage for such losses up to the full \$1 billion per occurrence limits of each of the Policies.

**There is No Enforceable Policy Exclusion Applicable to Taubman’s Loss**

123. A pandemic, such as Coronavirus, is not excluded by the Policies.

124. If Factory Mutual contends that the Policies’ “contamination” exclusion applies to limit or bar coverage, Factory Mutual is wrong.

125. The Contamination Exclusion provides:

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

1) **contamination**, and any cost due to **contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy. If **contamination** due only to the actual not suspected presence of **contaminant(s)** directly results from other physical damage not excluded by this Policy, then only physical damage caused by such **contamination** may be insured. This exclusion D1 does not apply to radioactive contamination which is excluded elsewhere in this Policy.

2) shrinkage.

3) changes in color, flavor, texture or finish.

126. The Policies define “**contaminant**” as “anything that causes “**contamination**” and defines “**contamination**” as:

any condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold or mildew.

127. The Contamination Exclusion does not apply to Taubman's losses caused by the risks of the Coronavirus pandemic, for numerous reasons.

128. Among the reasons, the Contamination Exclusion does not use the defined term "communicable disease" in the exclusion or in the definition of "contamination." While Factory Mutual included within the "contamination" definition the terms "pathogen," "pathogenic organism," "virus," and "disease causing or illness causing agent," Factory Mutual did not use those terms in its definition of "communicable disease." Based upon information and belief Taubman alleges that Factory Mutual thus did not intend to include "communicable disease" as an excluded "contaminant" under the Policy.

129. The Contamination Exclusion excludes only contamination and associated "direct" "costs," not "loss" or "damage," or even indirect "costs," such as time element loss and extra expenses.

130. Contamination exclusions like the one Factory Mutual drafted here apply to traditional pollution, not to natural catastrophes such as pandemic. To the extent Coronavirus is actually present or suspected of being present at a Taubman property, its presence would be the result of a natural process, as opposed to an act of pollution or contamination. Taubman reasonably expected and understood that a Contamination Exclusion would apply to polluting activities, as opposed to natural catastrophes such as the Coronavirus pandemic.

131. Factory Mutual's inclusion in the definition of "contamination" items such "pathogen" "virus" and "disease causing or illness causing agent," suggests that it hoped to expand, without detection, the scope of what was in reality and apparently intended to be a pollution exclusion well beyond what a reasonable insured would expect. The presence of items such as mold, mildew, bacteria and virus that lead to disease or health hazards do not fit the

definition of pollutants and should not be included in the text of a pollution exclusion or referred to as examples of pollutants. Had Factory Mutual wished to exclude losses resulting from health hazards or the risks thereof, it should have created a separate, clear exclusion for such losses.

132. Indeed, the language of the so-called Contamination Exclusion stands in stark contrast to the language of the ISO virus or bacteria exclusion referenced in ¶ 53 *supra*. Had Factory Mutual wished to exclude pandemic from its Policies, it could have incorporated into the Policies either a specific exclusion (such as a pandemic exclusion), or the ISO virus or bacteria exclusion.

### **FACTORY MUTUAL'S BREACH OF ITS INSURANCE CONTRACT**

133. Taubman timely reported its losses to Factory Mutual.

134. By letter dated August 31, 2020, Factory Mutual stated that the Communicable Disease coverages did not apply to Taubman's losses because "it is unknown if there are any reported cases of COVID-19 at any of Taubman's insured locations." Factory Mutual failed to evaluate and thus denied all other coverage under the Policies.

135. Given Factory Mutual's denial, Taubman was not required to respond to Factory Mutual's further requests for information. Taubman reasonably believed that any claimed investigation by Factory Mutual would be pretextual and perfunctory.

136. Factory Mutual's denial is contrary to its widely publicized representations that it is an expert in underwriting and studying casualty-related risks and tailoring property coverage to a client's actual exposures.

137. Factory Mutual was aware prior to issuing the Policy to Taubman of the risks associated with pandemics, expressly providing limited coverage to Taubman for such risks when they result from the actual presence of a communicable disease (as defined in the Policies), but

failing to incorporate an applicable exclusion or other limitation that would preclude coverage in the event of a pandemic for circumstances such as those at issue here that have caused massive Time Element and other loss for Taubman.

138. Factory Mutual misstated the scope of the Policies by, *inter alia*, stating that coverage is limited to Communicable Disease Response and Interruption by Communicable Disease.

139. In fact, despite its knowledge that the risks of Coronavirus can trigger multiple coverages under the Policies, Factory Mutual predetermined to steer its policyholders into, at most, sublimits for Communicable Disease Response and Interruption by Communicable Disease.

140. Specifically, Factory Mutual, along with a related company Affiliated FM Insurance Company, issued an internal memorandum entitled “Talking Points on the 2019 Novel Coronavirus (2019-nCoV)” (hereinafter “Talking Points Memo”). A true and correct copy of the Talking Points Memo, obtained from *Treasure Island, LLC v. Affiliated FM Ins. Co.*, Case No. 2:20-cv-00965 (D. Nev.), ECF No. 2-8, is attached hereto as **Exhibit D**. Upon information and belief, the Talking Points Memo was issued internally to advise Factory Mutual employees, such as claim adjusters, how to respond to Coronavirus claims.

141. The Talking Points Memo was issued early in the pandemic because “[s]everal of [Factory Mutual’s] clients have inquired as to whether there is coverage for losses they have or expect to incur as a result of the virus, which has spread outside of China.”

142. Upon information and belief, Factory Mutual issued the Talking Points Memo prior to making a coverage determination under Taubman Policy.

143. The Talking Points Memo advises that the Global Advantage policy form, such as that sold to Taubman, provides communicable disease coverage when there is the “actual

presence” of a communicable disease. The memo expressly states that if an insured “closes one or more locations because they suspect the presence of communicable disease or does so in an abundance of caution,” then the Communicable Disease coverages are not triggered, because the coverages require “the actual presence” of a communicable disease.

144. The Talking Points Memo then makes a blanket statement that there is no coverage under other policy coverages such as “Civil or Military Authority” or “Contingent Time Element.” In other words, Factory Mutual advised its adjusters in advance to telescope coverage into Communicable Disease, whether or not there was “actual presence” of Coronavirus.

145. For example, although the Talking Points Memo acknowledges that the “Contingent Time Element” coverage is triggered by “physical loss or damage to property” (emphasis added), the memo concludes without substantiation that “[t]he presence of a communicable disease does not constitute physical damage.”

146. Thus, prior to evaluating Taubman’ claim, Factory Mutual had already predetermined its coverage position, namely that there is no coverage for Taubman’s (or any other insured’s) property and business interruption losses. Factory Mutual had predetermined that coverage, if any, would be limited to the “specific limit” for the communicable disease coverage.

147. Taubman has complied with all terms and conditions contained in the Policies except to the extent its performance has been or is excused or waived by Factory Mutual.

## COUNT I

### **BREACH OF CONTRACT (Policy Number 1051105)**

148. Taubman realleges and incorporates by reference all preceding allegations as if fully stated herein.

149. Policy number 1051105, effective for the policy period April 1, 2019 to April 1,

2020 is a valid and enforceable contract between Taubman and Factory Mutual.

150. Taubman has sustained, and continues to sustain, losses covered under this policy.

151. Taubman provided prompt notice of its losses to Factory Mutual. Taubman performed, and was ready to perform, all obligations required of it under the policy.

152. Factory Mutual breached Policy number 1051105 by, among other things, denying coverage to Taubman and failing to pay for the losses Taubman sustained.

153. As a direct and proximate result of Factory Mutual's acts, omissions and breaches, Taubman has been damaged, and continue to be damaged, in an amount that exceeds the Court's jurisdictional limits and that will be established at trial.

## COUNT II

### **BREACH OF CONTRACT (Policy Number 1063820)**

154. Taubman realleges and incorporates by reference all preceding allegations as if fully stated herein.

155. Policy number 1063820, effective for the policy period April 1, 2020 to April 1, 2021 is a valid and enforceable contract between Taubman and Factory Mutual.

156. Taubman has sustained, and continues to sustain, losses covered under this policy.

157. Taubman provided prompt notice of its losses to Factory Mutual. Taubman performed, and was ready to perform, all obligations required of it under the policy.

158. Factory Mutual breached Policy number 1063820 by, among other things, denying coverage to Taubman and failing to pay for the losses Taubman sustained.

159. As a direct and proximate result of Factory Mutual's acts, omissions and breaches, Taubman has been damaged, and continue to be damaged, in an amount that exceeds the Court's jurisdictional limits and that will be established at trial.



### **COUNT III**

#### **ANTICIPATORY BREACH OF CONTRACT**

160. Taubman realleges and incorporates by reference all preceding allegations as if fully stated herein.

161. Each of the Policies is a valid and enforceable contract between Taubman and Factory Mutual.

162. Taubman has sustained, and continues to sustain, losses covered under the Policies. Taubman provided prompt notice of its losses to Factory Mutual.

163. Taubman performed, and was ready to perform, all obligations required of it under the Policies.

164. By their communications and actions, Factory Mutual definitely and clearly stated to Taubman that it has no intention of providing coverage for Taubman's claim and rendering the agreed-upon performance under the Policies.

165. Therefore, if any of Factory Mutual's acts and omissions is not deemed to constitute a breach of the Policies, they constitute an anticipatory breach of the Policies.

166. As a direct and proximate result of the Factory Mutual's acts, omissions and breaches, Taubman has been damaged, and continues to be damaged, in an amount that exceeds the Court's jurisdictional limits and that will be established at trial.

### **COUNT IV**

#### **DECLARATORY JUDGMENT**

167. Taubman realleges and incorporates by reference all preceding allegations as if fully stated herein.

168. Taubman seeks a declaration by this Court of their rights and the obligations of

Factory Mutual under the contractual agreements to provide coverage for Taubman's losses.

169. Taubman contends that Factory Mutual has a duty to pay for Taubman's losses caused by the risks of the Coronavirus pandemic, pursuant to the terms and conditions under multiple coverages of the Policies. Factory Mutual disputes Taubman's contentions.

170. Factory Mutual contends that coverage under the Policies is limited to Communicable Disease Response and Interruption by Communicable Disease, and its associated policy limit.

171. Taubman has complied with all the terms and conditions of the Policies, except to the extent performance has been or is excused or waived by Factory Mutual.

172. Taubman contends that the Policies provide full policy limits coverage for its losses and that Factory Mutual's coverage analysis to date is contrary to the Policies, the law, and public policy.

173. Taubman contends that the Policies must be interpreted in a reasonable manner to provide the coverage that the parties intended and understood was being provided, and that is in accord with Taubman's reasonable expectations. Taubman is informed and believe, and on that basis alleges, that Factory Mutual disputes these contentions.

174. An actual and justiciable controversy exists between Taubman and Factory Mutual concerning the matters alleged herein.

175. Taubman seeks a judicial declaration confirming: that Factory Mutual's contentions as stated above are wrong, and that Taubman's contentions as stated above are correct; that Factory Mutual must honor all duties under its Policies, including its duty to pay for the full amount of losses incurred as a result of the risks of the Coronavirus pandemic; and that because of Factory Mutual's conduct, Taubman is excused from performing or complying with any conditions

and duties otherwise imposed on Taubman by the Policies.

176. Declaratory relief by this Court will terminate some or all of the existing controversy between the parties.

## **COUNT V**

### **BAD FAITH (COMMON LAW)**

177. Taubman realleges and incorporates by reference all preceding allegations as if fully stated herein.

178. The acts and omissions of Factory Mutual as complained of in this Complaint, and also yet to be discovered in this matter, constitute bad faith.

179. Taubman sustained losses due to the actual physical presence of COVID-19, as well as the ongoing risks and spread of COVID-19, but Factory Mutual failed to comply with its obligations to evaluate all applicable coverages under the Policies, to conduct a reasonable and good-faith investigation of Taubman's claim, and to compensate Taubman for its claim.

180. Instead, Factory Mutual predetermined before evaluating Taubman's claim to steer coverage into the Policies' Communicable Disease coverages, and then rejected coverage on that basis on the grounds that there was no asserted "actual presence" of Coronavirus at Taubman's premises.

181. Taubman is entitled to compensatory damages, punitive damages and attorneys' fees and costs as a result of Factory Mutual's bad faith.

## **COUNT VI**

### **BAD FAITH (R.I.G.L. § 9-1-33)**

182. Taubman realleges and incorporates by reference all preceding allegations as if fully stated herein.

183. The acts and omissions of Factory Mutual as complained of in this Complaint, and also yet to be discovered in this matter, constitute bad faith under R.I.G.L. § 9-1-33.

184. Taubman sustained losses due to the actual physical presence of COVID-19, as well as the ongoing risks and spread of COVID-19, but Factory Mutual failed to comply with its obligations to evaluate all applicable coverages under the Policies, to conduct a reasonable and good-faith investigation of Taubman's claim, and to compensate Taubman for its claim.

185. Instead, Factory Mutual predetermined before evaluating Taubman's claim to steer coverage into the Policies' Communicable Disease coverages, and then rejected coverage on that basis on the grounds that there was no asserted "actual presence" of Coronavirus at Taubman's premises.

186. Taubman is entitled to compensatory damages, punitive damages and reasonable attorneys' fees and costs as a result of Factory Mutual's bad faith.

#### **PRAYER FOR RELIEF**

WHEREFORE, Taubman pray for judgment as follows:

- a. Judgment in favor of Taubman and against Factory Mutual on all claims;
- b. Compensatory and punitive damages in connection with the claims asserted, together with expert witness fees and costs, as permitted by law, in an amount to be determined;
- c. Pre-judgment interest, post-judgment interest, moratory interest, and any other interest as permitted by law;
- d. Declaratory Judgment as set forth in Count IV above;
- e. An award of attorney's fees and costs of suit incurred; and
- f. Such other and further relief as the Court deems proper.

#### **DEMAND FOR JURY TRIAL**

Taubman hereby demand a trial by jury on all issues so triable.

Dated: March 12, 2021

Respectfully submitted,

MCINTYRE TATE LLP

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