

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA**

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CARILION CLINIC, RMH EMERGENCY SERVICE, LLC, CARILION HEALTHCARE CORPORATION, CARILION BEHAVIORAL HEALTH, INC., CARILION EMERGENCY SERVICES, INC., CHS, INC., CARILION PROFESSIONAL SERVICES, LLC, CARILION CLINIC PATIENT TRANSPORTATION, LLC, CARILION MEDICAL CENTER, CARILION FRANKLIN MEMORIAL HOSPITAL, CARILION GILES COMMUNITY HOSPITAL, CARILION SERVICES, INC., CARILION TAZEWELL COMMUNITY HOSPITAL, CARILION SURGERY CENTER NEW RIVER VALLEY, LLC, CARILION NEW RIVER VALLEY MEDICAL CENTER, CARILION CLINIC PROPERTIES, LLC, AND CARILION STONEWALL JACKSON HOSPITAL,

Case No. 7:21cv00168

**COMPLAINT**

**JURY TRIAL DEMANDED**

Plaintiffs,

-against-

AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY,

Defendant.

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Plaintiffs Carilion Clinic, RMH Emergency Service, LLC, Carilion Healthcare Corporation, Carilion Behavioral Health, Inc., Carilion Emergency Services, Inc., CHS, Inc., Carilion Professional Services, LLC, Carilion Clinic Patient Transportation, LLC, Carilion Medical Center, Carilion Franklin Memorial Hospital, Carilion Giles Community Hospital, Carilion Services, Inc., Carilion Tazewell Community Hospital, Carilion Surgery Center New River Valley, LLC, Carilion New River Valley Medical Center, Carilion Clinic Properties, LLC, and Carilion Stonewall Jackson Hospital (collectively, “Carilion Clinic”), for its Complaint for a declaratory judgment and damages against Defendant American Guarantee and Liability Insurance Company (“AGLIC”), alleges as follows:

**NATURE OF THE ACTION AND RELIEF SOUGHT**

1. This action arises out of AGLIC's denial of coverage for Carilion Clinic's losses arising from the SARS-CoV-2 virus (the "Coronavirus") and the disease that it causes, Coronavirus Disease 2019 ("COVID-19") and the direct physical loss of or damage to property and business interruption they caused under the "all-risk" commercial property insurance policy AGLIC sold to Carilion Clinic (the "Policy", attached hereto as Ex. 1). AGLIC and/or its affiliate, Zurich American Insurance Company ("Zurich"), drafted the "all risk" Policy and issued it on a Zurich's specialized and broadened "Zurich EDGE™" form. The Policy covers "[a]ll risks of direct physical loss of or damage from any cause unless excluded."

2. The phrase "physical loss of or damage" is not defined or limited in the Policy. In plain English, "physical loss of or damage" to property denotes at least the following meanings: (1) physical damage to that property; (2) the structural alteration of that property; (3) the interaction of an external physical substance or force with the property, including its attachment to the surface of that property, rendering the property unfit, unsafe or uninhabitable for normal use or otherwise negatively affecting the property's usability; or (4) the loss of use or the loss of functional use, whether in whole or in part, of that property.

3. Virus, communicable disease and pandemics are not excluded causes of loss under the Policy.<sup>1</sup>

4. The toll of the Coronavirus and COVID-19 on lives, property, and businesses in the Commonwealth of Virginia, the United States and around the world has been unprecedented and is among the worst public health and economic catastrophes of the last 100 years.

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<sup>1</sup> AGLIC asserts, and Carilion Clinic disagrees, that virus related losses are excluded under the Policy.

5. Indeed, to date, COVID-19 has killed over 7,075 Virginians,<sup>2</sup> over 500,000 Americans,<sup>3</sup> and is now the third-leading cause of death in this country, surpassed only by heart disease and cancer.<sup>4</sup> At its peak, over 4,000 Americans were perishing per day from COVID-19.<sup>5</sup> Thousands of Americans are still dying daily, with surges of cases occurring throughout the United States.<sup>6</sup>

6. The physical loss of or damage to property and the economic devastation wrought by the Coronavirus and COVID-19 on Carilion and the whole of world are unprecedented. The Coronavirus and COVID-19 could result in net losses starting at \$3.2 trillion and reaching as much as \$4.8 trillion in U.S. real gross domestic product over two years.<sup>7</sup>

7. The impact of the Coronavirus and COVID-19 on Virginia is also devastating. As of February 18, 2021, Virginia has reported over 555,000 COVID-19 cases, including 7,075

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<sup>2</sup> *Virginia Coronavirus Map and Case Count*, N.Y. TIMES (updated Feb. 18, 2021), <https://www.nytimes.com/interactive/2020/us/virginia-coronavirus-cases.html> (last visited Feb. 18, 2021).

<sup>3</sup> *Coronavirus Disease 2019 (COVID-19)*, CDC, (updated Feb. 22, 2021), <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last visited Feb. 22, 2021).

<sup>4</sup> Gary Stix and Youyou Zhou, *COVID-19 Is Now the Third Leading Cause of Death in the U.S.*, SCI. AM., (Oct. 8, 2020), <https://www.scientificamerican.com/article/covid-19-is-now-the-third-leading-cause-of-death-in-the-u-s/> (last visited Feb. 12, 2021).

<sup>5</sup> Eugene Garcia, Lisa Marie Pane and Thalia Beaty, *U.S. tops 4,000 daily deaths from coronavirus for 1st time*, AP NEWS, (Jan. 9, 2021), <https://apnews.com/article/us-coronavirus-death-4000-daily-16c1f136921c7e98ec83289942322ee4> (last visited Feb. 12, 2021).

<sup>6</sup> *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, (updated Feb. 12, 2021), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last visited Feb. 12, 2021); Hopkins Medicine, *Coronavirus Second Wave? Why Cases Increase*, updated Nov. 17, 2020, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/first-and-second-waves-of-coronavirus> (last visited Feb. 17, 2021).

<sup>7</sup> Emily Gersema, *Business closures and partial reopenings due to COVID-19 could cost the U.S. trillions*, USC News (Nov. 30, 2020), <https://news.usc.edu/178979/business-closures-covid-19-pandemic-united-states-gdp-losses/#:~:text=The%20COVID%2D19%20pandemic%20could,years%2C%20a%20USC%20study%20finds> (last visited Feb. 17, 2021).

deaths.<sup>8</sup>

8. While most sectors of the economy are struggling, the nation's healthcare system has been particularly hard hit. At least 47 hospitals in the U.S. closed or entered bankruptcy as of October 16, 2020, as "lower patient volumes, canceled elective procedures and higher expenses tied to the pandemic have created" significant declines in revenues for hospitals.<sup>9</sup> A June 2020 report from the American Hospital Association estimated that U.S. hospitals would lose more than \$323 billion in 2020.<sup>10</sup> An April 23, 2020 study found that the number of visits to ambulatory care practices declined by nearly 60 percent due to the effects of the Coronavirus and COVID-19.<sup>11</sup>

9. Since February 2020, there has been a net loss of 189,900 jobs in Virginia – an overall loss of 4.6% of jobs across all industries, and a devastating loss of 9.9% of healthcare jobs.<sup>12</sup>

10. Carilion Clinic has suffered as a result of the Coronavirus and COVID-19.

11. Rather than stand by its insured and honor its obligations under the Policy, AGLIC turned its back on Carilion Clinic, and upon information and belief, many other Virginian insureds,

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<sup>8</sup> *Virginia Coronavirus Map and Case Count*, N.Y. TIMES (updated Feb. 18, 2021), <https://www.nytimes.com/interactive/2020/us/virginia-coronavirus-cases.html> (last visited Feb. 18, 2021).

<sup>9</sup> Ayla Ellison, *47 hospitals closed, filed for bankruptcy this year*, Beckers Hospital CRO Report (Oct. 16, 2020), <https://www.beckershospitalreview.com/finance/47-hospitals-closed-filed-for-bankruptcy-this-year.html> (last visited Feb. 18, 2021).

<sup>10</sup> American Hospital Association, *Hospitals and Health Systems Continue to Face Unprecedented Challenges due to COVID-19* (June 2020), <https://www.aha.org/system/files/media/file/2020/06/aha-covid19-financial-impact-report.pdf> (last visited Feb. 18, 2021).

<sup>11</sup> Ateev Mehrotra, Michael Chernew, David Linetsky, Hilary Hatch, and David Cutler, *The Impact of the COVID-19 Pandemic on Outpatient Visits: A Rebound Emerges*, The Commonwealth Fund (May 19, 2020), <https://www.commonwealthfund.org/publications/2020/apr/impact-covid-19-outpatient-visits> (last visited Feb. 18, 2021).

<sup>12</sup> Michael Ettlinger and Jordan Hensley, *COVID-19 Economic Crisis: By State*, UNIV. OF N.H. CARSEY SCH. OF PUB. POLICY, Jan. 27, 2021, <https://carsey.unh.edu/COVID-19-Economic-Impact-By-State> (last visited Feb. 12, 2021).

forcing Carilion Clinic to turn to this Court for relief.

12. Carilion Clinic is based in Roanoke, Virginia, and is the largest health system in Virginia's Blue Ridge and Southwest regions. Carilion Clinic provides care for nearly one million Virginians, West Virginians, Tennesseans and North Carolinians annually through a comprehensive network of hospitals, primary and specialty physician practices and other complementary services. Carilion Clinic also offers various fitness services, classes, and lessons through its Carilion Wellness Centers. Carilion Clinic also provides student health services in several locations and provides transportation services to many patients in need. A University of Virginia study found that Carilion Clinic contributed more than \$3.2 billion, and nearly 24,000 jobs, to Virginia's economy in 2018.<sup>13</sup> Carilion Clinic operates seven hospitals and employs over 13,000 people, including 1,000 physicians and over 300 acute care providers, providing care in over 80 specialties, at over 270 ambulatory care and related healthcare facilities.

13. But in early 2020, the Coronavirus and COVID-19 struck Virginia, and they struck hard.

14. On March 7, 2020, Virginia health officials announced the first positive test for COVID-19 in the state, involving a U.S. Marine at Fort Belvoir.<sup>14</sup> One week later, on March 14, the Virginia Department of Health reported the first death in Virginia due to COVID-19.<sup>15</sup> Carilion

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<sup>13</sup> Terance J. Rephann, *Carilion Clinic's Economic Contribution To The State And Service Region*, University of Virginia (Oct. 31, 2019), <https://www.carilionclinic.org/sites/default/files/2020-01/Weldon%20Cooper%20study%20of%20Carilion%20Clinic.pdf> (last visited Feb. 18, 2021).

<sup>14</sup> Virginia Department of Health, *First Virginia Case of Covid-19 Confirmed at Fort Belvoir* (Mar. 7, 2020), <https://www.vdh.virginia.gov/news/2021-news-releases/first-virginia-case-of-covid-19-confirmed-at-fort-belvoir/> (last visited Feb. 18, 2021).

<sup>15</sup> Virginia Department of Health, *Commonwealth of Virginia Reports First COVID-19 Death* (Mar. 14, 2020), [https://www.vdh.virginia.gov/news/2021-news-releases/commonwealth-of-virginia-reports-first-covid-19-death-in-the-peninsula-health-district/#:~:text=\(Richmond%2C%20Va.\),Virginia%20due%20to%20COVID%2D19](https://www.vdh.virginia.gov/news/2021-news-releases/commonwealth-of-virginia-reports-first-covid-19-death-in-the-peninsula-health-district/#:~:text=(Richmond%2C%20Va.),Virginia%20due%20to%20COVID%2D19) (last visited Feb. 18, 2021).

Clinic announced on March 19, 2020, that a patient had tested positive for the virus, marking the first confirmed case in Southwest Virginia.<sup>16</sup> Throughout March 2020, the Coronavirus and COVID-19 spread rapidly throughout Virginia, with numerous new infections and deaths reported daily, resulting in the closure of businesses and cancellation of events.<sup>17</sup>

15. The Coronavirus and COVID-19 have decimated lives and businesses, causing widespread physical loss of or damage to property in the regions Carilion Clinic serves and throughout Virginia. The Coronavirus and COVID-19 have harmed Carilion Clinic's property and business by causing direct physical loss of or damage to its property.

16. Carilion Clinic experienced direct physical loss of or damage to its property in at least four ways: (1) through the certain or virtually certain presence of COVID-19 and/or the Coronavirus throughout its network of hospitals, primary and specialty physician practices and other complementary services, and its Wellness Centers, in the air or on surfaces (whether in droplet nuclei, aerosols, droplets or otherwise); (2) through state, local and agency governmental orders that drastically limited Carilion Clinic's use of its property (including, but not limited to, the prohibition of elective medical care procedures), and at various points shut down or drastically limited the operations of its Wellness Centers and student health centers, causing Carilion Clinic to lose the total or partial normal use and function of its property; (3) through the need to modify physical behaviors through the use of social distancing, avoiding confined indoor spaces, and avoiding congregating in the same physical area as others, in order to reduce or minimize the

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<sup>16</sup> *Carilion Clinic confirms 1<sup>st</sup> positive coronavirus case in southwest Virginia*, WHSV 3 (Mar. 19, 2020), <https://www.wHSV.com/content/news/Carilion-Clinic-confirms-1st-positive-coronavirus-case-in-southwest-Virginia-568942401.html> (last visited Feb. 18, 2021).

<sup>17</sup> Jeke Hartner and Jack Moore, *The year of coronavirus: Key dates as the virus spread in DC, Maryland and Virginia*, WTOP News (Dec. 28, 2020), <https://wtop.com/coronavirus/2020/12/coronavirus-timeline-key-dates-as-the-virus-spread-in-dc-maryland-and-virginia> (last visited Feb. 18, 2021).

potential for viral transmission; and (4) through the need to mitigate the threat or actual physical presence of the Coronavirus on door handles, bedsheets, hospital gowns, bed railings, medical equipment, miscellaneous surfaces, in heating and air conditioning systems, and in or on any of the multitude of other places the Coronavirus has been or could be found.

17. The presence of the Coronavirus in the air and on surfaces made Carilion Clinic's facilities uninhabitable, unsafe, and unfit for their intended uses – just as if asbestos, ammonia, fumes or a salmonella outbreak was in the air or on surfaces of the premises. As a result, they had to close or operate at a limited capacity until they were able to institute their extensive and extraordinary safety, protection and mitigation protocols and add multiple negative pressure rooms to control the airborne virus, discussed below.

18. Carilion Clinic ceased all elective procedures throughout its healthcare system on March 25, 2020. While it resumed elective procedures on May 7, 2020, this interruption caused scheduling and staffing disruptions, and it operated with extensive and costly health and safety protocols and numerous modifications to its property.

19. The Carilion Wellness Centers closed entirely on March 18, 2020. All but two centers reopened in a limited capacity on or about June 10, they were subject to stringent operational, capacity and social distancing limitations, and were required to undergo extensive disinfection of equipment before opening and between every use.

20. One Carilion Wellness Center remains closed, and another reopened more recently on or about November 9, 2020.

21. In response to the Coronavirus and COVID-19, Carilion Clinic undertook herculean efforts and incurred massive expenses, covered as EXTRA EXPENSE under the Policy, to make Carilion Clinics' properties and locations as safe as possible, to protect its employees and

patients and their families, to resume and continue operating as close to normal (meaning, the way Carilion Clinic ran and performed prior to the emergence of the Coronavirus and COVID-19), and to ameliorate, as much as possible, the ongoing physical loss of or damage to Carilion Clinic's property caused by the Coronavirus and COVID-19.

22. Carilion Clinic's comprehensive and costly program of dramatically enhanced safety measures is known as the "Seeing You Safely" campaign. In connection with the "Seeing You Safely" campaign, the protective measures implemented by Carilion Clinic include:

- universal Coronavirus screening for all patients, visitors and staff;
- more frequent cleaning and disinfecting of high-touch surfaces and common areas;
- spacing-out seating in common areas;
- requiring pre-procedure Coronavirus testing;
- requiring and supplying, when necessary, face masks and other appropriate personal protective equipment ("PPE") for patients; and
- offering enhanced options for connecting with the patient care team remotely through phone, video or MyChart.

23. Continuing to this day, Carilion Clinic has taken all of these steps so that its facilities remain safe, providing hope, medical treatment, and, more than any single employer west of Richmond within the Commonwealth of Virginia, jobs (nearly 24,000 of them in total, including its over 13,000 employees) for Virginians, West Virginians, Tennesseans and North Carolinians alike. Indeed, the health, safety and welfare of the millions of Virginians, West Virginians, Tennesseans and North Carolinians that it serves is the lifeblood of Carilion Clinic's public health mission and its very reason for being.

24. Despite complying with and exceeding all required precautions, Carilion Clinic,



like substantially every other employer in this nation with public-facing employees and front-line workers, has not completely escaped the spread of COVID-19. To date, over 1,300 Carilion Clinic employees have reported that they contracted COVID-19 since March of 2020. This is direct proof that the Coronavirus and COVID-19 were and are present in Carilion Clinic's facilities and caused Carilion Clinic to sustain direct physical loss of or damage to its property.

25. To cushion the impact of the Coronavirus and COVID-19, Carilion Clinic turned to its property insurer, AGLIC, to whom Carilion Clinic has paid nearly \$1 million in premiums in exchange for \$1.3 billion in property damage and time element (also known as business interruption) coverage effective June 1, 2019 to June 1, 2020. AGLIC, however, declined to fulfill its obligations to Carilion Clinic under the Policy.

26. Particularly, Carilion Clinic submitted a claim for physical loss of or damage to its property and business interruption, and other covered losses arising from the Coronavirus and COVID-19, but AGLIC has refused to provide coverage or even properly investigate Carilion Clinic's losses. In spite of the fact that AGLIC told Carilion Clinic on April 23, 2020, that it was "continuing our investigation of your claim," and has never formally denied such claim, AGLIC nevertheless has agreed only to extend the one-year deadline under the Policy for Carilion Clinic to file a coverage action by 90 days, thus forcing Carilion Clinic to file this action to preserve and pursue its coverage rights, which are not just about the assets and resources of Carilion Clinic, but in reality about the assets and resources of its patients and communities.

27. AGLIC's abandonment of Carilion Clinic and the communities it serves is particularly egregious in light of Zurich's (AGLIC's parent company) marketing strategy. Beginning with its introduction in 2008, Zurich marketed the EDGE™ policy as offering uniquely "broader coverage and greater flexibility." Zurich's CEO made this announcement and lauded the

clarity of the form.

28. Zurich own's regulatory filings confirm that it and its affiliates, including AGLIC, knew they were selling an insurance product that did not exclude loss from virus. In December of 2019, after the effective date of the Policy, and just after the emergence of the first COVID-19 cases in China, Zurich filed a regulatory request to modify its policy language. Buried in the edits, and without reference to the significance of the change, Zurich's filing sought to add an exclusion for viruses.

29. Carilion Clinic seeks damages for breach of contract against AGLIC for its failure to honor its policy obligations.

30. Carilion Clinic also seeks a judgment declaring the scope of AGLIC's obligation to pay Carilion Clinic's losses under the Policy.

#### **THE PARTIES**

31. Carilion Clinic is a non-profit nonstock corporation formed under Virginia's laws with its principal place of business in Roanoke, Virginia.

32. RMH Emergency Service, LLC is a limited liability company formed under the laws of Virginia with its principal place of business in Roanoke, Virginia, whose members are in Virginia.

33. Carilion Healthcare Corporation is a non-profit corporation formed under Virginia's laws with its principal place of business in Roanoke, Virginia.

34. Carilion Behavioral Health, Inc. is corporation formed under Virginia's laws with its principal place of business in Roanoke, Virginia.

35. Carilion Emergency Services, Inc. is corporation formed under Virginia's laws with its principal place of business in Roanoke, Virginia.

36. CHS, Inc. is corporation formed under Virginia's laws with its principal place of

business in Roanoke, Virginia.

37. Carilion Professional Services, LLC is a limited liability company formed under the laws of Virginia with its principal place of business in Roanoke, Virginia, whose members are in Virginia.

38. Carilion Clinic Patient Transportation, LLC is a limited liability company formed under the laws of Virginia with its principal place of business in Roanoke, Virginia, whose members are in Virginia.

39. Carilion Medical Center is a non-profit corporation formed under Virginia's laws with its principal place of business in Roanoke, Virginia.

40. Carilion Franklin Memorial Hospital is a non-profit corporation formed under Virginia's laws with its principal place of business in Franklin County, Virginia.

41. Carilion Giles Community Hospital is a non-profit corporation formed under Virginia's laws with its principal place of business in Giles County, Virginia.

42. Carilion Services, Inc. is a non-profit corporation formed under Virginia's laws with its principal place of business in Roanoke, Virginia.

43. Carilion Tazewell Community Hospital is a non-profit corporation formed under Virginia's laws with its principal place of business in Tazewell County, Virginia.

44. Carilion Surgery Center New River Valley, LLC is a limited liability company formed under the laws of Virginia with its principal place of business in Montgomery County, Virginia, whose members are in Virginia.

45. Carilion New River Valley Medical Center is a non-profit corporation formed under Virginia's laws with its principal place of business in Montgomery County, Virginia.

46. Carilion Clinic Properties, LLC is a limited liability company formed under the

laws of Virginia with its principal place of business in Roanoke, Virginia, whose members are in Virginia, whose members are in Virginia.

47. Carilion Stonewall Jackson Hospital is a non-profit corporation formed under Virginia's laws with its principal place of business in the City of Lexington, Virginia.

48. Upon information and belief, AGLIC is a corporation formed under the laws of New York with its principal place of business in Illinois.

### **JURISDICTION AND VENUE**

49. This Court has subject matter jurisdiction over this dispute under 28 U.S.C. §1332 because the parties are citizens of different states and the amount in controversy exceeds \$75,000. This Court has general personal jurisdiction over AGLIC pursuant to Fed. R. Civ. P. §4(k)(1)(A) and Code of Virginia §8.01-328.1.A.1 because AGLIC carries on a continuous and systematic part of its general business within the Commonwealth, including but not limited to marketing, selling, and issuing insurance policies to Virginia businesses and insuring property in Virginia.

50. This Court also has limited personal jurisdiction over AGLIC pursuant to Fed. R. Civ. P. §4(k)(1)(A) and Code of Virginia §8.01-328.1.A.7 because AGLIC contracted to insure property and/or risk located within this Commonwealth at the time of contracting, and out of which this action arose.

51. Venue is proper in this Court pursuant to 28 U.S.C. §1391 because AGLIC conducts business in the Western District of Virginia and Carilion Clinic resides in the Western District of Virginia.

### **FACTUAL BACKGROUND**

#### **A. Carilion Clinic**

52. Carilion Clinic's comprehensive hospital network, primary and specialty physician practices and other complementary services operate in more than 270 locations, serving a 20-

county region in central and southwestern Virginia and southern West Virginia. Carilion Clinic also offers a variety of fitness services, classes and lessons through its Carilion Wellness Centers. Carilion Clinic also provides student health services in several locations. Carilion Clinic has over 13,000 employees in Virginia.

53. In 2019, before COVID-19 impacted its business, Carilion Clinic provided, among other services: (a) almost one (1) million primary care visits; (b) approximately 118,000 visits to its urgent care facilities; (c) over 175,000 emergency department visits; (d) nearly 40,000 days of hospice care; (e) admission of over 50,000 patients to its hospitals; and (f) services to nearly 17,000 Virginians through its Wellness Centers.

54. As a part of its prudent business practices and in recognition of its responsibilities to its employees, its community and its patients, Carilion Clinic maintains insurance coverage.

55. Carilion Clinic specifically maintains “all-risk” commercial property coverage with AGLIC, covering not only more commonly occurring risks like fire but also entirely unanticipated and novel risks that may arise. As described below in greater detail, the Policy provides coverage for all “*loss of or damage to*” Carilion Clinic’s property, unless expressly excluded.

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

56. COVID-19 is a severe infectious disease caused by the Coronavirus. COVID-19 is responsible for over 109 million reported cases and at least 2.4 million deaths worldwide.<sup>18</sup> Unlike other members of the coronavirus family, which tend to cause mild-to-moderate upper respiratory

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<sup>18</sup> Sergio Hernandez, Byron Manley, Henrik Pettersson, *Tracking coronavirus’ global spread*, CNN Health (last updated Feb. 15, 2021), <https://www.cnn.com/interactive/2020/health/coronavirus-maps-and-cases/> (last visited Feb. 15, 2021).

tract illness, the Coronavirus causes serious systemic illness and death<sup>19</sup>. COVID-19 has been declared a global pandemic by the World Health Organization (“WHO”),<sup>20</sup> and as such, the disease and its causative virus, Coronavirus, are presumed to be present or imminently present everywhere.<sup>21</sup>

57. The existence and/or presence of the Coronavirus and COVID-19 is not simply reflected in reported cases or individuals’ positive test results. The Centers for Disease Control and Prevention (“CDC”) estimates that the number of people in the United States who have been infected with COVID-19 is likely to be 10 times higher than the number of reported cases.<sup>22</sup> Additionally, at least 40% of people infected with COVID-19 are asymptomatic.<sup>23</sup> COVID-19 also includes a pre-symptomatic incubation period of up to 14 days, during which time infected people can transmit COVID-19 to people and onto surfaces without having experienced symptoms and without realizing that they are infected.<sup>24</sup> Studies have demonstrated that pre-symptomatic

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<sup>19</sup> Tianna Hicklin, *Immune cells for common cold may recognize SARS-COV-2*, NAT. INST. OF HEALTH (Aug. 18, 2020), <https://www.nih.gov/news-events/nih-research-matters/immune-cells-common-cold-may-recognize-sars-cov-2> (last visited Feb. 17, 2021).

<sup>20</sup> WHO, *WHO Director-General’s opening remarks at the media briefing on COVID-19* (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (last visited Feb. 12, 2021).

<sup>21</sup> See, e.g., Christopher Ingraham, *At the population level, the coronavirus is almost literally everywhere*, WASH. POST, Apr. 1, 2020, <https://www.washingtonpost.com/business/2020/04/01/population-level-coronavirus-is-almost-literally-everywhere/> (last visited Feb. 12, 2021).

<sup>22</sup> Lena H. Sun and Joel Achenbach, *CDC chief says coronavirus cases may be 10 times higher than reported*, WASH. POST (June 25, 2020), <https://www.washingtonpost.com/health/2020/06/25/coronavirus-cases-10-times-larger/> (last visited Feb. 17, 2021).

<sup>23</sup> Ellen Cranley, *40% of people infected with covid-19 are asymptomatic, a new CDC estimate says*, BUS. INSIDER (July 12, 2020), <https://www.businessinsider.com/cdc-estimate-40-percent-infected-with-covid-19-asymptomatic-2020-7> (last visited Feb. 17, 2021).

<sup>24</sup> See WHO, *Coronavirus disease 2019 (COVID-19) Situation Report - 73* (Apr. 2, 2020), <https://apps.who.int/iris/bitstream/handle/10665/331686/nCoVsitrep02Apr2020-eng.pdf?sequence=1&isAllowed=y> (last visited Feb. 17, 2021); Minghui Yang, Liang Li, Ting Huang, Shaxi Li, Mingxia Zhang, Yang, Yujin Jiang, Xiaohe Li, Jing Yuan, and Yingxia Liu, *SARS-CoV-2 Detected on Environmental Fomites for Both Asymptomatic*

individuals have an even greater ability to transmit COVID-19 than other infected people because they carry the greatest “viral load.”<sup>25</sup> The National Academy of Sciences has concluded that “the majority of transmission is attributable to people who are not exhibiting symptoms, either because they are still in the pre-symptomatic stage or the infection is asymptomatic.”<sup>26</sup>

58. As early as February 26, 2020, the CDC advised that COVID-19 was spreading freely without the ability to trace the origin of new infections, also known as community transmission.

59. On March 11, 2020, the WHO declared COVID-19 to be a global pandemic.

60. COVID-19 is highly contagious, uniquely resilient, and potentially deadly. The degree to which an infectious disease is contagious is measured by  $R^0$ , a term that defines how many other people will become infected by one person with that disease. Studies have concluded that one person with the Coronavirus will infect up to 5.7 others ( $R^0 \approx 5.7$ ), much higher than seasonal influenza for example, where on average, one person will infect only 1.3 others ( $R^0 \approx 1.3$ ).<sup>27</sup>

61. The Coronavirus can remain infectious for “much longer time periods than

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*and Symptomatic Patients with COVID-19*, 203 AM. J. OF RESPIRATORY AND CRITICAL CARE MED. 3, 374-78 (Feb. 1, 2021), <https://doi.org/10.1164/rccm.202006-2136LE> (last visited Feb. 18, 2021).

<sup>25</sup> See, e.g., Xi He et al., *Temporal dynamics in viral shedding and transmissibility of COVID-19*, 26 NATURE MED. 672, 674 (Apr. 15, 2020), <https://www.nature.com/articles/s41591-020-0869-5> (last visited Feb. 17, 2021); Lirong Zou et al., *SARS-CoV-2 Viral Load in Upper Respiratory Specimens of Infected Patients*, NEW ENG. J. OF MED. (Mar. 19, 2020).

<sup>26</sup> Meagan C. Fitzpatrick, Alison P. Galvani, Seyed M. Moghadas, Abhishek Pandey, Pratha Sah, Affan Shoukat, and Burton H. Singer, *The implications of silent transmission for the control of COVID-19 outbreaks*, 117 PNAS 30, 17513-15, July 28, 2020 <https://www.pnas.org/content/117/30/17513> (last visited Feb. 12, 2021).

<sup>27</sup> M. Cevik, C.C.G. Bamford, A. Ho, *COVID-19 pandemic-a focused review for clinicians*, 26 CLINICAL MICROBIOLOGY & INFECTION 7, 842-47 (July 2020), [https://www.clinicalmicrobiologyandinfection.com/article/S1198-743X\(20\)30231-7/fulltext](https://www.clinicalmicrobiologyandinfection.com/article/S1198-743X(20)30231-7/fulltext) (last visited Feb. 17, 2021).

generally considered possible.”<sup>28</sup> In the *Journal of Virology*, researchers demonstrated that the Coronavirus can survive up to 28 days at room temperature (68°F) on a variety of surfaces including glass, steel, vinyl, plastic, and paper.<sup>28</sup> A CDC report from March 27, 2020, stated that the Coronavirus was identified on surfaces of the cabins on board the Diamond Princess cruise ship 17 days after the cabins were vacated but before they were disinfected.<sup>29</sup> Numerous other scientific studies and articles have identified the persistence of the Coronavirus on doorknobs, toilets, faucets and other high-touch points, as well as on commonly overlooked surfaces such as floors.<sup>30</sup>

62. The WHO states that “[t]he disease spreads primarily from person to person through small droplets from the nose or mouth, which are expelled when a person with COVID-19 coughs, sneezes, or speaks . . . . People can catch COVID-19 if they breathe in these droplets from a person infected with the virus . . . . These droplets can land on objects and surfaces around the person such as tables, doorknobs and handrails. People can become infected by touching these objects or surfaces, then touching their eyes, nose or mouth.”<sup>31</sup>

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<sup>28</sup> Shane Riddell, Sarah Goldie, Andrew Hill, Debbie Eagles & Trevor W. Drew, *The effect of temperature on persistence of SARS-CoV-2 on common surfaces*, 17 *VIROLOGY J.* 145 (2020), <https://doi.org/10.1186/s12985-020-01418-7> (last visited Feb. 12, 2021).

<sup>29</sup> Leah F. Moriarty, Mateusz M. Plucinski, Barbara J. Marston, et al., *Public Health Responses to COVID-19 Outbreaks on Cruise Ships — Worldwide, February–March 2020*, 69 *MMWR* 12, 347-352, (Mar. 27, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.htm> (last visited Feb. 12, 2021).

<sup>30</sup> Zhen-Dong Guo, Zhong-Yi Wang, Shou-Feng Zhang, Xiao Li, Lin Li, Chao Li, Yan Cui, Rui-Bin Fu, Yun-Zhu Dong, Xiang-Yang Chi, Meng-Yao Zhang, Kun Liu, Cheng Cao, Bin Liu, Ke Zhang, Yu-Wei Gao, Bing Lu, Wei Chen, *Aerosol and Surface Distribution of Severe Acute Respiratory Syndrome Coronavirus 2 in Hospital Wards, Wuhan, China, 2020*, 26 *EMERG. INFECT. DIS.* 7, 1583-91 (July 2020), <https://pubmed.ncbi.nlm.nih.gov/32275497/> (last visited Feb. 17, 2021).

<sup>31</sup> *Q&A on coronaviruses (COVID-19)*, World Health Organization, <https://web.archive.org/web/20200506094904/https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses> (last visited Feb. 12, 2021).



63. Virginia experienced a reported COVID-19 outbreak in March 2020, and Carilion Clinic and the communities it serves have experienced dramatic increases in the number of cases thereafter.

**C. The Coronavirus and COVID-19 Cause Direct Physical Loss of or Damage to Property**

64. The omnipresence of the Coronavirus and COVID-19 is enabled by multiple modes of viral transmission, including respiratory droplet, airborne, and fomite transmission (i.e., transmission from surfaces and objects).<sup>32</sup> These transmission methods demonstrate that the Coronavirus and/or COVID-19 cause direct physical loss of or damage to property.

65. Respiratory transmission of COVID-19 occurs through exposure to an infected person's respiratory particles, such as from saliva or mucus.<sup>33</sup> Respiratory transmission of the Coronavirus is commonly divided into droplet (larger particles that have a transmission range of about six feet) and airborne (smaller particles that can remain suspended in the air for prolonged periods of time) modes of transmission. Though convenient, this binary division is an oversimplification that underscores transmission risk.<sup>34</sup> Humans produce a wide range of particle sizes when coughing, sneezing, talking, singing, or otherwise dispersing droplets, with pathogens predominating in the smallest particles.<sup>35</sup> Respiratory particles produced by the average person can travel almost 20 feet by sneezing.<sup>36</sup> An M.I.T. researcher has found that virus-laden "clouds"

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<sup>32</sup> See, e.g., WHO, *Transmission of SARS-CoV-2: implications for infection prevention precautions* (Jul. 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions> (last visited Feb. 12, 2021).

<sup>33</sup> *Id.*

<sup>34</sup> Kevin P. Fennelly, *Particle sizes of infectious aerosols: implications for infection control*, 8 LANCET RESPIRATORY MED. 9, P914-24 (Sept. 1, 2020), [https://www.thelancet.com/journals/lanres/article/PIIS2213-2600\(20\)30323-4/fulltext](https://www.thelancet.com/journals/lanres/article/PIIS2213-2600(20)30323-4/fulltext) (last visited Feb. 17, 2021).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

containing clusters of droplets can travel 23 to 27 feet.<sup>37</sup>

66. Airborne transmission involves the spread of the infectious agent caused by the dissemination of droplet nuclei (aerosols) from, for example, exhaled breath, that remain infectious when suspended in the air over long distances and time.<sup>38</sup> These tiny particles can remain suspended “for indefinite periods unless removed by air currents or dilution ventilation.”<sup>39</sup> As a result, the risk of disease transmission increases substantially in enclosed environments, compared to outdoor settings.<sup>40</sup>

67. The WHO and the scientific community have studied the spread of the Coronavirus through aerosols in indoor settings via air circulation systems. For example, the CDC published a research letter concluding that a restaurant’s air conditioning system triggered the transmission of the Coronavirus, spreading it to people who sat at separate tables downstream of the restaurant’s airflow.<sup>41</sup>

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<sup>37</sup> Lydia Bourouiba, *Turbulent Gas Clouds and Respiratory Pathogen Emissions, Potential Implications for Reducing Transmission of COVID-19*, 323 JAMA 18, 1837-38, Mar. 26, 2020, <https://jamanetwork.com/journals/jama/fullarticle/2763852> (last visited Feb. 12, 2021).

<sup>38</sup> *Id.*; see also Jose-Luis Jimenez, *COVID-19 Is Transmitted Through Aerosols. We Have Enough Evidence, Now It Is Time to Act*, TIME, Aug. 25, 2020, <https://time.com/5883081/covid-19-transmitted-aerosols/> (last visited Feb. 12, 2021); Ramon Padilla & Javier Zarracina, *Coronavirus might spread much farther than 6 feet in the air. CDC says wear a mask in public*, (last updated Sept. 21, 2020), [www.usatoday.com/in-depth/news/2020/04/03/coronavirusprotection-how-masks-might-stop-spread-throughcoughs/5086553002/](http://www.usatoday.com/in-depth/news/2020/04/03/coronavirusprotection-how-masks-might-stop-spread-throughcoughs/5086553002/) (last visited Feb. 12, 2021); Nan Zhang, Jianjian Wei, Hui-Ling Yen, and Yuguo Li, *Short-range airborne route dominates exposure of respiratory infection during close contact*, 176 BLDG. AND ENV’T (June 2020).

<sup>39</sup> Kevin P. Fennelly, *Particle sizes of infectious aerosols: implications for infection control*, 8 LANCET RESPIRATORY MED. 9, P914-24 (Sept. 1, 2020), [https://www.thelancet.com/journals/lanres/article/PIIS2213-2600\(20\)30323-4/fulltext](https://www.thelancet.com/journals/lanres/article/PIIS2213-2600(20)30323-4/fulltext) (last visited Feb. 17, 2021).

<sup>40</sup> Muge Cevik, Julia L Marcus, Caroline Buckee, & Tara C Smith, *Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) Transmission Dynamics Should Inform Policy*, CLINICAL INFECTIOUS DISEASES (2020), <https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1442/5910315> (last visited Feb. 17, 2021).

<sup>41</sup> Jianyun Lu, Jieni Gu, Kuibiao Li, Conghui Xu, Wenzhe Su, Zhisheng Lai, Deqian Zhou, Chao Yu, Bin Xu, and Zhicong Yang, *COVID-19 outbreak associated with air conditioning in restaurant, Guangzhou, China, 2020*, 26 EMERGING INFECTIOUS DISEASES 7 (July 2020),

68. Additionally, the CDC has stated that “there is evidence that under certain conditions, people with COVID-19 seem to have infected others who were more than 6 feet away” and infected people who entered the space shortly after the person with COVID-19 had left.<sup>42</sup> A recently published (February 2021) systematic review of airborne transmission of the Coronavirus corroborated the CDC’s concerns and recommended procedures to improve ventilation of indoor air environments to decrease bioaerosol concentration and reduce the Coronavirus’ spread.<sup>43</sup>

69. The CDC has recommended “ventilation interventions” to help reduce exposures to the airborne Coronavirus in indoor spaces, including increasing airflow and air filtration (such as with high-efficiency particulate air (HEPA) fan/filtration systems).<sup>44</sup> The CDC has recommended that in addition to ventilation changes, health care providers make various modifications to their facilities, including installing barriers and creating outdoor triage stations.<sup>45</sup> These and other remedial measures must be implemented, at high cost and extra expense, to reduce the amount of the Coronavirus present in the space and make property safe for its intended use.

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[https://wwwnc.cdc.gov/eid/article/26/7/20-0764\\_article](https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article) (last visited Feb. 12, 2021); *see also* Keun-Sang Kwon, Jung-Im Park, Young Joon Park, Don-Myung Jung, Ki-Wahn Ryu, and Ju-Hyung Lee, *Evidence of Long-Distance Droplet Transmission of SARS-CoV-2 by Direct Air Flow in a Restaurant in Korea*, 35 J. KOREAN MED. SCI. 46 (Nov. 2020), <https://doi.org/10.3346/jkms.2020.35.e415> (last visited Feb. 12, 2021).

<sup>42</sup> CDC, *Ways COVID-19 Spreads* (updated Oct. 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited Feb. 17, 2021).

<sup>43</sup> Zahra Noorimotlagh, Neemat Jaafarzadeh, Susana Silva Martínez, & Seyyed Abbas Mirzaee, *A systematic review of possible airborne transmission of the COVID-19 virus (SARS-CoV-2) in the indoor air environment*, 193 ENV’T RSCH. 110612, 1-6 (Feb. 2021), [https://www.sciencedirect.com/science/article/pii/S0013935120315097?dgcid=rss\\_sd\\_all](https://www.sciencedirect.com/science/article/pii/S0013935120315097?dgcid=rss_sd_all) (last visited Feb. 17, 2021).

<sup>44</sup> CDC, *Ventilation in Buildings* (updated Feb. 9, 2020), [https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html#:~:text=HEPA%20filters%20are%20even%20more,with%20SARS%2DCoV%2D2\\_](https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html#:~:text=HEPA%20filters%20are%20even%20more,with%20SARS%2DCoV%2D2_) (last visited Feb. 12, 2021).

<sup>45</sup> CDC, *Infection Control Guidance* (updated Feb. 10, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control-recommendations.html> (last visited Feb. 18, 2020).

These extreme measures demonstrate that the Coronavirus and COVID-19 cause direct physical loss of or damage to interior spaces.

70. COVID-19 may also be transmitted to people from physical objects, materials or surfaces. “Fomites” are physical objects or materials that carry, and are capable of transmitting infectious agents, altering these objects to become vectors of disease.<sup>46</sup> Fomite transmission has been demonstrated as highly efficient for viruses, both from object-to-hand and from hand-to-mouth.<sup>47</sup>

71. The WHO has described fomite transmission as follows:

Respiratory secretions or droplets expelled by infected individuals can contaminate surfaces and objects, creating fomites (contaminated surfaces). **Viable SARS-CoV-2 virus and/or RNA detected by RT-PCR can be found on those surfaces for periods ranging from hours to days**, depending on the ambient environment (including temperature and humidity) and the type of surface, in particular at high concentration in health care facilities where COVID-19 patients were being treated. Therefore, transmission may also occur indirectly through touching surfaces in the immediate environment or objects contaminated with virus from an infected person . . . .<sup>48</sup> (Emphasis added).

72. In addition to studies cited by the WHO,<sup>49</sup> numerous other studies and scientific articles have discussed fomite transmission as a mode of virus transmission, including, but not limited to:

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<sup>46</sup> Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/fomite> (last visited Feb. 12, 2021).

<sup>47</sup> P. Rusin, S. Maxwell, & C. Gerba, *Comparative surface-to-hand and fingertip-to-mouth transfer efficiency of gram-positive bacteria, gram-negative bacteria, and phage*, 93 J. OF APPLIED MICROBIOLOGY, 4, 585-92 (Sept. 18, 2002), <https://pubmed.ncbi.nlm.nih.gov/12234341/> (last visited Feb. 18, 2021).

<sup>48</sup> See, e.g., WHO, *Transmission of SARS-CoV-2: implications for infection prevention precautions* (Jul. 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions> (last visited Feb. 12, 2021).

<sup>49</sup> *Id.*

- a. A study of a COVID-19 outbreak published by the CDC identifying elevator buttons and restroom taps as possible causes of the “rapid spread of SARS-CoV-2” in a shopping mall in China.<sup>50</sup>
- b. A National Institutes of Health study published in the New England Journal of Medicine finding that the Coronavirus survives up to 4 hours on copper, up to 24 hours on cardboard, and up to 3 days on plastic and stainless steel, and suggesting that people may acquire the virus through the air and after touching contaminated objects.<sup>51</sup>
- c. An American Society for Microbiology article discussing fomite infection as involving both porous and non-porous surfaces, and occurring through a fomite’s contact with bodily secretions, hands, aerosolized virus from talking, sneezing, coughing, etc., or other airborne viral particles that settle after a disturbance of a fomite (*e.g.*, shaking a contaminated blanket).<sup>52</sup> According to the researchers, “[o]nce a fomite is contaminated, the transfer of infectious virus may readily occur between inanimate and animate objects, or vice versa, and between two separate fomites (if brought together).”<sup>53</sup> Of course, materials like blankets, hospital beds, computer terminals and a huge variety of medical equipment that come into contact with droplets and hands are handled thousands of times a day. Generally, frequently touched surfaces can become highly transmissible fomites.<sup>54</sup>

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<sup>50</sup> CDC, Jing Cai, Wenjie Sun, Jianping Huang, Michelle Gamber, Jing Wu, Guiqing He, *Indirect Virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China, 2020*, 26 EMERGING INFECTIONS DISEASES 6 (June 2020), [https://wwwnc.cdc.gov/eid/article/26/6/20-0412\\_article](https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article) (last visited Feb. 12, 2021).

<sup>51</sup> Stephanie A. Bone and Charles P. Gerba, *Significance of Fomites in the Spread of Respiratory and Enteric Viral Disease*, 73 APPLIED AND ENVIRONMENTAL MICROBIOLOGY 6, 1687-96 (Mar. 2007) <https://aem.asm.org/content/73/6/1687> (last visited Feb. 12, 2021).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

- d. A CDC research letter reporting that the Coronavirus can remain viable on polystyrene plastic, aluminum, and glass for 96 hours in indoor living spaces.<sup>55</sup>
- e. A *Journal of Hospital Infection* article citing studies revealing that human coronaviruses can persist on inanimate surfaces like metal, glass, or plastic for up to 9 days.<sup>56</sup>

73. Importantly, the Coronavirus has been detected on environmental objects and surfaces from both symptomatic and asymptomatic individuals.<sup>57</sup> Fomites transform the surface of property into a potentially deadly Coronavirus transmission device. A study published in the *Journal of Epidemiology and Infection* demonstrated that after lockdown in the United Kingdom, Coronavirus transmission via fomites may have contributed to as many as 25% of deaths in that region.<sup>58</sup>

74. Accordingly, the presence of the Coronavirus in and on property, including in indoor air, on surfaces, and on objects, causes direct physical loss of or damage to property by

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<sup>55</sup> CDC, Boris Pastorino, Franck Touret, Magali Gilles, Xavier de Lamballerie, and Rémi N. Charrel, *Prolonged Infectivity of SARS-CoV-2 in Fomites*, 26 EMERGING INFECTIOUS DISEASES 9 (Sept. 2020), [https://wwwnc.cdc.gov/eid/article/26/9/20-1788\\_article](https://wwwnc.cdc.gov/eid/article/26/9/20-1788_article) (last visited Feb. 12, 2021).

<sup>56</sup> G. Kampf, D. Todt, S. Pfaender, E. Steinmann, *Persistence of coronaviruses on inanimate surfaces and their inactivation with biocidal agents*, J. OF HOSPITAL INFECTION 104, 246-51 (2020), <https://www.journalofhospitalinfection.com/action/showPdf?pii=S0195-6701%2820%2930046-3> (last visited Feb. 12, 2021).

<sup>57</sup> Minghui Yang, Liang Li, Ting Huang, Shaxi Li, Mingxia Zhang, Yang, Yujin Jiang, Xiaohe Li, Jing Yuan, and Yingxia Liu, *SARS-CoV-2 Detected on Environmental Fomites for Both Asymptomatic and Symptomatic Patients with COVID-19*, 203 AM. J. OF RESPIRATORY AND CRITICAL CARE MED. 3, 374-78 (Dec. 16, 2020), <https://doi.org/10.1164/rccm.202006-2136LE> (last visited Feb. 17, 2021).

<sup>58</sup> A. Meiksin, *Dynamics of COVID-19 transmission including indirect transmission mechanisms: A mathematical analysis*, 148 EPIDEMIOLOGY & INFECTION e257, 1-7 (2020), <https://www.cambridge.org/core/journals/epidemiology-and-infection/article/dynamics-of-covid19-transmission-including-indirect-transmission-mechanisms-a-mathematical-analysis/A134C5182FD44BEC9E2BA6581EF805D3> (last visited Feb. 24, 2021).

causing physical harm to and altering property and otherwise making it incapable of being used for its intended purpose.

75. Among other things, the presence of the Coronavirus transforms everyday surfaces and objects into fomites, causing a tangible change of the property into a transmission vehicle for disease from one host to another. The WHO's description of fomite transmission of COVID-19 expressly recognizes this physical alteration of property, describing viral droplets as “**creating** fomites (contaminated surfaces)”<sup>59</sup> (emphasis added). “Creating” involves making or bringing into existence something new<sup>60</sup> – such as something that is in an altered state from what it was before the Coronavirus was present on, in and around the property.

76. The Coronavirus adheres to surfaces and objects, harming and physically changing and physically altering those objects by becoming a part of their surface and making physical contact with them unsafe for their ordinary and customary use. Once the Coronavirus is in, on, or near property, it is easily spread by the air, people and objects from one area to another, causing additional direct physical loss of or damage.

77. Additionally, the presence of the Coronavirus in and on property, including in indoor air, on surfaces, and on objects, renders the property unsafe and unfit for its normal usage. Respiratory particles (including droplets and airborne aerosols) and fomites are physical substances that alter the physical properties of the interiors of buildings to make them unsafe, untenable and uninhabitable.

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<sup>59</sup> See, e.g., WHO, *Transmission of SARS-CoV-2: implications for infection prevention precautions* (Jul. 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions> (last visited Feb. 12, 2021).

<sup>60</sup> See, e.g., Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/create> (last visited Feb. 12, 2021).

78. In addition to being found in air samples,<sup>61</sup> the Coronavirus remains stable in body secretions (respiratory, urine, feces), on surfaces, and in sewage, particularly at lower temperatures.<sup>62</sup>

79. A number of studies have demonstrated that the Coronavirus is “much more resilient to cleaning than other respiratory viruses tested.”<sup>63</sup> The measures that must be taken to remove the Coronavirus from property are significant and far beyond ordinary cleaning.

80. Efficacy of decontaminating agents for viruses are based on a number of factors, including the initial amount of virus present, contact time with the decontaminating agent, dilution, temperature, and pH, among many others. Detergent surfactants are not recommended as single agents, but rather in conjunction with complex disinfectant solutions.<sup>64</sup>

81. Additionally, it can be challenging to accurately determine the efficacy of decontaminating agents. The toxicity of an agent may inhibit the growth of cells used to determine the presence of virus, making it difficult to determine if lower levels of infectious virus are actually still present on treated surfaces.<sup>65</sup>

82. In order to be effective, cleaning and decontamination procedures require strict

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<sup>61</sup> Zhen-Dong Guo, Zhong-Yi Wang, Shou-Feng Zhang, Xiao Li, Lin Li, Chao Li, Yan Cui, Rui-Bin Fu, Yun-Zhu Dong, Xiang-Yang Chi, Meng-Yao Zhang, Kun Liu, Cheng Cao, Bin Liu, Ke Zhang, Yu-Wei Gao, Bing Lu, Wei Chen, *Aerosol and Surface Distribution of Severe Acute Respiratory Syndrome Coronavirus 2 in Hospital Wards, Wuhan, China*, 2020, 26 EMERG. INFECT. DIS. 7, 1583-91 (July 2020), <https://pubmed.ncbi.nlm.nih.gov/32275497/> (last visited Feb. 17, 2021).

<sup>62</sup> Nevio Cimolai, *Environmental and decontamination issues for human coronaviruses and their potential surrogates*, 92 J. OF MED. VIROLOGY 11, 2498-510 (June 2020), <https://doi.org/10.1002/jmv.26170> (last visited Feb. 17, 2021).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Muge Cevik, Julia L Marcus, Caroline Buckee, & Tara C Smith, *Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) Transmission Dynamics Should Inform Policy*, CLINICAL INFECTIOUS DISEASES (2020), <https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1442/5910315> (last visited Feb. 17, 2021).



adherence to protocols not necessarily tested under “real life” or practical conditions, where treated surfaces or objects may not undergo even exposure or adequate contact time.<sup>66</sup> Studies of coronaviruses have demonstrated viral RNA persistence on objects despite cleaning with 70% alcohol.<sup>67</sup>

83. When considering disinfection and decontamination, the safety of products and procedures must be considered as well, due to the risks of harmful chemical accumulation, breakdown of treated materials, flammability, and potential for allergen exposure.<sup>68</sup>

84. With respect to textiles, studies have demonstrated that virus can survive on fabrics and be transferred to skin and other surfaces, “suggesting it is biologically plausible that . . . infectious diseases can be transmitted directly through contact with contaminated textiles.”<sup>69</sup> Given the inadequacy of conventional cleaning procedures, disinfection and decontamination measures include, but are not limited to, the use of harsh chemicals to perform deep disinfection, the removal and disposal of porous materials like clothing, cloth and other fabrics, making changes to air filtration systems, and redesigning interior spaces, all performed at great cost and expense to Carilion Clinic. These measures, among others, demonstrate that the Coronavirus and COVID-19 cause direct physical loss, damage or destruction to property.

85. Many of the surfaces and materials discussed in the studies and articles cited above

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<sup>66</sup> *Id.*

<sup>67</sup> Joon Young Song, Hee Jin Cheong, Min Joo Choi, Ji Ho Jeon, Seong Hee Kang, Eun Ju Jeong, Jin Gu Yoon, Saem Na Lee, Sung Ran Kim, Ji Yun Noh, & Woo Joo Kim, *Viral Shedding and Environmental Cleaning in Middle East Respiratory Syndrome Coronavirus Infection*, 47 *INFECTION & CHEMOTHERAPY* 4, 252-5 (2015), <https://www.icjournal.org/DOIx.php?id=10.3947/ic.2015.47.4.252> (last visited Feb. 18, 2021).

<sup>68</sup> *Id.*

<sup>69</sup> Lucy Owen and Katie Laird, *The role of textiles as fomites in the healthcare environment: a review of the infection control risk*, 8 *PEER J. LIFE AND ENV'T* e9790, 1-35 (2020), <https://peerj.com/articles/9790/> (last visited Feb. 17, 2021).

are used throughout Carilion Clinic and as part of its operations, including plastics, glass, metals and cloth and fabrics such as blankets.

86. Over 1,300 of Carilion Clinic's employees have contracted COVID-19. Given the high percentage of asymptomatic cases of COVID-19, it is certain that the actual number of Carilion Clinic employees who had contracted COVID-19 was substantially greater than the number of employees known to have contracted COVID-19.

87. The above is direct proof of the actual, certain presence of the Coronavirus on Carilion Clinic's property.

88. Additionally, given how highly contagious the Coronavirus is, its multiple modes of transmission, the global pervasive status of COVID-19 and its heavy toll throughout Virginia, it is statistically certain or near-certain that many other individuals at or in the vicinity of Carilion Clinic's properties contracted and carried the Coronavirus. It is also statistically certain or near-certain that the Coronavirus was dispersed continuously into the air and on property in and around such properties.

89. The presence of the Coronavirus and COVID-19 in, on, and near property therefore caused and continues to cause direct physical loss of or damage to Carilion Clinic's property, resulting in business income loss covered under the Policy.

90. This direct physical loss of or damage to Carilion Clinic's property required Carilion Clinic to close specific properties, sharply limit routine patient care at others, incur extra expense, and undertake costly efforts to protect and preserve property from further damage or loss. Even after resuming elective medical procedures and reopening properties such as the Carilion Wellness Centers, the many remaining restrictions continued to limit operations and require extensive ongoing remediation, all resulting in losses above \$150 million.

**D. The Certain or Virtually Certain Presence of the Coronavirus at Carilion Clinic**

91. Virginia, like much of the nation, experienced dramatic COVID-19 outbreaks in mid-and late-March 2020.<sup>70</sup> Until March 2020, Carilion Clinic was treating patients at approximately the same pace as in 2019, expecting to serve almost one million patients. Its Wellness Centers business was also on track. And then, as the Coronavirus and COVID-19 progressed, as discussed above, over 1,300 Carilion Clinic employees were diagnosed with COVID-19.

92. The presence of Coronavirus at Carilion Clinic properties and at the many nearby locations that attract customers was certain or virtually certain. This can be confirmed with certainty or near-certainty by statistical modeling based on the known incidences of infection despite the lack of commercially available tests for fomite or the aerosolized Coronavirus, and despite the shortage of COVID-19 tests that could have otherwise been administered to every individual who was on-site at the relevant times.<sup>71</sup>

93. Early in the course of the Coronavirus and COVID-19, testing was limited, and thus potentially thousands more people were infected than was reported.<sup>72</sup> Concerning the testing that was available at that time, local positivity rates clearly demonstrated the pervasiveness of the Coronavirus throughout Virginia and in the counties where Carilion Clinic operates.

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<sup>70</sup> Jeke Hartner and Jack Moore, *The year of coronavirus: Key dates as the virus spread in DC, Maryland and Virginia*, WTOP News (Dec. 28, 2020), <https://wtop.com/coronavirus/2020/12/coronavirus-timeline-key-dates-as-the-virus-spread-in-dc-maryland-and-virginia> (last visited Feb. 18, 2021).

<sup>71</sup> See, e.g., Aron Chande, Seolha Lee, Mallory Harris, Ouan Nguven, Stephen J. Beckett, Troy Hilley, Clio Andris, & Joshua S. Weitz, *Real-time, interactive website for US-county-level COVID-19 event risk assessment*, 4 NAT. HUMAN BEHAVIOR, 1313-19 (Nov. 9, 2020), <https://doi.org/10.1038/s41562-020-01000-9> (last visited Feb. 12, 2021).

<sup>72</sup> See, e.g., Benedict Carey and James Glanz, *Hidden Outbreaks Spread Through U.S. Cities Far Earlier Than Americans Knew, Estimates Say*, N.Y. TIMES (Apr. 23, 2020), (updated July 6, 2020), [nytimes.com/2020/04/23/us/coronavirus-early-outbreaks-cities.html](https://www.nytimes.com/2020/04/23/us/coronavirus-early-outbreaks-cities.html) (last visited Feb. 12, 2021).

Epidemiologists have explained that “the percent positive is a critical measure because it gives us an indication of how widespread infection is in the area where the testing is occurring[.]”<sup>73</sup> It is a crucial indicator of whether a business can safely remain open. As a threshold for the percent positive being “too high,” the WHO stated that the percent positive should remain below 5% for at least two weeks before re-opening.<sup>74</sup> As of March 16, 2020, Virginia’s positivity rate was above 5% and climbed sharply after that.<sup>75</sup>

94. Carilion Clinic was prohibited from conducting elective medical procedures as of March 25, 2020, and resumed such procedures on May 7, 2020. Throughout this time and continuing thereafter, Carilion Clinic adopted extensive health and safety protocols that also limited the number of patients receiving treatment.

95. The Carillion Wellness Centers closed on March 18, 2020, and all but two centers reopened on or about June 10 with numerous severe capacity, distancing, disinfection and other restrictions.

96. One Carilion Wellness Center remains closed, and another reopened more recently on or about November 9, 2020.

97. These closures and events were due to direct physical loss of or damage to property caused by the Coronavirus and COVID-19 and as a result of the loss of the ability to operate the Carilion Clinic properties safely or without draconian restrictions and modifications to property

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<sup>73</sup> David Dowdy and Gypsyamber D’Souza, *COVID-19 Testing: Understanding the “Percent Positive”*, Johns Hopkins Bloomberg School of Public Health Expert Insights (Aug. 10, 2020), <https://www.jhsph.edu/covid-19/articles/covid-19-testing-understanding-the-percent-positive.html> (last visited Feb. 12, 2021).

<sup>74</sup> *Id.*

<sup>75</sup> *Virginia’s COVID-19 test positivity rate hits new low*, Inside NoVa (updated Oct. 6, 2020), [https://www.insidenova.com/headlines/virginias-covid-19-test-positivity-rate-hits-new-low/article\\_5d4e887a-fce0-11ea-a00e-0790865ffe46.html](https://www.insidenova.com/headlines/virginias-covid-19-test-positivity-rate-hits-new-low/article_5d4e887a-fce0-11ea-a00e-0790865ffe46.html) (last visited Feb. 18, 2021).

and procedures. Also, during this time, Virginia Governor Ralph Northam issued numerous emergency orders addressing the health and public safety crisis caused by the outbreak, prohibiting access to specific businesses and activities to limit exposure to and transmission of the Coronavirus.

98. The governor's emergency orders were issued for a number of reasons. These include physical loss of or damage to property caused by the Coronavirus and COVID-19; the ability of the Coronavirus and COVID-19 to be transmitted through fomites; and the ability of the Coronavirus and COVID-19 to survive on surfaces for days, linger in indoor air, and transform surfaces and air into vehicles of virus transmission, thereby rendering property unsafe for normal use.

#### **E. Government Orders And The Impact On Carilion Clinic Properties**

99. On March 16, 2020, the CDC and the national Coronavirus Task Force issued public guidance titled "30 Days to Slow the Spread" of COVID-19, which called for restrictive social distancing measures, such as working from home, avoiding gatherings of more than 10 people and staying away from bars and restaurants.<sup>76</sup>

100. State and local governments recognized the unprecedented and mushrooming outbreaks of COVID-19 across the nation and the Coronavirus's catastrophic impact through the direct physical loss of or damage to property and lives. As a consequence, many states issued "State of Emergency" Declarations in early March 2020. Within a short time, the Commonwealth of Virginia followed suit and issued orders suspending or severely limiting business operations where people could potentially contract COVID-19. Healthcare providers, such as Carilion Clinic,

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<sup>76</sup> The President's Coronavirus Guidelines for America, *30 Days to Slow the Spread*, The White House and CDC (Mar. 16, 2020), [https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/03/03.16.20\\_coronavirus-guidance\\_8.5x11\\_315PM.pdf](https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf) (last visited Feb. 17, 2021).

were barred from conducting elective medical procedures. Exercise and fitness clubs like the Carilion Wellness facilities were required to cease all operations.

101. Among other justifications, the Virginia governmental orders were issued pursuant to Article V, Section 7 of the Constitution of Virginia, and based on the determination that “the anticipated effects of COVID-19 constitute a disaster as described in § 44-146.16 of the *Code of Virginia (Code)*.”<sup>77</sup> These orders made non-compliance a misdemeanor and grounds for businesses to lose their permit to operate. These orders also required measures to protect against fomite transmission.

102. On March 12, 2020, Governor Northam declared a state of emergency in response to the “recent confirmed occurrences of COVID-19 within the Commonwealth and in neighboring states, as well as information from the Centers of Disease Control and Prevention, [indicating] it is anticipated that the disease will spread.”<sup>78</sup>

103. Five days later, on March 17, 2020, Governor Northam issued an executive order providing that “restaurants, fitness centers, and theatres are mandated to significantly reduce seating capacity to 10 patrons, or close,” impacting a wide variety of fitness providers across the Commonwealth, including the Carilion Wellness facilities (the “March 17, 2020 Order”).<sup>79</sup> The March 17, 2020 Order noted that violations “may result in immediate operation permit suspension”

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<sup>77</sup> Executive Order Number Fifty-One, *Declaration of a State of Emergency Due To Novel Coronavirus (Covid-19)*, Office of the Governor (March 12, 2020), [https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-(COVID-19).pdf) (last visited Feb. 18, 2021).

<sup>78</sup> *Id.*

<sup>79</sup> Order of the Governor and State Health Commissioner Declaration of Public Health Emergency, Commonwealth of Virginia Executive Department (Mar. 17, 2020), <https://www.scribd.com/document/452100808/Order-of-the-Governor-and-State-Health-Commissioner-Declaration-of-Public-Health-Emergency> (last visited February 18, 2021).

and were “punishable as a Class 1 misdemeanor.”<sup>80</sup>

104. In response to the March 17, 2020 Order, and to protect its property from further physical loss of or damage to property, Carilion Clinic closed the Carilion Wellness Centers and began cleaning and disinfecting these properties.

105. On March 23, 2020, in response to the “ongoing threat” of COVID-19 and “occurrences of the virus in every region of the Commonwealth,” Governor Northam issued an executive order, which, among other things, prohibited all public gatherings of 10 or more individuals, mandated the closure of all public access to non-essential businesses including “fitness centers, gymnasiums, recreation centers, indoor sports facilities, and indoor exercise facilities[,]” required all businesses to adhere to social distancing guidelines, and adhere to “enhanced sanitizing practices on common surfaces” and “other appropriate workplace guidance.”<sup>81</sup> Governor Northam’s executive order was subsequently extended multiple times.

106. On March 25, 2020, Governor Northam and the State Health Commission jointly issued the “Order of Public Health Emergency Two” that “prohibit[ed] all inpatient and outpatient surgical hospitals licensed under 12 VAC 5-410, free-standing endoscopy centers, physicians’ offices, and dental, orthodontic, and endodontic offices in the Commonwealth from providing procedures and surgeries that require personal protective equipment (‘PPE’), which if delayed, are not anticipated to cause harm to the patient by negatively affecting the patient’s health outcomes,

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<sup>80</sup> *Id.*

<sup>81</sup> Executive Order Number Fifty-Three, *Temporary Restrictions on Restaurants, Recreational, Entertainment, Gatherings, Non-Essential Retail Businesses and Closure of K-12 Schools Due to Novel Coronavirus (COVID-19)*, Office of the Governor (Mar. 23, 2020), [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-53-Temporary-Restrictions-Due-To-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-53-Temporary-Restrictions-Due-To-Novel-Coronavirus-(COVID-19).pdf) (last visited Feb. 18, 2021).

or leading to disability or death.”<sup>82</sup> The governor extended the order’s scheduled April 24, 2020 expiration through April 30, 2020. The “Order of Public Health Emergency Two” thus barred Carilion Clinic from seeing non-emergency patients or performing elective medical procedures throughout its facilities until May 1, 2020. Elective procedures resumed on May 7, 2020. Carilion Clinic established protocols to ensure patients were isolated for five days before any elective procedure and were tested for COVID-19 before their procedure could occur. Additionally, clinical staff needed to be appropriately scheduled.

107. On March 30, 2020, Governor Northam issued a “Stay at Home Order” directing Virginians to: (a) “remain at their place of residence” with limited exceptions; (b) maintain “social distancing of at least six feet” when using shared or outdoor spaces; (c) prohibiting “all public and private in-person gatherings of more than ten individuals”; and (d) directing institutions of higher education to “cease all in-person classes and instruction, and cancel all gatherings of more than ten individuals.”<sup>83</sup>

108. On May 8, 2020, Governor Northam issued a “Phase One” order easing certain COVID-19 related restrictions but noting the “critical” importance of remaining “vigilant, cautious

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<sup>82</sup> Order of the Governor and State Health Commissioner, *Order of Public Health Emergency Two*, Commonwealth of Virginia Executive Department, (Mar. 25, 2020), <https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/Order-of-Public-Health-Emergency-Two---Order-of-The-Governor-and-State-Health-Commissioner.pdf> (last visited Feb. 18, 2021); Amended Order of the Governor and State Health Commissioner, *Extending Order of Public Health Emergency Two*, Commonwealth of Virginia Executive Department, (Apr. 23, 2020), <https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/AMENDED-Order-of-Public-Health-Emergency-Two---Order-of-The-Governor-and-State-Health-Commissioner.pdf> (last visited Feb. 18, 2021).

<sup>83</sup> Executive Order No. 55, *Temporary State at Home Order Due to Novel Coronavirus (COVID-19)*, Office of the Governor (Mar. 30, 2020), [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-(COVID-19).pdf) (last visited Feb. 18, 2021).



and measured” (the “May 8, 2020 Order”).<sup>84</sup> The May 8, 2020 Order provided that fitness and exercise facilities, such as the Carilion Wellness Centers, were permitted to “reopen for outdoor activities only,” provided that such businesses complied with the extensive guidelines contained in the order, including: (a) maintaining social distancing of ten feet; (b) cleaning and disinfecting shared equipment after each use; (c) prohibiting the use of equipment that cannot be cleaned after each use; and (d) creating hand sanitizer stations. The May 8, 2020 Order further provided that higher education institutions could not resume in-person classes.

109. Governor Northam’s May 8, 2020 Order incorporated by reference Virginia’s “Safer At Home: Phase One Guidelines For All Business Sector” (the “Business Sector Guidelines”) which contains detailed guidance for how businesses can minimize the risks of COVID-19 transmission. The Business Sector Guidelines call for, among other things, “routine cleaning and disinfection of high contact areas and hard surfaces, including check out stations and payment pads, store entrance push/pull pads, door knobs/handles, dining tables/chairs, light switches, handrails, restrooms, floors, and equipment. Follow CDC Reopening Guidance for Cleaning and Disinfection and use an EPA-approved disinfectant to clean. For high contact areas, routinely disinfect surfaces at least every 2 hours. Certain surfaces and objects in public spaces.”<sup>85</sup> The Business Sector Guidelines explicitly noted that healthcare facilities should also consider the CDC’s Guidelines for Environmental Infection Control In Health-Care Facilities (the “CDC

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<sup>84</sup> Executive Order No. 61, *Order of Public Health Emergency Three, Phase One Easing of Certain Temporary Restrictions Due to Novel Coronavirus (COVID-19)*, Office of the Governor (May 8, 2020), [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-61-and-Order-of-Public-Health-Emergency-Three---Phase-One-Easing-Of-Certain-Temporary-Restrictions-Due-To-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-61-and-Order-of-Public-Health-Emergency-Three---Phase-One-Easing-Of-Certain-Temporary-Restrictions-Due-To-Novel-Coronavirus-(COVID-19).pdf) (last visited Feb. 18, 2021).

<sup>85</sup> *Safer at Home: Phase One Guidelines for all Business Sectors*, <https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Virginia-Forward-Phase-One-Business-Sector-Guidelines.pdf> (last visited Feb. 18, 2021).

Guidelines”).<sup>86</sup> The CDC Guidelines stressed, among other things, “proper use of disinfectants” and “proper ventilation” to “decrease the risk of health-care associated infections” among patients and healthcare workers.

110. Carilion Clinic resumed elective medical procedures on May 7, 2020, under severe operational restrictions and following safety measures that resulted in additional expenditures to prevent further physical loss of or damage to its property from Coronavirus. Among other measures, Carilion Clinic has extensively modified ventilation systems, installed physical barriers, reconfigured indoor spaces, adopted rigorous procedures for disinfecting surfaces and provided workers with PPE such as facemasks and gowns, at cost.

111. On June 2, 2020, Governor Northam issued a Phase II reopening order, excluding only Northern Virginia and Richmond.<sup>87</sup> Pursuant to this order, on June 5, 2020, fitness and exercise facilities were permitted to reopen for indoor activities at the lesser of 30% of “the lowest occupancy load on the certificate of occupancy” or 50 patrons, members or guests. The Carilion Wellness Centers were subject to this order. They remained subject to various requirements with a draconian impact on their business, including social distancing beyond 10 feet, cleaning and disinfection of shared equipment after each use, and prohibiting the use of equipment that could not be thoroughly disinfected between uses. Higher education institutions were encouraged to continue remote learning but were permitted to resume in-person classes of up to 50 individuals. All businesses were asked to continue to adhere to the state-issued Business Sector Guidelines.

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<sup>86</sup> CDC and Healthcare Infection Control Practices Advisory Committee, *Guidelines for Environmental Infection Control in Health-Care Facilities* (updated July 2019) <https://www.cdc.gov/infectioncontrol/pdf/guidelines/environmental-guidelines-P.pdf> (last visited Feb. 18, 2021).

<sup>87</sup> Executive Order No. 65, *Phase Two Easing of Certain Temporary Restrictions Due to Novel Coronavirus (COVID-19)*, Office of the Governor (June 2, 2020), <https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-65-Phase-Two.pdf> (last visited Feb. 18, 2021).

112. On July 1, 2020, Virginia moved to Phase 3 reopening (the “Phase 3 Order”).<sup>88</sup> The Phase 3 Order has been amended six times, and significant restrictions on Virginia businesses remain. For example, fitness and exercise facilities remain subject to occupancy, social distancing and disinfection requirements that sharply interfere with normal business operations and impose high ongoing costs and extra expenses.

113. All but two of the Carilion Wellness Centers reopened in a limited capacity on or about June 10, and one center remains closed and another reopened more recently on or about November 9, but all continue to suffer catastrophic losses from restrictions imposed on their business by the above-cited governmental orders pertaining to exercise and fitness businesses as well as from the certain or virtually certain presence of the Coronavirus at the premises.

114. Carilion Clinic’s losses throughout its health system and at the Carilion Wellness Centers exceed \$150 million.

115. Carilion Clinic timely notified AGLIC of its losses and has met all conditions and requirements for coverage under the Policy. As set forth herein, AGLIC has wrongly refused to provide coverage.

**F. The “All-Risk” Commercial Property Policy and Potentially Applicable Coverages**

116. In exchange for a very substantial premium, AGLIC sold Carilion Clinic the Policy, policy number ZMD 9304498-18, effective June 1, 2019 to June 1, 2020.

117. AGLIC and/or its affiliate, Zurich, drafted the Policy, which includes the Zurich EDGE™ coverage form.

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<sup>88</sup> Executive Order No. 67, *Order of Public Health Emergency Seven – Phase Three Easing of Certain Temporary Restrictions Due to Novel Coronavirus (COVID-19)*, Office of the Governor (June 30, 2020), [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-67-and-Order-of-Public-Health-Emergency-Seven---Phase-Three-Easing-of-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-67-and-Order-of-Public-Health-Emergency-Seven---Phase-Three-Easing-of-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-(COVID-19).pdf) (last visited Feb. 18, 2021).

118. When introduced in 2008, the Zurich EDGE™ coverage form was marketed as offering uniquely “broader coverage and greater flexibility” and would “enhance . . . our ability to serve customers in this important line of business and offers significant advantages for global property programs . . . .” Zurich’s CEO made this announcement in a press release, dated April 22, 2008, and lauded the clarity of the form, boasting that “The Zurich Edge policy is clearly written with all limits, sub-limits and other critical coverage issues incorporated within the policy declarations.”<sup>89</sup>

119. Zurich did not limit touting the EDGE™ coverage form to its press releases. Instead, Zurich made the same claims to insurance regulators. For example, in an Explanatory Memorandum Zurich filed with the California Department of Insurance and the Oregon Insurance Division on January 11, 2008, and February 5, 2008, respectively, Zurich claimed that the EDGE™ coverage form offers “our Insured’s [sic] a very broad and flexible policy.”

120. The Policy insures against “[a]ll risks of direct physical loss of or damage from any cause unless excluded,” and provides coverage for property damage losses, business interruption losses (“Time Element” per the policy language), and other losses.

121. The Policy Limit<sup>90</sup> is \$1,300,000,000 per **Occurrence**. The Policy Deductible is “\$50,000 combined Property Damage (PD) and Time Element (TE) per **Occurrence**” and contains other deductibles applicable in specified circumstances.

122. The Policy does not exclude viruses or communicable diseases as causes of loss. Thus, the entire \$1,300,000,000 Policy Limit is potentially available for Carilion Clinic’s losses.

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<sup>89</sup> *Zurich introduces The Zurich Edge™ for highly protected risks and global property markets*, Media Release Zurich (Apr. 22, 2008), [https://zsl.zurichna.com/zus/zna\\_config.nsf/pages/9123da88864cd81485257433006ed710!OpenDocument&Click=\\_](https://zsl.zurichna.com/zus/zna_config.nsf/pages/9123da88864cd81485257433006ed710!OpenDocument&Click=_) (last visited Feb. 17, 2021).

<sup>90</sup> Unless otherwise noted, capitalized and bolded terms herein are capitalized and bolded in the Policy.

123. The Policy's full terms and conditions are not set forth therein, but as relevant here, the Policy provides as follows:

**Time Element and Time Element Coverages**

124. The Policy covers Time Element loss resulting from "the necessary **Suspension** of the Insured's business activities at an Insured Location. The **Suspension** must be due to direct physical loss of or damage to Property (of the type insurable under this Policy other than **Finished Stock**) caused by a **Covered Cause of Loss** at the **Location**[".]"

125. Each of the properties that make up Carilion Clinic's healthcare system constitutes an Insured Location under the Policy.

126. The Policy defines **Covered Cause of Loss** as "All risks of direct physical loss of or damage from any cause unless excluded."

127. As set forth above, Coronavirus and COVID-19 caused direct physical loss of or damage to property at Carilion Clinic properties.

128. Coronavirus and COVID-19 also rendered such property unfit and unsafe for its normal usages, depriving Carilion Clinic of its property.

129. Neither Coronavirus nor COVID-19 is excluded under the Policy.

130. Among the Policy's Time Element Coverages is GROSS EARNINGS, covering "the actual loss sustained by the Insured during the Period of Liability." GROSS EARNINGS is subject to a Limit of Liability of \$1,300,000,000.

131. Carilion Clinic derives a large proportion of its revenue from the provision of elective medical care. Carilion Clinic was barred from providing elective medical care from March 25, 2020, through April 30, 2020. Carilion Clinic worked diligently to safely resume elective medical care in compliance with all guidance from state and public health agencies and was able to do so on May 7, 2020. As such, Carilion Clinic sustained a substantial Time Element loss,

which is insured under the Policy.

132. The Policy includes an EXTENDED PERIOD OF LIABILITY, providing in relevant part: “Upon the termination of the coverage for Gross Earnings loss under 4.02.01.01. this Policy will continue to pay the actual Gross Earnings loss sustained by the Insured.”

133. The Policy provides EXTRA EXPENSE coverage, covering “the reasonable and necessary Extra Expenses incurred by the Insured, during the Period of Liability, to resume and continue as nearly as practicable the Insured’s normal business activities that otherwise would be necessarily suspended, due to direct physical loss of or damage caused by a **Covered Cause of Loss** to Property of the type insurable under this policy at a **Location**.”

134. As set forth herein, Carilion Clinic incurred covered Extra Expenses to resume and continue as nearly as practicable its normal business activities that would otherwise be suspended due to direct physical loss of or damage caused by Coronavirus and COVID-19, costs associated with altering its property to protect it from physical loss of or damage, as well as the safety of its employees and patients, such as erecting barriers, altering air circulation, reconfiguring indoor spaces, disinfecting surfaces and materials, and providing PPE to employees and patients.

### **Special Coverages**

135. The Policy includes numerous Special Coverages that potentially apply to Carilion Clinic’s losses from the Coronavirus and COVID-19. These include the following, among others.

136. The Policy provides CIVIL OR MILITARY AUTHORITY coverage for “the actual Time Element loss sustained by the Insured, as provided by this Policy, resulting from the necessary **Suspension** of the Insured’s business activities at an Insured Location if the **Suspension** is caused by order of civil or military authority that prohibits access to the **Location**. That order must result from a civil authority’s response to direct physical loss of or damage caused by a **Covered Cause of Loss** to property not owned, occupied, leased or rented by the Insured or

insured under this Policy and located within the distance of the Insured's Location as stated in the Declarations."

137. The Coronavirus and COVID-19 caused direct physical loss of or damage to property throughout Virginia and caused the deprivation of use of such property, including property within five (5) miles of Carilion Clinic facilities, giving rise to the actions of civil authority, including Governor Northam's orders as set forth herein. These orders prohibited access to Carilion Clinic facilities.

138. The Policy provides CONTINGENT TIME ELEMENT coverage for "the actual Time Element loss as provided by the Policy, sustained by the Insured during the Period of Liability directly resulting from the necessary **Suspension** of the Insured's business activities at an Insured Location if the **Suspension** results from direct physical loss of or damage caused by a **Covered Cause of Loss** to Property (of the type insurable under this Policy) at **Direct Dependent Time Element Locations, Indirect Dependent Time Element Locations, and Attraction Properties** located worldwide . . . ."91

139. The Policy defines **Direct Dependent Time Element Locations** as including: "Any **Location** of a direct: **customer**, supplier, contract manufacturer or contract service provider to the Insured;" and "Any **Location** of any company under a royalty, licensing fee or commission agreement with the Insured."

140. The Policy defines **Attraction Properties** as: "A property within the distance described in the declarations of an Insured Location that attracts customers to the Insured's business" that is "[l]ocated within one mile(s) of the Insured Location."

141. In plain English, the Policy provides coverage for Carilion Clinic's losses if certain

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<sup>91</sup> With certain geographic exclusions not relevant here.

types of nearby properties or the properties of Carilion Clinic's direct customers or suppliers suffer direct physical loss of or damage unless expressly excluded under the Policy. The Policy covers all risks of loss and does not contain any relevant exclusions for Carilion Clinic's losses.

142. Among other things, as set forth herein, the Coronavirus and COVID-19 caused direct physical loss of or damage at properties that attract patients to Carilion Clinic facilities. For example, Carilion Clinic provides student health services at several facilities, dependent on the educational institutions being open for in person instruction to attract patients to Carilion Clinic facilities.

143. Additionally, as set forth herein, the Coronavirus and COVID-19 rendered such properties unfit and unsafe for their normal usages, resulting in the deprivation of use of such properties.

144. The Policy provides DECONTAMINATION COSTS coverage, which provides in relevant part: "If Covered Property is **Contaminated** from direct physical loss of or damage caused by a **Covered Cause of Loss** to Covered Property and there is in force at the time of the loss any law or ordinance regulating **Contamination** due to the actual not suspected presence of **Contaminant(s)**, then this Policy covers, as a direct result of enforcement of such law or ordinance, the increased cost of decontamination and/or removal of such **Contaminated** Covered Property in a manner to satisfy such law or ordinance."

145. The Policy provides INGRESS/EGRESS coverage for "the actual Time Element loss sustained by the Insured, as provided by this Policy, resulting from the necessary **Suspension** of the Insured's business activities at an Insured Location if ingress or egress to that Insured Location by the Insured's suppliers, customers or employees is prevented by physical obstruction due to direct physical loss of or damage caused by a **Covered Cause of Loss** to property not



owned, occupied, leased or rented by the Insured or insured under this Policy and located within the distance of the Insured Location as stated in the Declarations.”

146. The Coronavirus and COVID-19 caused direct physical loss of or damage to property throughout the Commonwealth of Virginia and caused the deprivation of use of such property, including property within 5 miles of Carilion Clinic properties. The area within a 5-mile radius of Carilion Clinic properties, like the rest of Virginia, was a non-viable destination in general, thus preventing access to Carilion Clinic’s properties.

147. The Policy provides PROTECTION AND PRESERVATION OF PROPERTY coverage, for “[t]he reasonable and necessary costs incurred for actions to temporarily protect or preserve Covered Property; provided such actions are necessary due to actual or imminent physical loss or damage due to a **Covered Cause of Loss** to such Covered Property” and “[t]he Gross Earnings loss sustained by the Insured for a period of time not to exceed the hours listed in the Declarations prior to and after the Insured first taking reasonable action for the temporary protection and preservation of Covered Property.”

148. Carilion Clinic undertook costly measures necessary to protect its property from further loss or damage. These measures included altering its property to protect it from physical loss of or damage and ensuring the safety of its employees, patients and visitors, including: erecting barriers, altering air circulation, reconfiguring indoor spaces, disinfecting surfaces and materials, and providing PPE to employees and patients.

149. No exclusions apply to Carilion’s claim.

**Other Potentially Relevant Provisions**

150. The Policy contains an exclusion at Section 3.03.01.01 (the “Contamination Exclusion”), which excludes “**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, except as provided by the Radioactive Contamination Coverage of this Policy.”

151. The Contamination Exclusion is deleted by endorsement (the “Virus Deletion Endorsement”) and replaced with the following exclusionary provision: “**Contamination** or asbestos, and any cost due to **Contamination** or asbestos including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy.” *See* Ex. 1 at form EDGE-219-C (01/18).

152. The Virus Deletion Endorsement is added to the Policy by endorsement and by its express terms it applies to all risks located throughout the United States, and is not limited to property located in Louisiana or to a specific geographic area.<sup>92</sup>

153. The Policy further provides that “[t]he titles of the various paragraphs and endorsements are solely for reference and shall not in any way affect the provisions to which they relate.” Thus, when the Virus Deletion Endorsement indicates that text is “deleted” from the Policy and “replaced” with alternative language, such change is made to the Policy itself.

154. The Virus Deletion Endorsement also deletes and replaces the definitions for **Contamination (Contaminated)** and **Contaminant(s)**, as follows.

- a. In the Policy, AGLIC defined **Contamination (Contaminated)** as: “Any condition of property due to the actual 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.”
- b. The Policy also defined **Contaminant(s)** as: “Any solid, liquid, gaseous,

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<sup>92</sup> The Zurich EDGE™ Form also includes other endorsements bearing the names of specific states in their titles, however, unlike the Virus Deletion Endorsement, certain of those endorsements contain express language that states that the endorsement only applies to risks located in that state.

thermal or other irritant, pollutant or contaminant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste (including materials to be recycled, reconditioned or reclaimed), asbestos, ammonia, other hazardous substances, **Fungus or Spores.**”

- c. The Virus Deletion Endorsement to the Policy replaces the definition of **Contamination (Contaminated)** with: “Any condition of property due to the actual presence of any **Contaminant(s).**”
- d. The Virus Deletion Endorsement to the Policy replaces the definition of **Contaminant(s)** with: “Any solid, liquid, gaseous, thermal or other irritant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste (including materials to be recycled, reconditioned or reclaimed), other hazardous substances, **Fungus or Spores.**”

155. The Virus Deletion Endorsement removes, among other things, viruses and disease or illness causing agents from the ambit of the Contamination Exclusion.

156. The Virus Deletion Endorsement applies to all risks insured under the Policy without regard to the state or country of location of those risks.

157. Under the Policy, coverage is dictated by the policy language and not by headings and titles found in the Policy. In Section 6.20, the Policy explicitly states: “The titles of the various paragraphs and endorsements are solely for reference and shall not in any way affect the provisions to which they relate.”

158. All of Carilion Clinic’s Insured Locations under the Policy are located within the Commonwealth of Virginia.

159. Carilion Clinic has no Insured Locations located within the State of Louisiana.

160. The Policy contains the Virus Deletion Endorsement.

161. Upon information and belief, AGLIC has issued policies containing the Virus

Deletion Endorsement to policyholders who have no Insured Locations, as that term is defined in Section 2.01 of the Zurich EDGE™ form, located in the state of Louisiana.

162. Upon information and belief, AGLIC included the Virus Deletion Endorsement in all policies containing the Zurich EDGE™ form that it issued in June 2019 to policyholders who have no Insured Locations, as that term is defined in Section 2.01 of the Zurich EDGE™ form, located in the state of Louisiana.

163. The Policy also provides INTERRUPTION BY COMMUNICABLE DISEASE coverage “for the actual Gross Earnings loss sustained by the Insured, as provided by this Policy, resulting from the necessary **Suspension** of the Insured’s business activities at an Insured Location if the **Suspension** is caused by order of an authorized governmental agency enforcing any law or ordinance regulating communicable diseases and that such portions of the location are declared uninhabitable due to the threat of the spread of communicable disease, prohibiting access to those portions of the **Location**. This Policy also covers the reasonable and necessary cost incurred for the cleanup, removal and disposal of the actual not suspected presence of substances(s) [sic] causing the spread of such communicable disease and to restore the locations in a manner so as to satisfy such authorized governmental agency.”

164. Upon information and belief, AGLIC has issued policies containing the Virus Deletion Endorsement to policyholders who have no **Locations**, as that term is defined in the Zurich EDGE™ form, located in the state of Louisiana.

165. Upon information and belief, AGLIC included the Virus Deletion Endorsement in all policies containing the Zurich EDGE™ form that it issued in June 2019 to policyholders who had no **Locations**, as that term is defined in the Zurich EDGE™ form, located in the state of Louisiana.

166. Upon information and belief, AGLIC has issued policies containing the Virus Deletion Endorsement to policyholders who have provided AGLIC with a Schedule of Locations, pursuant to Section 2.01.01 in the Zurich EDGE™ form, that contain no locations that are within the state of Louisiana.

167. Upon information and belief, AGLIC included the Virus Deletion Endorsement in all policies containing the Zurich EDGE™ form that it issued in June 2019 to policyholders who have provided AGLIC with a Schedule of Locations, pursuant to Section 2.01.01 in the Zurich EDGE™ form, that contain no locations that are located in the state of Louisiana.

168. Upon information and belief, AGLIC included the Virus Deletion Endorsement in all policies containing the Zurich EDGE™ form that it issued in June 2019.

169. Upon information and belief, AGLIC included the Virus Deletion Endorsement in all policies containing the Zurich EDGE™ form that it issued in June 2019 to Named Insureds with an address listed in the policy as within the Commonwealth of Virginia.

170. Carilion Clinic also expects that additional coverages under the Policy may become relevant and applicable when the calculation of its full losses is fully known. The foregoing is not a comprehensive discussion of all potentially applicable Policy coverages, terms, and conditions, which are fully set forth in the Policy.

**G. AGLIC Effectively Denies Carilion Clinic's Claim**

171. On or about March 18, 2020, Carilion Clinic gave notice to AGLIC of its losses from the Coronavirus and COVID-19 ("Carilion Clinic's Claim").

172. AGLIC never sent an adjuster – or anyone on its behalf – to visit, inspect or set foot in any Carilion Clinic locations or properties to investigate Carilion Clinic's Claim.

173. Other than asking some superficial questions and requesting an updated list of Carilion Clinic's impacted facilities, AGLIC has not conducted any investigation of Carilion

Clinic's Claim.

174. Instead, AGLIC's parent company, Zurich, has waged a public relations campaign to discourage and deter policyholders from bringing business interruption claims.

175. On or about May 14, 2020, Zurich's CFO George Quinn announced Zurich's position that virtually all (more than 99%) of its policies in the United States exclude losses for virus (even though its broadly marketed EDGE™ form does not exclude virus losses). He further claimed that Zurich's worldwide business interruption claims due to COVID-19 would be about \$450 million (60% of \$750 million) in 2020, with the bulk of those claims payments being in Europe.<sup>93</sup>

176. On April 23, 2020, AGLIC issued a coverage letter reserving AGLIC's rights to deny coverage on various grounds and effectively denying coverage insofar as AGLIC has still not agreed to provide the urgently needed coverage.

177. AGLIC's denial of Carilion Clinic's Claim without conducting a substantive investigation of such claim constitutes a breach of the duty of good faith and fair dealing an insurer owes to its insured. In so doing, AGLIC placed its own interests above those of its policyholder.

178. Among other things, AGLIC asserted in its April 23, 2020 letter that "it does not appear that the presence of the COVID-19 virus constitutes direct physical loss or damage to property" – ignoring the mounting evidence to the contrary and mischaracterizing the applicable policy language.

179. Upon information and belief, AGLIC also contends that its promise to pay for loss

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<sup>93</sup> *Zurich Q1 update – resilient performance while serving customers and protecting colleagues*, Media Release, Zurich (May 14, 2020), <https://www.zurich.com/en/media/news-releases/2020/2020-0514-01> (last visited Feb. 17, 2021); L.S. Howard, *Zurich Insurance Estimates Coronavirus Pandemic Claims to Hit \$750 Million for 2020*, Insurance Journal, <https://www.insurancejournal.com/news/international/2020/05/14/568567.htm> (last visited Feb. 17, 2021).

resulting from “physical loss of or damage” to qualifying property is strictly limited to property that undergoes a tangible, permanent alteration or transformation as a result of an external force, as might be the case when a fire burns a piece of wood. But the coverage provided under the Policy is not so narrowly circumscribed; its coverage expressly extends to all “risks of direct physical loss of or damage” unless excluded, including the inability to access or use all or a portion of the insured premises.

180. The requirement of “physical loss of or damage” to property has been met in one or more ways as alleged herein, including by virtue of the “physical loss of or damage” to Carilion Clinic’s qualifying property caused by (i) the actual or potential presence of virus in the air (whether in droplet nuclei, aerosols, droplets, or otherwise) and on surfaces such as door handles, bed railings and medical equipment at such properties; (ii) the necessity of modifying physical behaviors through the use of social distancing in order to reduce or minimize the potential for viral transmission, as well as the necessity of physically modifying interior spaces; (iii) government orders requiring that physical spaces such the Carillion Wellness Centers, be shut down, or restricting the use of such physical spaces, as was the case with the prohibition on elective medical care; and/or (iv) the need to mitigate the threat or actual physical presence of virus on door handles, bedsheets, hospital gowns, bed railings, medical equipment, and assorted surfaces, as well as in heating and air conditioning systems and any other of the multitude of places virus has or could be found.

181. AGLIC came to this conclusion despite never visiting or sending an adjuster to any Carilion Clinic properties to verify the accuracy of this assertion, and despite Zurich’s website postings about the physical nature of the Coronavirus and how “proper cleaning and disinfection of surfaces can help minimize the spread of the virus” – postings that remain on Zurich’s website

even today.<sup>94</sup>

182. AGLIC also cited the Contamination Exclusion as a basis for denying coverage, asserting that “[t]he presence of the COVID-19 virus falls within the definition of **Contamination**” – AGLIC ignored and failed to mention the Policy’s Virus Deletion Endorsement.

183. AGLIC also disputed that the relevant governmental orders were issued “as a result of direct physical loss of or damage to property” for CIVIL OR MILITARY AUTHORITY coverage – ignoring the very text and context of the relevant orders discussed herein.

184. AGLIC cited additional coverage exclusions that do not apply to Carilion Clinic’s losses and misrepresented the INTERRUPTION BY COMMUNICABLE DISEASE coverage.

185. Finally, while not offering to investigate the losses or provide coverage by any particular date certain, AGLIC nevertheless has agreed only to extend the one-year deadline under the Policy for Carilion Clinic to file a coverage action by 90 days, thus forcing Carilion Clinic to bring the instant action to preserve its coverage rights.

**FIRST CLAIM FOR RELIEF**  
**(Declaratory Judgment)**

186. Carilion Clinic incorporates the above Paragraphs by reference.

187. This is a claim for relief for declaratory judgment pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. §2201. An actual and justiciable controversy exists between Carilion Clinic and AGLIC concerning their respective rights and obligations under the Policy.

188. The issuance of declaratory relief will terminate the controversy between Carilion Clinic and AGLIC that gave rise to this action.

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<sup>94</sup> *Cleaning and Disinfecting Plans During COVID-19 Outbreak*, Zurich (May 19, 2020), <https://www.zurich.com/en/knowledge/topics/covid-19/cleaning-and-disinfecting-plans-during-ovid-19-outbreak> (last visited Feb. 17, 2021).



189. As such, this Court has the authority to issue a declaratory judgment concerning the respective rights and obligations of Carilion Clinic and AGLIC under the Policy.

190. Carilion Clinic seeks a declaratory judgment declaring that the Policy covers the losses it has suffered.

191. Carilion Clinic seeks a declaratory judgment declaring that AGLIC is responsible for fully and timely paying Carilion Clinic's Claim.

192. The burden of proof is upon AGLIC to demonstrate that coverage is limited in any way under the Policy.

**SECOND CLAIM FOR RELIEF**  
**(Breach of Contract)**

193. Carilion Clinic incorporates the above Paragraphs by reference.

194. The Policy is a valid and enforceable contract.

195. Carilion Clinic paid substantial premiums for the Policy and the promises of coverage contained therein, and otherwise performed all of its obligations owed under the Policy or was excused from performance.

196. AGLIC has denied or effectively denied Carilion Clinic's claims and has refused to pay or otherwise honor its promises. In denying coverage for Carilion Clinic's insurance claim as alleged above, AGLIC breached the contract (that is, the Policy). As a result, Carilion Clinic has suffered and continues to suffer damage in an amount to be proven at trial, but currently estimated to exceed \$150 million.

197. By failing to investigate Carilion Clinic's Claim, AGLIC breached its duty of good faith and fair dealing to its insured. As a result, Carilion Clinic is entitled to consequential damages for AGLIC's breach of the Policy.

198. Consequential damages for breach of the Policy were reasonably contemplated by

the parties when AGLIC issued the Policy.

**PRAYER FOR RELIEF**

Wherefore, Carilion Clinic respectfully requests that the Court enter Judgment in its favor against Defendant as follows:

- A. On the First Claim for Relief, a declaratory judgment that the losses Carilion Clinic has suffered are covered by the Policy and that Defendant is responsible for fully and timely paying Carilion Clinic's losses;
- B. On the Second Claim for Relief, for an award of damages in favor of Carilion Clinic in an amount to be proven at trial, plus pre- and post-judgment interest at the maximum legal rate;
- C. An award of costs and attorneys' fees pursuant to Va. Code §38.2-209; and
- D. For such other equitable and further relief as this Court deems just and proper.

**JURY DEMAND**

Carilion Clinic hereby demands a trial by jury on all issues so triable in this action.

Dated: March 18, 2021

Plaintiffs Carilion Clinic, et al.

/s J. Benjamin Rottenborn  
Of Counsel

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