

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

TP RACING, L.L.L.P.

Plaintiff,

v.

AMERICAN HOME ASSURANCE
COMPANY

Defendant.

Civil Action No.

JURY TRIAL DEMANDED

COMPLAINT FOR DECLARATORY JUDGMENT AND BREACH OF CONTRACT

Plaintiff, TP Racing, L.L.L.P. (“TPR”), by and through its undersigned attorneys, complains against Defendant, American Home Assurance Company (“American Home”), as follows:

NATURE OF THE ACTION

1. TPR operates a Thoroughbred racing track in Arizona called Turf Paradise as well as approximately 55 off track betting (“OTB”) facilities across Arizona.
2. This breach of contract and declaratory judgment action arises out of Defendant American Home’s failure to provide insurance coverage for TPR’s significant business interruption losses incurred as a result of the novel SARS-CoV-2 (“COVID-19”) outbreak.
3. The OTBs operated by TPR are located within various bars and restaurants which are neither owned nor operated by TPR.
4. TPR has continuously operated the Turf Paradise racetrack in the Deer Valley section of Phoenix from 1956 until earlier this year when TPR was forced to close the Turf Paradise doors and shut down business due to the actual presence and continued threat of COVID-19, as well as various resultant government-issued closure orders.

5. Instead of being able to open the doors to the Turf Paradise racetrack to its paying customers, TPR was forced to close the racetrack on March 14, 2020 and is to remain closed until at least January 4, 2021 due to the direct physical loss of or damage to property brought about by the actual presence and continued threat of COVID-19.

6. TPR was similarly forced to cease the operations of all of its OTBs as early as March 18, 2020 through at least the end of May 2020, and a number of its OTBs again from late June until August 2020. During these times, approximately 10 of TPR's OTBs were forced to close down permanently when the bars out of which they operate were closed.

7. Although TPR has been permitted to "re-open" some of its OTBs and TPR desires to "re-open" Turf Paradise in January 2021, TPR is unable to do so without a significant reduction in the number of customers permitted to be at any one of its covered locations at one time, with strict social distancing guidelines in place, and with substantial modifications to each location designed to prevent the actual presence and/or spread of COVID-19. To do anything else would lead to the emergence and/or reemergence of COVID-19 at Turf Paradise and the OTBs. Until COVID-19 was brought even slightly under control, even such limited capacity as this was not possible.

8. TPR has sustained substantial business income losses, loss caused by loss of and/or damage to its property, loss caused by restriction of access to its properties, including loss of access and interruption to business caused by orders of Civil Authority. TPR has also incurred significant costs associated with actions taken to protect and preserve its insured locations.

9. This loss is "direct"—TPR is not asking American Home to reimburse it after someone obtained a judgment against TPR for getting them sick. That might be an indirect loss.

TPR is asking American Home to pay its loss of business income occasioned by being unable to use its properties.

10. This loss is physical. TPR is unable to use the Turf Paradise racetrack, including its dining rooms, restaurants, and numerous bars, concession stands and other interior spaces, or its OTBs in the manner in which TPR had previously used such covered locations. The probability of illness prevents TPR's use of its covered locations just as, on a rainy day, a crumbling and open roof from the aftermath of a tornado would make the interior space of a business unusable.¹

11. There has been an actual and confirmed presence of COVID-19 at TPR's covered locations by virtue of its employees and/or patrons, guests and other visitors testing positive for COVID-19.²

12. This loss is a loss. It is the loss of functionality of space for business purposes. It is the diminishment of the physical space in the buildings. What once could hold many now can safely hold only a few.

13. The impairment of business function is also damage which TPR's racetrack and OTBs have sustained.

14. In preparation for disasters like the COVID-19 pandemic, TPR purchased American Home Assurance Company Policy Number 020413332 which was effective for the

¹ Note, however, that TPR is not seeking recovery for its loss of use. TPR is seeking coverage for its loss of business income. An example that drives home the difference is illustrated through law firms. Some law firms have been unable to use their office spaces because of COVID-19, but nevertheless the law firms' business income has increased and they thus have faced no loss of business income. A claim by such a law firm for not being able to use its office space would be a "loss of use" claim. The law firm would have no claim for loss of business income. Here, Plaintiff's business has decreased because of the impairment of its facilities, and Plaintiff is seeking the loss of business income under the business income, or "Time Element" coverage of the subject American Home Policy.

² TPR cannot, at this time, disclose the identity of the persons whom tested positive for COVID-19 due to HIPAA privacy laws.

policy period of October 1, 2019 to October 1, 2020. The aforementioned policy is attached hereto as **Exhibit A** (“the Policy”).

15. In exchange for significant premiums, the Policy provides \$81,776,007 per occurrence in coverage for property damage and business interruption losses.

16. In pertinent part, the Policy provides coverage for:

- a. Business income, or “Time Element” coverage, including gross earnings, extended period of indemnity, and extra expense;
- b. Loss caused by loss of or damage to property;
- c. Loss caused by restriction of access to property, including loss of access and interruption to business caused by an order issued by a Civil Authority; and
- d. Costs incurred for actions taken to temporarily protect and preserve insured property.

17. As part of the Policy limit, the Policy, in relevant part, includes the following sub-limits:

- a. \$2,500,000 in accounts receivable coverage;
- b. \$500,000 in Preservation of Property (“Sue & Labor”) coverage;
- c. \$10,000,000 in Extra Expense coverage; and
- d. Civil authority coverage for up to 30 days, subject to the maximum per occurrence sublimit of \$1,000,000 and a distance limitation of 1 mile.

18. Importantly, the business interruption or “Time Element” provisions of the Policy provide broad coverage. There is no “virus” exclusion therein that could possibly exempt American Home from providing TPR full payment.

19. Accordingly, TPR is owed the full amount of coverage available under the Policy, which includes coverage for the losses suffered by TPR as a result of the presence of COVID-19 at the insured locations.

20. The Policy is an “All Risk” policy, and includes Business Income, or “Time Element” coverage for the “actual business income loss sustained” due to the “necessary partial or total interruption” of business operations for up to 365 days. *See Ex. A*, at pp. 36.

21. The Policy also promises to pay for loss caused by the action of a civil authority that “limits, restricts or prohibits access” to TPR’s covered locations. *Id.* at pp. 41.

22. The Policy provides for “Extra Expense” coverage, which promises to pay the reasonable and necessary expenses incurred by TPR to “temporarily continue as nearly normal as practicable the conduct of [TPR’s] business[.]” *Id.* at pp. 40.

23. The Policy further provides coverage commonly known as “Sue and Labor coverage” for costs incurred by TPR for reasonable efforts taken to protect property in case of imminent loss or damage. *Id.* at pp. 48.

24. Unlike many policies that provide business income/interruption coverage, the Policy does not include, and is not subject to, any exclusion for losses caused by viruses or communicable diseases.

25. TPR was forced to suspend operations and business at its racetrack and OTBs due to the direct physical loss or damage caused by COVID-19 and the resultant closure orders issued by civil authorities in Arizona, as well as in order to take necessary steps to prevent further damage and minimize the suspension of business and continue operations.

26. Pursuant to the Policy, TPR filed a claim for loss of business income caused by COVID-19, of which Defendant received notice on April 13, 2020.

27. American Home has, by written communication to TPR dated July 7, 2020, refused to pay its insured a single dollar of the Policy's coverages for losses suffered due to the COVID-19 pandemic. *See Exhibit B*, Declination Letter. In so refusing, American Home has materially breached the parties' insurance contract and is liable for the full amount of coverage afforded by the Policy.

28. According to Defendant American Home, "there has not been any information suggesting direct physical loss or damage to covered property or leased property." *Id.* at pp. 6. Defendant also declined coverage on the basis that the "pollutants or contaminants" exclusion applies and "coverage for any loss from the COVID-19 virus is not triggered, as the peril is specifically excluded." *Id.* Both of Defendant American Home's bases for refusing to pay a single dollar of the Policy's coverages for TPR's losses are meritless.

29. Insurers around the country now desire for federal and state judges to interpret the words "direct physical loss or damage," but those words need no interpretation. Insurers, such as Defendant, would like for courts to alter the meaning of those terms rather than allow for a jury to apply the facts of the case to these ordinary words and reach a verdict in the same way a jury would reach a verdict if called upon to answer whether a person was injured or property was damaged.

30. Moreover, the "pollutants or contaminants" exclusion is not applicable to losses such as TPR's. Rather, this exclusion is one that contemplated environmental and industrial losses rather losses caused by communicable diseases such as COVID-19.

JURISDICTION AND VENUE

31. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332 because Plaintiff and Defendant are citizens of different states, and because the amount in controversy exceeds \$75,000 exclusive of interest and costs.

32. Venue is proper in this District under 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to the claim occurred, or a substantial party of property that is the subject of the action is situated in this District.

THE PARTIES

33. Plaintiff, TP Racing, L.L.L.P. (“TPR”) is an Arizona corporation, with its principal place of business located at 1501 West Bell Road, Phoenix, Arizona 85023. TPR paid premiums and was, therefore, an insured under the Policy for the coverage period October 1, 2019 to October 1, 2020.

34. Defendant, American Home Assurance Company (“American Home”), is an insurance company organized and existing under the laws of the State of New York with its principal place of business in New York City, New York. Defendant, American Home, is authorized to write, sell, and issue insurance policies providing property and business income coverage. At all times material hereto, Defendant American Home Assurance Company conducted and transacted business through the selling and issuing of insurance policies, including but not limited to selling and issuing commercial property coverage to TPR.

FACTUAL ALLEGATIONS

A. The Policy

35. In preparation for disasters like the COVID-19 pandemic, TPR purchased American Home Assurance Company Policy Number 020413332 which was effective for the policy period of October 1, 2019 to October 1, 2020. *See Ex. A.*

36. TPR has performed all of its obligations under the Policy, including payment of premiums.

37. As noted above, the Policy provides Business Income (or “Time Element”), Civil Authority, Extra Expense, and Sue and Labor coverages.

38. In many parts of the world, property insurance is sold on a specific peril basis. Such policies cover a risk of loss if that risk of loss is specifically listed (*e.g.*, hurricane, earthquake, H1NI, etc.). Most property policies of insurance sold in the United States, however, including the Policy, are all-risk property damage policies. These types of policies cover all risk of loss except for risks that are expressly and specifically excluded.

39. Defendant American Home did not exclude or limit coverage for losses from viruses such as COVID-19 in TPR’s Policy.

40. In exchange for a premium, the Policy provides Business Income (or “Time Element”) coverage for the actual business income loss sustained for a period of at least 365 days. Losses due to COVID-19 constitute Covered Causes of Loss thereunder.

41. The Policy’s Business Income/Time Element Coverage includes the following coverage grant: “We will pay the actual business income loss sustained by you due to the necessary partial or total interruption of your business operations, services or production during the period of indemnity as a result of direct physical loss or damage to: (1) covered property by a

covered cause of loss or (2) property of the type insured under this Policy by a covered cause of loss which directly affects your use of the covered property, provided that you are a lessee or occupant of the premises where the direct physical loss or damage occurred.” **Ex. A**, at pp. 36.

42. “Business income” is defined as “gross profits” which is calculated as the sum produced by adding the net profit to the charges and expenses (including ordinary payroll, but only to the extent shown in item 8.A. of the Declarations) which necessarily continue during the period of indemnity. If there is no net profit, business income means the sum of such charges and expenses which necessarily continue less any loss from business operations which would have been sustained had there been no occurrence. *Id.*

43. “Covered cause of loss” is defined as “a peril or other type of loss, not otherwise excluded under this Policy.” **Ex. A**, at pp. 52.

44. The Policy thus provides coverage for up to at least 365 days of TPR’s gross profits in the event of physical loss of or damage to TPR’s covered properties.

45. TPR’s covered properties have suffered direct physical loss or damage. Due to COVID-19, the insured properties have become unsafe for their intended business purpose and thus have suffered physical loss or damage. COVID-19 was physically present at TPR’s covered properties. TPR’s covered properties’ business functions have been impaired. If TPR were to conduct business as usual, the disease and virus would show up and people would get sick.

46. This is not a non-physical or remote loss such as one occasioned by a breach of contract, loss of market, or the imposition of a government penalty. It is a direct physical loss. In their current condition, TPR’s properties are not functional for their intended business purposes.

47. Moreover, the presence of virus or disease can constitute physical damage to property, as the insurance industry has recognized since at least 2006. When preparing so-called “virus” exclusions to be placed in some policies, but not others, the insurance industry drafting arm, ISO, circulated a statement to state insurance regulators that included the following:

Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces of personal property. ***When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses.*** Although building and personal property could arguably become contaminated (often temporarily) by such viruses or bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case.

48. The presence of viruses or disease has resulted in physical damage to property in that manner in this case.

49. Through its Business Income/Time Element coverage, Defendant American Home also agreed to pay Extra Expense coverage. The Policy specifically provides: “We will pay loss sustained by you for extra expense during the period of indemnity resulting from direct physical loss or damage by a covered cause of loss.” **Ex. A**, at pp. 40.

50. “Extra expense” is defined, in relevant part, as “reasonable and necessary: (a) Extra expense incurred to temporarily continue as nearly normal as practicable the conduct of your business; (b) Extra costs of temporarily using your property or your facilities or the property or facilities of others[.]” *Id.*

51. Defendant American Home also agreed to provide Civil Authority coverage by stating: “We will pay the actual business income loss sustained by you and extra expense if an order of civil or military authority limits, restricts or prohibits access to property not insured

under this Policy provided that: (a) Such property sustains direct physical loss or damage by a covered cause of loss; (b) Such property is within the distance from the covered location as shown in Item 7.C. of the Declarations under Interruption by Civil or Military Authority; and (c) The effect of such order is to partially or totally prohibit access to a covered location.” *Id.* at pp. 41.

52. At the same time, the “Sue and Labor” coverage provided by the Policy requires American Home insureds to, in the case if imminent loss or damage, “make reasonable efforts to protect property from such loss or damage.”

53. TPR’s losses caused by COVID-19 and the related orders issued by local, state, and federal authorities triggered the Business Income/Time Element, Extra Expense, Civil Authority, and Sue and Labor provisions of the Policy.

54. Indeed, when issuing stay at home orders, many governmental bodies have specifically found that COVID-19 causes property damage. *See* N.Y.C. Emergency Exec. Order No. 100, 2 (Mar. 16, 2020) (emphasizing the virulence of COVID-19 and that it “physically is causing property loss and damage”)³; Broward Cty. Administrator’s Emergency Order No. 20-01, 2 (Mar. 22, 2020) (noting that COVID-19 “constitutes a clear and present threat to the lives, health, welfare, and safety of the people of Broward County.”)⁴; Harris Cty. Office of Homeland Security & Emergency Mgmt., Order of Cty. J. Lina Hidalgo, 2 (Mar. 24, 2020) (emphasizing that the COVID-19 virus can cause “property loss or damage” due to its contagious nature and transmission through “person-to-person contact, especially in group settings”)⁵; Napa Cty. Health & Human Service Agency, Order of the Napa Cty. Health Officer (Mar. 18, 2020) (issuing restrictions based on evidence of the spread of COVID-19 within the Bay Area and

³ <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-100.pdf>

⁴ <https://www.broward.org/CoronaVirus/Documents/BerthaHenryExecutiveOrder20-01.pdf>

⁵ https://www.taa.org/wp-content/uploads/2020/03/03-24-20-Stay-Home-Work-Safe-Order_Harris-County.pdf

Napa County “and the physical damage to property caused by the virus.”⁶; City of Key West State of Local Emergency Directive 2020-03, 2 (Mar. 21, 2020) (COVID-19 is “causing property damage due to its proclivity to attach to surfaces for prolonged periods of time.”)⁷; City of Oakland Park, Fla. Local Public Emergency Action Directive, 2 (Mar. 19, 2020) (COVID-19 is “physically causing property damage”)⁸; Panama City, Fla. Resolution No. 20200318.1 (Mar. 18, 2020) (stating that the resolution is necessary because of COVID-19’s propensity to spread person to person and because the “virus physically is causing property damage”)⁹; Exec. Order of the Hillsborough Cty. Emergency Pol’y Group, 2 (Mar. 27, 2020) (in addition to COVID-19’s creation of a “dangerous physical condition”, it also creates “property or business income loss and damage in certain circumstances”)¹⁰; Colorado Dep’t of Pub. Health & Env’t, Updated Public Health Order No. 20-24, 1 (Mar. 26, 2020) (emphasizing the danger of “property loss, contamination, and damage” due to COVID-19’s “propensity to attach to surfaces for prolonged periods of time”)¹¹; Sixth Supp. to Mayoral Proclamation Declaring the Existence of a Local Emergency, 26 (Mar. 27, 2020) (“This order and the previous orders issued during this emergency have all been issued . . . also because the virus physically is causing property loss or damage due to its proclivity to attach to surfaces for prolonged periods of time.”)¹²; City of Durham, Second Amendment to Declaration of State of Emergency, 8 (effective Mar. 26, 2020) (prohibiting entities that provide food services from allowing food to be eaten at the site where it

⁶ <https://www.countyofnapa.org/DocumentCenter/View/16687/3-18-2020-Shelter-at-Home-Order>

⁷ https://www.cityofkeywest-fl.gov/egov/documents/1584822002_20507.pdf

⁸ <https://oaklandparkfl.gov/DocumentCenter/View/8408/Local-Public-Emergency-Action-Directive-19-March-2020-PDF>

⁹ <https://www.pcgov.org/AgendaCenter/ViewFile/Item/5711?fileID=16604>

¹⁰ <https://www.hillsboroughcounty.org/library/hillsborough/mediacenter/documents/administrator/epg/saferathomeorder.pdf>

¹¹ <https://www.pueblo.us/DocumentCenter/View/26395/Updated-Public-Health-Order---032620>

¹² https://sfgov.org/sunshine/sites/default/files/sotf_061020_item3.pdf

is provided “due to the virus’s propensity to physically impact surfaces and personal property.”¹³.

B. Plaintiff Suffered a Covered Loss under the Policy

55. According to the CDC, “COVID-19 is caused by a coronavirus called SARS-CoV-2. Coronaviruses are a large family of viruses that are common on people and [many] different species of animals, including camels, cattle, cats and bats. Rarely, animal coronaviruses can infect people and then spread between people.”¹⁴ “The virus that causes COVID-19 is thought to spread mainly from person to person, mainly through respiratory droplets produced when an infected person coughs or sneezes. These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs. Spread is more likely when people are in close contact with one another (within about 6 feet).”¹⁵

56. “It may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes.”¹⁶ A scientific study investigating the stability of COVID-19 in different environmental conditions found that, following COVID-19 contamination, the virus could be detected hours later for tissues and paper, days later for wood, cloth and glass, or even a week later for stainless steel and plastic.¹⁷

¹³ https://durhamnc.gov/DocumentCenter/View/30043/City-of-Durham-Mayor-Emergency-Dec-Second-Amdmt-3-25-20_FINAL

¹⁴ <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics>.

¹⁵ *Id.*

¹⁶ <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

¹⁷ See Alex W.H. Chin, et al., “Stability of SARS-CoV-2 in different environmental conditions,” *The Lancet Microbe* (April 2, 2020), available at [https://doi.org/10.1016/S2666-5247\(20\)30003-3](https://doi.org/10.1016/S2666-5247(20)30003-3).

57. The CDC advised businesses to “[u]se videoconferencing or teleconferencing for work-related meetings and gatherings,” and to “[c]ancel, adjust, or postpone large work-related meetings or gatherings that can only occur in-person in accordance with state and local regulations and guidance.”¹⁸

58. TPR was forced to suspend operations and business at its racetrack and OTB facilities due to the direct physical loss or damage caused by COVID-19 and the resultant Closure Orders issued by civil authorities across the country.

1. The Closure Orders

59. COVID-19 has caused civil authorities throughout the country to issue Closure Orders requiring the suspension of businesses, specifically bars which house TPR’s OTB facilities, as well as Turf Paradise.

60. On March 19, 2020, Arizona Governor, Douglas A. Ducey, issued Executive Order 2020-09, titled “Limiting the Operations of Certain Business to Slow the Spread of COVID-19.” .

61. Governor Ducey’s March 19, 2020 Closure Order mandated the following, in relevant part:

1. Beginning at close of business on Friday, March 20, 2020, all of the following establishments located in counties of the State with confirmed cases of COVID-19 shall close access to the public until further notice:
 - a. Bars
 - b. Movie theaters
 - c. Indoor gyms and fitness clubs
2. Beginning at the close of business on Friday, March 20, 2020, all restaurants in counties of the State with confirmed cases of COVID-19 shall close access to on-site dining until further notice. Restaurants may continue serving the public through pick up, delivery, and drive-thru operations.

¹⁸ <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

Id.

62. Given that all of TPR's OTB locations are housed within bars and/or restaurants, the March 19, 2020 Closure Order mandated that TPR's OTB locations must be closed.

63. On March 30, 2020, Governor Ducey issued Executive Order 2020-18, titled "Stay Home, Stay Healthy, Stay Connected, *Physical Distancing to Mitigate COVID-19 Transmission*" which mandated, in relevant part, the following:

WHEREAS, many *businesses have greatly reduced their hours and operations as directed by health officials* and in an effort to protect the public health and slow the spread of COVID-19; and

WHEREAS, on March 17, 2020, following updated guidance from the Centers for Disease Control and Prevention (CDC), the Arizona Department of Health Services (ADHS) issued updated guidance that included *canceling or postponing gatherings of 10 or more people*, recommending telework and other alternatives, restricting access to nursing homes, retirement homes and long-term care facilities to provide critical assistance, and providing recommendations to restaurants and eating establishments to mitigate the risk of COVID-19 transmission; and

WHEREAS, to combat COVID-19, and at the recommendation of the state's health officials, *the State of Arizona must continue its efforts by further limiting potential exposure through a policy of physical distancing* while maintaining social connectedness; and

WHEREAS, on March 30, 2020, the Director of Arizona Department of Health Services, based on an epidemiological assessment of Arizona specific data and in alignment with CDC guidance, recommended the state *implement enhanced mitigation strategies*.

NOW, THEREFORE, I, Douglas A. Ducey, Governor of the State of Arizona...hereby order, effective at 5:00 p.m. on March 31, 2020:

1. Arizona shall institute a "Stay home, Stay health, Stay connected" policy that promotes physical distancing, while also encouraging social connectedness. This builds on actions the state has already taken, and further memorializes some already in effect, to slow the spread of COVID-19 and protect our citizens.

12. Non-essential businesses may continue to operate those activities that do not require in-person, on-site transactions and are encouraged to maintain at least minimum basic operations that maintain the value of the business'

inventory, preserve the condition of the business' physical plant and equipment, ensure security, process payroll and employee benefits, facilitate employees of the business being able to continue to work remotely from their residences, and related functions to include mail pickup.

See **Ex. C**, at March 30, 2020 Closure Order (emphasis added).

64. On April 29, 2020, the mandates of the March 30, 2020 “Stay Home, Stay Healthy, Stay Connected, *Physical Distancing to Mitigate COVID-19 Transmission*” were reiterated and largely kept in place by Executive Order 2020-33, along with the following additional relevant mandates:

NOW, THEREFORE, I, Douglas A. Ducey, Governor of the State of Arizona...do hereby order:

12. Except as provided herein, non-essential businesses may continue to operate *those activities that do not require in-person, on-site transactions*....

d. *Areas where people may be inclined to congregate in an enclosed or confined area such as indoor shopping malls shall continue to limit operations*. Retailers located within such buildings or areas whose only entrance is through the shopping mall or other enclosed area may operate through delivery or curbside service or appointment only.

e. Nothing in this order shall be construed as requiring a retailer to open for business.

Id. at April 29, 2020 Closure Order (emphasis added).

65. On May 12, 2020, Governor Ducey issued Executive Order 2020-36, which clarified that a number of prior Executive Orders were expired and/or rescinded. *Id.* at May 12, 2020 Closure Order. Importantly, however, Executive Order 2020-09, which required all bars, and thus all of Plaintiff's OTB locations, to close, was not one of the expired and/or rescinded Executive Orders and therefore remained in effect.

66. On June 29, 2020, with the COVID-19 pandemic ravaging Arizona's communities, Governor Ducey issued Executive Order 2020-43, titled "Pausing of Arizona's Reopening, *Slowing the Spread of COVID-19*" which ordered, in relevant part:

WHEREAS, as of June 28, 2020, there have been 73,908 diagnosed cases of COVID-19 in Arizona including 1,588 deaths, and the State is seeing an increase in the number of cases and hospitalizations; and

WHEREAS, the increased case numbers and hospitalizations also necessitate the need for an increased focus on precautionary measures both by businesses and individuals;

NOW, THEREFORE, I, Douglas A. Ducey, Governor of the State of Arizona...hereby order as follows:

1. Effective June 29, 2020, ***organized public events of more than 50 people are prohibited....***

3. Notwithstanding any other law or executive order, effective at 8:00 pm on Monday, June 29, 2020, ***the following establishments shall pause operations until at least July 27, 2020, unless extended:***

a. ***Bars***, meaning an entity who holds a series 6 or 7 liquor license from the Department of Liquor Licenses and Control and whose primary business is the sale or dispensing of alcoholic beverages. These entities may continue serving the public through pick up, delivery, and drive-thru operations as provided for series 12 liquor licensees in ***Executive Order 2020-09, Limiting The Operations Of Certain Businesses To Slow The Spread Of COVID-19***.

Id. at June 29, 2020 Closure Order (emphasis added).

67. Executive Order 2020-43, above, was continued and extended by Executive Order 2020-52, dated July 23, 2020. *Id.* at July 23, 2020 Closure Order.

68. On July 9, 2020, Governor Ducey issued Executive Order 2020-47, titled "Reducing the Risk, Slowing the Spread, *Limiting Indoor Dining*" which provided, in relevant part:

WHEREAS, recommendations in the Arizona State Report issued by the White House Coronavirus Task Force on July 5, 2020, for actions to be taken to limit the

spread of COVID-19 include encouraging outdoor dining and limiting indoor dining to less than 50%; and

NOW, THEREFORE, I, Douglas A. Ducey, Governor of the State of Arizona...do hereby order:

1. Every restaurant with indoor seating in the State of Arizona ***shall operate at less than 50 percent of the permitted fire code occupant load***. Restaurants shall ensure at least six (6) feet of separation between parties or groups at different tables, booths or bar tops, unless the tables are separated by glass or plexiglass. Restaurant staff shall not be counted against the occupancy limit.
2. Every restaurant establishment with outdoor dining areas shall ensure at least six (6) feet of physical distance between tables, benches or other areas for patrons to sit while dining or waiting to be seated.
3. ***Restaurants shall eliminate any indoor standing room where patrons can congregate*** and are encouraged to use reservation systems to limit capacity and congregating of patrons.

5. All buffets, cafeteria style and self-serve food bars at restaurants shall be closed.
6. ***For purposes of this order, the term “restaurant” is defined as an establishment regularly open for the serving of food to guests for compensation and that has kitchen facilities connected with the restaurant for keeping, cooking and preparing foods required for ordinary food service.***

Id. at July 9, 2020 Closure Order (emphasis added).

69. Even since being permitted to re-open as of late August 2020, the OTB’s are required to operate under substantially reduced capacity restrictions and social distancing measures.

70. The COVID-19 pandemic continues to rage on, obliterating Arizona communities in its path and decimating Arizona businesses, including Turf Paradise and TPR’s OTB facilities, which have been outright prohibited and/or severely restricted from operating by the Closure Orders and the pervasive presence of COVID-19.

71. Violations of the above-referenced Closure Orders and other orders setting forth reduced capacity limitations and social distancing guidelines for Arizona could lead to the

imposition of criminal penalties as the closure orders give Arizona Governor Doug Ducey complete authority to exercise the police powers in the state constitution to effectuate the orders.

72. The foregoing orders and others limiting or outright preventing TPR's use of the racetrack and OTB facilities were issued in response to the rapid spread and actual presence of COVID-19.

2. The Impact of COVID-19 and the Closure Orders

73. The presence of COVID-19 caused "direct physical loss of or damage to" TPR's covered locations under the Policy, by impairing TPR's premises and business functions and by causing a necessary suspension of operations during a period of indemnity.

74. Prior to the COVID-19 pandemic, TPR's racetrack, Turf Paradise, regularly hosted several thousand customers on a daily basis. On event days, the standing room section of the racetrack was routinely filled to capacity.

75. Although the lower level of the racetrack currently operates as an OTB location with severely restricted capacity limitations in place, the actual presence of COVID-19 and the Closure Orders have prevented any races from being run since March 13, 2020.

76. Prior to the COVID-19 pandemic, TPR's racetrack also operated numerous restaurants, bars and concessions throughout its three floor facility as well eating areas on the apron where visitors watch races. On promotional days, these areas were filled to the capacity of 7,500 persons and on average racing days they were filled with an average of between 1,000 guests on weekdays and between 3,000 to 4,000 guests on weekends.

77. TPR's three floor facility at its racetrack consists of a Club House Dining Room; The Turf Club Restaurant; the Silks Room (a bar area next to the Turf Club Restaurant); a

Banquet Room; The Director's Suite; numerous concession stands and bars at the grand stand areas of all floors and eating areas on the apron.

78. Prior to the COVID-19 pandemic, the Club House Dining Room accommodated 1,100 people; the Turf Club Restaurant accommodated 275 people, the Silks Room accommodated 75 people; the Banquet Room accommodated 300 people, and the Director's Suite accommodated 75 people indoors and 275 people outdoors. The eating areas at the grand stands and apron were bustling.

79. TPR's ability to accommodate its pre-pandemic level of paying customers has been utterly decimated. When TPR reopens the doors to its racetrack on January 4, 2021, TPR will not have any customers on live race days. TPR will otherwise be limited to hosting a miniscule 50 customers on dark days and will not be permitted to sell said customers any food or beverages.

80. Turf Paradise has been closed since March 13, 2020 due to the actual presence of COVID-19 and the Closure Orders and has been prevented from accommodating any paying customers, in stark contrast to the thousands that it hosted every day.

81. The actual presence of COVID-19 at Turf Paradise and TPR's OTB facilities is evidenced, in part, by the confirmed COVID-19 cases of certain on-site employees.¹⁹

82. At the same time, TPR's ability to operate its OTB facilities is inextricably linked to the ability of the bars and restaurants in which they are located to operate.

83. The OTB facilities at which TPR has been legally able to resume operations, have been "re-opened" in a severely limited capacity due to the presence and continued threat of COVID-19 and the Closure Orders.

¹⁹ Plaintiff cannot, at this time, disclose the identity of those persons who tested positive for COVID-19 due to HIPAA privacy laws.

84. TPR's OTB facilities cannot accommodate its pre-COVID-19 number of customers and TPR has been required to routinely turn away customers, thereby incurring tremendous losses. Prior to COVID-19, many of TPR's OTB facilities could accommodate up to 200-300 customers at one time, with an average capacity per OTB of 130 people (an average of 6,750 people total per OTB). Now, TPR's OTB facilities that have been able to "re-open" cannot accommodate more than 50% of these customers.

85. TPR's OTB facilities that have been able to "re-open" have been required to drastically reduce the furniture available for customers in order to comply with reduced capacity and social distancing limitations.

86. Even where TPR has been able to "re-open" its OTB facilities, TPR has been forced to incur significant costs to comply with applicable COVID-19 regulations and the various Arizona Closure Orders, including but not limited to the purchase and installation of glass and/or plexiglass in order to prevent further spread of the COVID-19 permeating TPR's facilities and infecting TPR's patrons and/or employees.

87. COVID-19 has rendered TPR's covered locations unfit for their intended business purposes.

88. In their current condition, TPR's covered locations are not functional for their intended business purposes because of the changed physical environment due to COVID-19.

89. Put simply, TPR has suffered tremendous financial loss of business income as a result of the "direct physical loss of or damage to" TPR's covered locations under the Policy and due to the COVID-19 Closure Orders.

90. Defendant, American Home promised to pay TPR for its Business Income/Time Element, Extra Expense, and Sue and Labor losses incurred as a result of the foregoing.

91. Defendant, American Home, has egregiously violated its promises to TPR and has refused to pay a single dollar of what TPR is owed under the Policy.

C. American Home's Improper Declination of Coverage

92. Pursuant to the terms of the Policy, TPR filed a claim for loss of business income caused by COVID-19. American Home received notice of TPR's claim on April 13, 2020.

93. On July 7, 2020, American Home sent TPR a coverage declination letter stating that TPR's business income and extra expense losses were not covered under the Policy. According to American Home, "there has not been any information suggesting direct physical loss or damage to covered property or leased property." *Id.* at pp. 6. American Home also declined coverage on the basis that the "pollutants or contaminants" exclusion applies and "coverage for any loss from the COVID-19 virus is not triggered, as the peril is specifically excluded."

94. Both of Defendant American Home's bases for refusing to pay a single dollar of the Policy's coverages for TPR's losses are meritless, and loss caused by virus or disease constitutes direct physical loss or damage to property, as the insurance industry has explicitly recognized since at least 2006.

95. Losses caused by COVID-19 and the related Closure Orders issued by civil authorities triggered the Business Income/Time Element coverage provisions of the Policy.

96. Defendant American Home has nonetheless refused to pay any Business Income, Civil Authority, Extra Expense, and/or Sue and Labor coverage under the Policy, and indeed has unjustifiably denied TPR's claims.

D. The Insurance Industry’s “Virus Exclusion” is Not in the Policy

97. Many insurance policies issued in the United States that cover business interruption (though not the Policy at issue) contain an exclusion identical or very similar to the Insurance Services Office (“ISO”) Form CP 01 40 07 06, adopted in 2006, and titled “Amendatory Endorsement – Exclusion of Loss Due to Virus or Bacteria.”

98. The ISO Form CP 01 40 07 06 exclusion and those similar to it typically state: “We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.”

99. No such exclusion or comparable language is included in the Policy at issue.

100. By virtue of ISO Form CP 01 40 07 06, Defendant American Home unquestionably knew exactly how to exclude coverage for loss caused by or resulting from any virus, *yet American Home chose not to do so. Indeed, the Policy contains no such virus exclusion.*

101. Defendant American Home knew exactly how to exclude coverage for losses caused by viruses like COVID-19, but just chose not to do so.

102. The Policy in no way excludes or limits coverage for losses caused by viruses, such as COVID-19.

E. Defendant American Home’s “Pollutant or Contaminant” Exclusion Does Not Apply to Losses Caused by COVID-19

103. In improperly denying TPR’s claims, Defendant American Home asserted that the “pollutants or contaminants” exclusion applied and permitted Defendant to disclaim coverage. *See Ex. B.*

104. This exclusion provides, in relevant part:

Except as otherwise provided under the Additional Coverages or Additional time Element Coverages (and in such event, only to the extent provided therein), we do not insure loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss or damage. The following exclusions apply whether or not the loss event results in widespread damage or affects a substantial area:

- d. The actual, alleged or threatened release, discharge, escape or dispersal of pollutants or contaminants, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any covered cause of loss under this policy.

See **Ex. A**, at pp. 34.

105. The Policy defines “pollutants or contaminants” as follows:

Pollutants or contaminants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, virus, or hazardous substances. Waste includes materials to be recycled, reconditioned or reclaimed. Pollutants or contaminants do not include fungus, mold or spore.

Id. at pp. 57-58.

106. This “pollutant or contaminant” exclusion does not apply to losses caused by COVID-19.

107. The inclusion of the words “virus” and “bacteria” does not logically align with the grouping of the virus exclusion with the other pollutants or contaminants listed, such as “smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste,” and it is apparent that the Policy, and Defendant, did not anticipate and intend to deny coverage for business losses stemming from COVID-19.

108. American Home included the words “virus” and “bacteria” as a mere proxy for the actual pollutants and contaminants listed above (“smoke, vapor, soot, fumes, acids, alkalis,

chemicals and waste”) because bacteria and virus commonly exist and fester in similar environments as the aforementioned pollutants and contaminants.

109. American Home did *not* include “virus” in the “pollutants and contaminants” definition with the intention of excluding losses caused by viral diseases unrelated to the other pollutants or contaminants listed, such as the COVID-19 global pandemic.

110. The basic canon of construction *ejusdem generis* destroys Defendant American Home’s argument that the “pollutants or contaminants” exclusion applies to losses caused by COVID-19 and claimed by TPR.

CLAIMS FOR RELIEF

COUNT I

BREACH OF CONTRACT – TIME ELEMENT COVERAGE

111. TPR repeats and re-alleges the allegations set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

112. The Policy is a contract under which Defendant American Home was paid premiums in exchange for its promise to pay TPR’s losses for claims covered by the Policy.

113. Under the Policy, American Home agreed and promised to “pay the actual business income loss sustained by you due to the necessary partial or total interruption of your business operations, services or production during the period of indemnity as a result of direct physical loss or damage to: (1) covered property by a covered cause of loss or (2) property of the type insured under this Policy by a covered cause of loss which directly affects your use of the covered property, provided that you are a lessee or occupant of the premises where the direct physical loss or damage occurred.” **Ex. A**, at pp. 36.

114. The Policy defines “business income” as “gross profits which is calculated as the sum produced by adding the net profit to the charges and expenses (including ordinary payroll, but only to the extent shown in item 8.A. of the Declarations) which necessarily continue during the period of indemnity. If there is no net profit, business income means the sum of such charges and expenses which necessarily continue less any loss from business operations which would have been sustained had there been no occurrence.” *Id.*

115. The Policy covers business income losses for up to at least 365 days.

116. COVID-19 caused direct physical loss or damage to TPR’s covered locations, requiring suspension of operations at the aforementioned covered locations. Losses caused by COVID-19 thus triggered the Business Income/Time Element provision of the Policy.

117. TPR has complied with all applicable provisions of the Policy and/or those provisions have been waived by American Home or American Home is estopped from asserting them, and yet American Home has abrogated its insurance coverage obligations pursuant to the Policy’s clear terms and has wrongfully and illegally refused to provide coverage to which TPR is entitled.

118. By denying coverage for Business Income/Time Element losses incurred by TPR in connection with the COVID-19 pandemic, American Home has breached its coverage obligations under the Policy.

119. As a result of American Home’s breaches of the Policy, TPR has sustained substantial damages for which American Home is liable in an amount to be established at trial.

COUNT II

BREACH OF CONTRACT – CIVIL AUTHORITY COVERAGE

120. TPR repeats and re-alleges the allegations set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

121. The Policy is a contract under which American Home was paid significant premiums in exchange for its promise to pay TPR losses for claims covered by the Policy.

122. Under the Policy, American Home promised to “pay the actual business income loss sustained by you and extra expense if an order of civil or military authority limits, restricts or prohibits access to property not insured under this Policy provided that: (a) Such property sustains direct physical loss or damage by a covered cause of loss; (b) Such property is within the distance from the covered location as shown in Item 7.C. of the Declarations under Interruption by Civil or Military Authority; and (c) The effect of such order is to partially or totally prohibit access to a covered location.” *Id.* at pp. 41.

123. The Closure Orders enacted by Arizona’s governor and health officials triggered coverage under the Civil Authority provision of the Policy. COVID-19 caused direct loss or damage to the covered locations in the same manner described above that it caused direct physical loss or damage to the covered locations. The civil authority orders were actions taken in response to dangerous physical conditions resulting from the direct physical loss or damage to such premises. The Closure Orders further prohibited access to an area immediately surrounding TPR’s covered locations, specifically including TPR’s OTB facilities housed within bars and restaurants.

124. TPR has complied with all applicable provisions of the Policy and/or those provisions have been waived by American Home or American Home is estopped from asserting

them, and yet American Home has abrogated its insurance coverage obligations pursuant to the Policy's clear terms and has wrongfully and illegally refused to provide coverage to which TPR is entitled.

125. By denying coverage for Civil Authority losses incurred by TPR in connection with the COVID-19 pandemic, American Home has breached its coverage obligations under the Policy.

126. As a result of American Home's breach of the Policy, American Home has sustained substantial damages for which American Home is liable in an amount to be established at trial.

COUNT III

BREACH OF CONTRACT – EXTRA EXPENSE COVERAGE

127. TPR repeats and re-alleges the allegations set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

128. The Policy is a contract under which Defendant American Home was paid significant premiums in exchange for its promise to pay TPR's losses for claims covered by the Policy.

129. Defendant American Home promised to "pay loss sustained by you for extra expense during the period of indemnity resulting from direct physical loss or damage by a covered cause of loss." **Ex. A**, at pp. 40.

130. "Extra expense" is defined, in relevant part, as "reasonable and necessary: (a) Extra expense incurred to temporarily continue as nearly normal as practicable the conduct of your business; (b) Extra costs of temporarily using your property or your facilities or the property or facilities of others[.]" *Id.*

131. Due to COVID-19 and the Closure Orders, TPR incurred significant Extra Expenses at its covered locations.

132. TPR has complied with all applicable provisions of the Policy and/or those provisions have been waived by American Home, or American Home is estopped from asserting them, and yet American Home has abrogated its insurance coverage obligations pursuant to the Policy's clear terms and has wrongfully and illegally refused to provide coverage to which TPR is entitled.

133. By denying coverage for Extra Expense losses incurred by TPR in connection with the COVID-19 pandemic, American Home has breached its coverage obligations under the Policy.

134. As a result of American Home's breach of the Policy, TPR has sustained substantial damages for which American Home is liable in an amount to be established at trial.

COUNT IV

BREACH OF CONTRACT – SUE AND LABOR COVERAGE

135. TPR repeats and re-alleges the allegations set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

136. The Policy is a contract under which Defendant American Home was paid significant premiums in exchange for its promise to pay TPR's losses for claims covered by the Policy.

137. Defendant American Home promised to provide up to \$500,000 in the case of imminent loss or damage for the costs TPR expended in making reasonable efforts to protect Turf Paradise and TPR's OTBs from such loss or damage.

138. Due to COVID-19 and the Closure Orders, TPR incurred significant Sue and Labor expenses at its covered locations under the Policy.

139. TPR has complied with all applicable provisions of the Policy and/or those provisions have been waived by American Home, or American Home is estopped from asserting them, and yet American Home has abrogated its insurance coverage obligations pursuant to the Policy's clear terms and has wrongfully and illegally refused to provide coverage to which TPR is entitled.

140. By denying coverage for Sue and Labor losses incurred by TPR in connection with the COVID-19 pandemic, American Home has breached its coverage obligations under the Policy.

141. As a result of American Home's breach of the Policy, TPR has sustained substantial damages for which American Home is liable in an amount to be established at trial.

COUNT V

DECLARATORY JUDGMENT – TIME ELEMENT COVERAGE

142. TPR repeats and re-alleges the allegations set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

143. The Policy is a contract under which American Home was paid significant premiums in exchange for its promise to pay TPR's losses for claims covered by the Policy.

144. TPR has complied with all applicable provisions of the Policy and/or those provisions have been waived by American Home, or American Home is estopped from asserting them, and yet Defendant has abrogated its insurance coverage obligations pursuant to the Policy's clear terms and has wrongfully and illegally refused to provide the coverage to which TPR is entitled.

145. An actual case or controversy exists regarding TPR's rights and American Home's obligations under the Policy to reimburse TPR for the full amount of losses incurred under the Policy's Time Element coverage provisions.

146. Pursuant to 28 U.S.C. §2201, TPR seeks declaratory judgment from this Court finding that:

- a. TPR's income losses incurred in connection with statewide closure orders and the necessary interruption of its businesses stemming from the COVID-19 pandemic are insured losses under the Time Element coverage of the Policy; and
- b. American Home Assurance Company is obligated to pay TPR for the full amount of Time Element loss incurred as a result of the COVID-19 pandemic during the Period of Indemnity at the covered locations.

COUNT VI

DECLARATORY JUDGMENT – CIVIL AUTHORITY COVERAGE

147. TPR repeats and re-alleges the allegations set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

148. The Policy is a contract under which Defendant American Home was paid significant premiums in exchange for its promise to pay TPR's losses for claims covered by the Policy.

149. TPR has complied with all applicable provisions of the Policy and/or those provisions have been waived by Defendant, American Home Assurance Company, or Defendant is estopped from asserting them, and yet Defendant has abrogated its insurance coverage

obligations pursuant to the Policy's clear terms and has wrongfully and illegally refused to provide coverage to which TPR is entitled.

150. An actual case or controversy exists regarding TPR's rights and American Home's obligations under the Policy to reimburse TPR for the full amount of losses incurred included under the Policy's Civil Authority coverage.

151. Pursuant to 28 U.S.C. §2201, TPR seeks declaratory judgment from this Court finding that:

- a. TPR's income losses incurred in connection with statewide closure orders and the necessary interruption of its businesses stemming from the COVID-19 pandemic are insured losses under the Civil Authority coverage of the Policy; and
- b. American Home Assurance Company is obligated to pay TPR for the full amount of Civil Authority loss incurred as a result of the COVID-19 pandemic during the Period of Indemnity at the covered locations.

COUNT VII

DECLARATORY JUDGMENT – EXTRA EXPENSE COVERAGE

152. TPR repeats and re-alleges the allegations set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

153. The Policy is a contract under which American Home was paid significant premiums in exchange for its promise to pay TPR's losses for claims covered by the Policy.

154. TPR has complied with all applicable provisions of the Policy and/or those provisions have been waived by American Home, or American Home is estopped from asserting them, and yet American Home has abrogated its insurance coverage obligations pursuant to the

Policy's clear terms and has wrongfully and illegally refused to provide coverage to which TPR is entitled.

155. An actual case or controversy exists regarding TPR's rights and American Home's obligations under the Policy to reimburse TPR for the full amount of losses incurred included under the Policy's Extra Expense coverage.

156. Pursuant to 28 U.S.C. §2201, TPR seeks declaratory judgment from this Court finding that:

- a. TPR's income losses incurred in connection with statewide closure orders and the necessary interruption of its businesses stemming from the COVID-19 pandemic are insured losses under the Extra Expense coverage of the Policy; and
- b. American Home is obligated to pay TPR for the full amount of Extra Expense loss incurred as a result of the COVID-19 pandemic during the Period of Indemnity at the covered locations.

COUNT VIII

DECLARATORY JUDGMENT – SUE AND LABOR COVERAGE

157. TPR repeats and re-alleges the allegations set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

158. The Policy is a contract under which Defendant American Home was paid significant premiums in exchange for its promise to pay TPR's losses for claims covered by the Policy.

159. TPR has complied with all applicable provisions of the Policy and/or those provisions have been waived by Defendant, American Home, or Defendant American Home is

estopped from asserting them, and yet American Home has abrogated its insurance coverage obligations pursuant to the Policy's clear terms and has wrongfully and illegally refused to provide coverage to which TPR is entitled.

160. An actual case or controversy exists regarding TPR's rights and American Home's obligations under the Policy to reimburse TPR for the full amount of losses incurred included under the Policy's Sue and Labor coverage.

161. Pursuant to the Declaratory Judgment Act, 28 U.S.C. §2201, TPR seeks declaratory judgment from this Court finding that:

- a. TPR's income losses incurred in connection with statewide closure orders and the necessary interruption of its businesses stemming from the COVID-19 pandemic are insured losses under the Sue and Labor coverage of the Policy; and
- b. American Home is obligated to pay TPR for the full amount of Sue and Labor loss incurred as a result of the COVID-19 pandemic during the Period of Indemnity at the covered locations.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff TP Racing, L.L.L.P respectfully requests that the Court enter judgment in Plaintiff's favor and against Defendant as follows:

- a. Entering judgment on Counts I-IV in favor of Plaintiff and awarding damages for breach of contract in an amount to be determined at trial.
- b. Entering declaratory judgment on Counts V-VIII in favor of Plaintiff as follows:

- i. The Time Element, Civil Authority, Extra Expense, and Sue and Labor losses incurred by Plaintiff in connection with the COVID-19 pandemic and statewide closure orders are insured losses under the Policy; and
- ii. American Home Assurance Company is obligated to pay under the Policy the full amount of the Time Element, Civil Authority, Extra Expense, and Sue and Labor losses incurred by Plaintiff in connection with the COVID-19 pandemic and statewide closure orders;
- c. Ordering American Home to pay both pre- and post-judgment interest on any amounts awarded;
- d. Ordering American Home to pay attorneys' fees and costs of suit plus interest; and
- e. Ordering such other and further relief as may be just and proper.

JURY DEMAND

TPR hereby demands a trial by jury on all claims so triable.

Dated: January 20, 2021

Respectfully submitted,

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*Applications for admission *pro hac vice* to be filed.