

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

DICKIE BRENNAN AND COMPANY, L.L.C.,	*	CIVIL ACTION:
COUSINS RESTAURANTS, INC., AND	*	
716 IBERVILLE, L.L.C.	*	
PLAINTIFFS	*	
 	*	
VERUS	*	JUDGE
	*	
ZURICH AMERICAN INSURANCE	*	MAGISTRATE
COMPANY AND AMERICAN GUARANTEE	*	
AND LIABILITY INSURANCE COMPANY	*	
DEFENDANTS	*	



COMPLAINT

NOW COME Plaintiffs, Dickie Brennan and Company, L.L.C., a Louisiana limited liability company (“DBC”), Cousins Restaurants, Inc., a Louisiana corporation (“Cousins”) and 716 Iberville, L.L.C. (“716 Iberville”) (DBC, Cousins and 716 Iberville may sometimes be collectively referred herein as “Plaintiffs,” each a “Plaintiff”) and, for their complaint against defendants, Zurich American Insurance Company and American Guarantee and Liability Insurance Company, the wholly owned subsidiary of Zurich American Insurance Company (“Defendants” or “Zurich”) aver as follows:

PARTIES

1.

Plaintiff, DBC, is a Louisiana limited liability company with its principal place of business in New Orleans, Orleans Parish, Louisiana. DBC’s members are Richard J. Brennan, Jr., a resident of Jefferson Parish, Louisiana, Steven L. Pettus, a resident of Orleans Parish, Louisiana and Lauren Brennan Brower, a resident of Orleans Parish, Louisiana.

2.

DBC, Cousins and 716 Iberville are all affiliated companies under common ownership. Plaintiff, Cousins, is a Louisiana corporation, with its principal place of business in New Orleans, Louisiana. The shareholders of Cousins are Richard J. Brennan, Jr. and Lauren Brennan Brower. 716 Iberville is a Louisiana limited liability company with its principal place of business in New Orleans, Louisiana. The members of 716 Iberville are Richard J. Brennan, Jr., a resident of Jefferson Parish, Louisiana and Steven L. Pettus and Lauren Brennan Brower, both residents of Orleans Parish, Louisiana.

3.

Made defendants herein are Zurich American Insurance Company and American Guarantee and Liability Insurance Company, which is a wholly owned subsidiary of Zurich. Zurich American Insurance Company and American Guarantee and Liability Insurance Company are both organized under the laws of the State of New York and have their principal place of business in the State of Illinois.

JURISDICTION AND VENUE

4.

This Court has jurisdiction over this matter under 28 U.S.C. § 1332(a)(1) because the amount in controversy in this action exceeds \$75,000 and this action is between citizens of different states.

5.

Venue is proper in this district under 28 U.S.C. § 1391(b)(1) because Defendants are transacting business in this district and are subject to personal jurisdiction in this district and under 28 U.S.C. § 1391(b)(2) because Zurich issued a policy of insurance to Plaintiffs covering property

situated in this district and the acts and omissions giving rise to Plaintiffs' claims set forth herein occurred and are continuing to occur in this district.

FACTUAL BACKGROUND

The Plaintiffs and their Restaurants

6.

DBC is a holding company that holds all of the membership interests in Commissary, L.L.C., which owns and operates The Commissary Market + Eatery ("The Commissary"), 616 St. Peter, L.L.C., which owns and operates Tableau ("Tableau"), and Brasserie, L.L.C., which owns and operates Dickie Brennan's Bourbon House (the "Bourbon House"). DBC also owns and operates Acorn, a Dickie Brennan Café ("Acorn"). Cousins owns and operates Dickie Brennan's Palace Café (the "Palace Café") and 716 Iberville owns and operates Dickie Brennan's Steakhouse (the "Steakhouse").

7.

Tableau, which is located at 616 St. Peter Street, the Bourbon House, which is located at 144 Bourbon Street, the Palace Café, which is located at 605 Canal Street and the Steakhouse, which is located at 716 Iberville Street, are all located within blocks of one another in the French Quarter of New Orleans. Acorn Café is located inside the Louisiana Children's Museum in New Orleans City Park. The Commissary is located in the Lower Garden District of New Orleans at 634 Orange Street.

8.

Tableau, the Bourbon House, the Palace Café, the Steakhouse are full-service, dine-in restaurants. Acorn provides dine-in and outdoor dining options. The Commissary is a multi-

purpose facility which sells prepared foods for on and off-site consumption, as well as products to be prepared by customers at home and also offers dine-in options.

The Policy

9.

Zurich (sometimes referred to hereinafter as the “Insurer”) and Plaintiffs entered into a contract of indemnity, in the form of Zurich Policy No. ERP-0534504-02 (the “Policy”), whereby Zurich agreed to indemnify Plaintiffs from “all risks of direct physical loss or damage from any cause, unless excluded.” *See* § 1.01 of the Policy, a copy of which is attached hereto as Exhibit A.

10.

DBC, Cousins and 716 Iberville are all Named Insureds under the Policy and the Palace Café, the Bourbon House, the Steakhouse, Acorn and The Commissary are all “Insured Locations,” under § 2.01 of the Policy.

11.

The Policy was issued in consideration of the payment of a premium of \$293,485.88 by DBC to Zurich. The Policy’s limit of liability is \$37,955,000. The Policy went into effect on March 1, 2020 at 12:01 a.m. and remains effective through March 1, 2021 at 12:01 a.m.

12.

Pursuant to § 3.01 of the Policy “Covered Property” includes (1) the Insured’s interest in buildings or structures that the Insured owns, leases, occupies or rents, located at an Insured “Location” or within 1,000 feet of an Insured Location; (2) the Insured’s interest in Personal Property located at an Insured Location or within 1,000 feet of an Insured Location; and (3) personal property of officers and employees of the Insured.

13.

The Policy also provides coverage for the “actual Time Element [or Business Interruption] loss...[resulting] from the necessary Suspension of the Insured’s business activities at an Insured Location...due to direct physical loss of or damage to property...caused by a Covered Cause of Loss at the Location....” *See* Policy, § 4.

14.

Section 5.02.03 of the Policy provides a Special Coverage, as it relates to Time Element (“TE”) or Business Interruption (“BI”) loss for the actual TE loss sustained (subject to the Policy deductibles) resulting from orders of “Civil or Military Authority,” that causes a necessary Suspension of the Insured’s business activities at an Insured Location where the suspension is caused by order of civil or military authority that prohibits access to the Location, provided that the order results from the 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 [the] Policy,” and located within five (5) miles of the Insured’s Location, during the time such order(s) remain in effect.

16.

Section 3.03.01.01 of the Policy contains an exclusion for “**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.”

17.

Zurich deleted and replaced Section 3.03.01.01 of the Policy in its entirety in the Amendatory Endorsement – Louisiana (the “Louisiana Endorsement”) to the Policy so that § 3.03.01.01 now reads as follows: “**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.”

18.

Section 7.09 of the Policy defined “**Contamination (Contaminated)**” as “[a]ny 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.”

19.

Section 7.10 of the Policy defined “**Contaminant(s)**” as “[a]ny solid, liquid, gaseous, 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**.”

20.

Zurich deleted and replaced Section 7.09 of the Policy in its entirety in the Louisiana Endorsement so that § 7.09 now reads as follows: “**Contamination (Contaminated)** – Any condition of property due to the actual presence of any **Contaminant(s)**.”

21.

Zurich deleted and replaced Section 7.10 of the Policy in its entirety in the Louisiana Endorsement so that § 7.10 of the Policy now reads as follows: “**Contaminant(s)** – 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**.”

22.

Fungus (or **Fungi**) is defined in § 7.23 of the Policy as “[a]ny form of fungus including, but not limited to, yeast, mold, mildew, rust, smut, mushroom, spores, mycotoxins, odors, or any other substances or gases, products or by products produced by released by, or arising out of the current or past presence of **Fungi**.”

23.

Spores are defined in § 7.53 of the Policy as “[a]ny reproductive body produced by or arising out of any **Fungus** (or **Fungi**).

24.

As a result of the deletions and replacements made to §§ 3.01.01, 7.09 and 7.10 of the Policy in the Louisiana Endorsement, pathogens, pathogenic organisms, bacteria, viruses, disease causing and illness causing agents are not excluded causes of loss under the Policy.

25.

The Policy does not contain any exclusion for pandemics or global pandemics.

26.

For purposes of TE/BI coverage, the term “Suspension” (or, Suspended) “refers to the *slowdown* or cessation of the Insured’s business activities. *See* Policy, § 7.56.01. Thus, a complete cessation of all business activities at the Insured Locations is not required under the Policy for there to be TE/BI coverage.

27.

The Policy also provides coverage for “Extra Expense(s)” 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....” *See*, Policy, § 4.02.03.

28.

Section 4.02.02 of the Policy further provides “Extended Period of Liability” coverage for actual Gross Earnings losses, as defined in the Policy, sustained by the Insured until the earlier of (i) the date the Insured could restore its business, with due diligence to the condition that would have existed had no direct physical loss or damage occurred to the Insured’s Covered Property; or (ii) 365 days.

29.

Section 5.02.23 of the Policy provides coverage for “the actual costs incurred by the Insured, of reasonable fees paid to the Insured’s accountants, architects, auditors, engineers, or other professionals and the cost of using the Insured’s employees for producing and certifying any details contained in the Insured’s documents, or such other proofs or evidence required by the [Insurer] resulting from loss or damage” payable under the Policy....”

**COVID-19, The Pandemic, the Orders of Civil Authorities and
Effects to Plaintiffs' Businesses**

30.

In December 2019 it was first reported in the United States that the novel coronavirus, SARS-CoV-2, which became commonly referred to as "COVID-19," had been identified in Wuhan, Hubei Province, People's Republic of China, and had infected a large portion of the population there. The virus began to spread rapidly throughout many countries in the world, including the United States.

31.

By January 31, 2020, the United States Secretary for Health and Human Services had declared a public health emergency for the United States as a result of the spread of COVID-19 in this country.

32.

The first presumptive positive case of COVID-19 in Louisiana was identified in the New Orleans metropolitan area on March 9, 2020. The following day, two more presumptive positive cases were identified in the New Orleans area. From that point, COVID-19 quickly began to spread throughout New Orleans, the surrounding parishes and throughout the entire state of Louisiana.

33.

On March 11, 2020, the World Health Organization designated the COVID-19 outbreak as a worldwide pandemic.

34.

It is widely known and accepted in the scientific and medical communities and by the public at large that COVID-19 is carried and transmitted by individuals, that it is airborne and that

it readily attaches to surfaces and objects, on which it can remain for indeterminate periods of time.

35.

On March 11, 2020, the Governor of the State of Louisiana (the “Governor”) issued Proclamation Number 25 JBE 2020 declaring a public health emergency in the State of Louisiana (the “State”) due to COVID-19.

36.

The Mayor of the City of New Orleans (the “Mayor”) declared a state of emergency related to COVID-19 within the City of New Orleans on March 11, 2020. By March 11, 2020, the date of the Mayor’s Executive Order declaring a state of emergency within the City of New Orleans (the “City”), several more presumptive cases of COVID-19 had been identified within the New Orleans area.

37.

The Mayor’s Executive Order of March 11, 2020, declaring a state of emergency within the City related to the COVID-19 pandemic states, in pertinent part, that:

[T]he direct and definite public health and safety threats of COVID-19, and the related threats to the health, safety and welfare of the residents of the City of New Orleans are now imminent and emergency action must be taken to prevent death or injury and to preserve the lives and property of the people of the City of New Orleans[.]

38.

On March 13, 2020, the Governor issued Proclamation Number JBE 2020-27 limiting gatherings within the State, including the City, to no more than 250 people between Friday, March 13 and Monday, April 13, 2020.

39.

On March 14, 2020, Plaintiffs were informed that that an employee of the Steakhouse (the “Infected Employee”) had reported testing presumptive positive for COVID-19. The Infected Employee reported that he had worked his regular shift at the Steakhouse on March 7, 2020 but had not felt well that evening. Thereafter, he continued to feel symptomatic and did not return to work. On March 11, 2020, the Infected Employee was tested for COVID-19 and his presumptive positive test results were reported to him on March 14, 2020.

40.

Further investigation revealed that, during his final shift at the Steakhouse on March 7, 2020, at a time when he was already experiencing COVID-19 symptoms, the Infected Employee had worked closely together with two other employees on a serving team and had come into contact with many people, including diners, other employees and staff members as well as with various physical elements of the property.

41.

Based on the results of Plaintiffs’ investigation into the matter, it was determined that the Steakhouse property was contaminated with the COVID-19 virus and that many of the employees and staff at the Steakhouse had been exposed to COVID-19. DBC closed the Steakhouse on March 15, 2020.

42.

Because employees of Plaintiffs’ French Quarter restaurants including maintenance personnel, human resources and sales personnel, and other staff members regularly work in and travel between Plaintiffs’ French Quarter restaurants on a daily basis and because of

the presence of COVID-19 throughout the City, and not knowing at the time how the virus was spreading throughout the population of the City, Plaintiffs closed their other restaurants on March 16, 2020, as they had also certainly been contaminated with COVID-19 and the employees of those restaurants had been very likely been exposed to COVID-19 at that time.

44.

By Proclamation Number JBE 2020-30 issued on March 16, 2020, the Governor reduced the size of gatherings within the State, including the City, to no more than 50 people. Proclamation Number JBE 2020-30 also ordered that beginning at 12:00 a.m. on March 17, 2020, until 11:59 p.m. on April 12, 2020, “all restaurants, cafes and coffee shops statewide, shall cease allowing for any on-premises consumption of food or beverages.” Affected establishments were permitted to engage in take out, drive-thru and delivery services only.

45.

Also, on March 16, 2020, the Mayor issued an Executive Order, exercising her authority to “control ingress and egress to and from the affected area, the movement of persons within the area, and the occupancy of premises therein.” Pursuant to the March 16, 2020 Executive Order (the Governor’s March 16, 2020 Order, the Mayor’s March 16, 2020 Executive Order and all subsequent extensions of those Orders may be referred to hereinafter as the “Closure Orders,” each, a “Closure Order”), all restaurants, bars, cafes and coffee shops within the “affected area,” *i.e.*, the entire City, were ordered to cease providing any food or beverages for on-premises consumption and were permitted only to

operate to the extent they were providing food or beverages for take-out or delivery beginning March 17, 2020 through April 16, 2020.

46.

COVID-19 physically intruded into businesses and properties throughout the City, including all of Plaintiffs' restaurants. The Closure Orders were issued as a direct result of the pervasive physical infiltration of COVID-19 throughout the City and within the State of Louisiana, coupled with the inability to accurately evaluate the scope of the community spread of the virus due to lack of availability of testing.

47.

Prior to the COVID-19 outbreak in the City, Plaintiffs' restaurants were not in the business of providing food or meals for take-out or delivery. The Palace Café and the Bourbon House were open daily for dine-in breakfast, lunch and dinner. The Steakhouse and Tableau were open daily for dine-in lunch and dinner. Acorn Café was open daily, roughly coinciding with the hours of operation of the Louisiana Children's Museum, to which it was attached, for dine-in or outdoor seated dining. All of the restaurants also provided banquet and event services.

48.

Because of the physical intrusion of COVID-19 into the Insured Locations and additionally, based on the determinations underlying the Closure Orders that property within the State of Louisiana and the City of New Orleans would suffer damage from COVID-19 in the absence of the Closure Orders, the Insured Locations were rendered uninhabitable in that they could not safely be used for their intended purposes of providing

food and beverages for consumption on-premises, as the Governor and the Mayor so determined when they issued the Closure Orders.

49.

By March 20, 2020 at least 249 positive cases of COVID-19 had been identified in the City, 8 of which had resulted in death. By that date, the City was emerging as a COVID-19 “hotspot,” meaning that the City was experiencing a rapid spread and an explosive growth in the number of COVID-19 positive cases.

50.

On March 20, 2020, the New Orleans Department of Health (the “Department of Health”), at the direction of the Mayor, issued Guidelines for COVID-19 Response and Stay at Home Directives (the “Guidelines”). The Guidelines clarified that the residents of the City were required to stay at home unless providing essential functions. Movement around the City was restricted to necessary travel to and from authorized work environments, accessing essential services and engaging in personal outdoor recreation.

51.

On March 22, 2020, the Governor issued Proclamation Number 33 JBE 2020, limiting public gatherings to no more than 10 people and imposing a general stay-at-home order (the Mayor’s Executive Order, the Guidelines and the Governor’s “stay-at-home order” may be referred to herein as the “Stay-at-Home Orders,” each a “Stay-at-Home Order”), pursuant to which all residents of the State were directed to stay at home until April 13, 2020, unless performing an essential activity. The orders prohibiting restaurants from providing food and beverages for on-premises consumption remained in place. The Governor’s Stay-at-Home Order was extended through April 30, 2020 by Proclamation

Number 41 JBE 2020 and was further extended through May 15, 2020 by Proclamation Number 52 JBE 2020.

52.

Shortly after the issuance of the Stay-at-Home Orders, in an effort to comply with its duty under the Policy to mitigate its losses and to be able to safely continue to provide service its customers, Plaintiffs began offering a limited take-out/delivery menu, featuring popular menu items from each of their Restaurants, which were made available for pick-up from the Place Café only between the hours of 11 a.m. and 8 p.m. each day.

53.

Ultimately, Plaintiffs ceased providing take-out meal services as a result of the continuing danger of COVID-19 exposure to the physical surfaces of the Palace Café and to its employees, as well as the continuing impact of the Closure Orders and Stay-at-Home Orders and the challenges associated with providing a safe workplace and continuing operations in the face of the ongoing risks of COVID-19 exposure.

54.

On April 16, 2020, the Mayor issued an Executive Order extending her March 16, 2020 Executive Order through May 16, 2020. By that time, there had been more than 5,700 cases of COVID-19 in the City, more than 275 of which had resulted in death.

55.

On April 29, 2020, DBC opened The Commissary. The Commissary contains approximately 7,000 square feet of space and is a multi-purpose facility that houses a staging kitchen to service DBC's restaurants, a retail market and dine-in services.

56.

Operations at the Commissary have enabled DBC to mitigate a fraction of the losses that it has suffered and continues to suffer as a result of COVID-19 and the COVID-19 orders.

57.

On May 7, 2020, DBC reopened Acorn for take-out and delivery service.

58.

On May 14, 2020, the Governor issued Proclamation Number 58 JBE 2020 pursuant to which he announced that Louisiana had met the requirements to enter Phase 1 of reopening on May 15, 2020. Under the State's Phase 1 reopening plan, restaurants, cafes and coffee shops were permitted to continue to provide food and beverage services through take-out and delivery services, and were also allowed to resume dine-in services, effective May 15, 2020, at a maximum of 25% of total occupancy, as determined by the State Fire Marshall, provided that they met the conditions imposed by the Phase I Guidelines, including but not limited to masking, distancing, sanitization and disinfection guidelines and contact restrictions.

59.

On May 15, 2020, the Mayor issued an Executive Order instituting Phase 1 of recovery in the City under guidelines similar to those announced the previous day by the Governor. In particular, the Mayor implemented the 25% of total occupancy for dine-in services at Restaurants, cafes and coffee shops, so long as they were in compliance with the safety guidelines issued by the Department of Health (the "Phase 1 Guidelines").

60.

Palace Café reopened for dine-in service under the Phase 1 Guidelines on May 19, 2020. Bourbon House reopened shortly thereafter. The Steakhouse and Tableau remained closed throughout Phase 1.

62.

The State of Louisiana, other than New Orleans, moved into Phase 2 of recovery on June 5, 2020. The City of New Orleans moved into Phase 2 of recovery on June 13, 2020. Among other things, under the Guidelines for COVID-19 Reopening Phase Two issued by the City’s Health Department on June 12, 2020 (the “Phase 2 Guidelines”), public and private gatherings, whether indoors or outdoors were limited to no more than 100 provided that the Phase 2 Guidelines were observed and restaurants, cafes and bars that serve food were permitted to open for indoor seated dining at 50% of total capacity.

63.

In September 2020, the Governor issued Proclamation 117 JBE 2020, wherein the Governor announced that Louisiana – other than the City – would move into Phase 3 on September 11, 2020. This order, among other things, permitted restaurants, cafes and coffee shops other than those in New Orleans to offer dine-in service at a level of 75% of occupancy, provided that all COVID-19 protocols were maintained.

64.

The Steakhouse reopened for business in September 2020.

65.

The City did not move into Phase 3 until October 3, 2020. At that time, the Mayor initiated Phase 3.1 of recovery, wherein restaurants, cafes, coffee shops were permitted to offer dine-in service at a level of 75% of occupancy for indoor dining and 100% of occupancy for outdoor dining, provided that all COVID-19 protocols and guidelines issued by the Department of Health were observed.

66.

The City moved into Phase 3.2 of recovery on October 17, 2020. Under Phase 3.2, in which the rules for restaurant operations remained the same as in Phase 3.1.

67.

In November 2020, the number of COVID-19 cases within the State and the City began to spike. On November 25, 2020, the State regressed to modified Phase 2 guidelines in which restaurants, cafes and coffee shops were again restricted to 50% occupancy for indoor dining. The State remains in modified Phase 2 as of the date of the filing of this Complaint.

68.

Cases within the City have continued to spike since the Governor announced the return to modified Phase 2 and, on January 6, 2021, the Mayor announced that the City was moving back to modified Phase 1 restrictions, whereby restaurants, cafes and coffee shops would be permitted to offer dine-in service at only 25% of occupancy.

69.

Effective February 26, 2021, the City returned to modified Phase 2 regulations, in which restaurants are permitted to operate with 50% occupancy for indoor dining and 100% occupancy for outdoor dining.

DBC's Claim and Zurich's Denials

70.

The Plaintiffs put Zurich on notice of their claims for losses under the Policy, including but not limited to TE/BI losses, Extra Expense losses and losses resulting from orders of civil or military authorities in March 2020 shortly after the Infected Employee had tested positive for COVID-19 and after the first Closure Orders were issued.

71.

On April 20, 2020, Zurich preliminarily denied coverage under the Policy for Plaintiffs' claimed losses, primarily on the grounds that any recovery under the Policy requires "direct physical loss or damage" to Property, which Zurich claimed Plaintiffs cannot show because, according to Zurich, the presence of the COVID-19 virus at the Insured Locations does not constitute direct physical loss or damage to property and based on Zurich's contention that losses from COVID-19 were excluded under the Policy's Contamination provisions.

72.

By letter dated June 16, 2020, Plaintiffs responded to Zurich's request for additional information regarding its claim and set forth a more detailed description and analysis of Plaintiffs' claims under the Policy.

73.

By letter dated August 19, 2020, Zurich again denied coverage under the Policy for Plaintiffs' TE/BI, Extra Expense, Civil Authority and other losses sustained by Plaintiffs and that continue to be sustained at all Insured Locations, as a result of COVID-19, the COVID-19 pandemic, the outbreak of COVID-19 within the City, the presence of COVID-19 in, on and at the Insured Locations, and orders of civil authorities issued in order to stem the spread of COVID and prevent damage to property within the City (all such orders issued by the Governor and the Mayor may sometimes be collectively referred to hereinafter as the "COVID-19 Orders"). The four primary bases of Zurich's continued denial were that: (1) there was no direct physical loss of or damage to property at an Insured Location; (2) the presence of the COVID-19 virus does not constitute direct physical loss or damage to property; (3) COVID-19 is excluded under the "Contamination" exclusion set forth in Section 3.03 of the Policy as amended by the Louisiana Endorsement, as hereafter defined, particularly the exclusion of losses caused by "**Fungi or Spores;**" and (4) the Special Coverage for losses caused by orders of civil or military authorities does not apply because COVID-19 does not constitute direct physical loss or damage to property and because the orders issued by the Governor and the Mayor as a result of the COVID-19 pandemic in the State and City were not issued to prevent direct physical loss or damage to property and that these orders did not prevent access to the Insured locations.

74.

COVID-19 clearly does not constitute **Fungi**, under Section 7.23 of the Policy or **Spores**, under Section 7.53 of the Policy, as Zurich contended in its August 19, 2020 denial.

75.

By letter dated October 29, 2020, Plaintiffs responded to and refuted each of Zurich's bases for its continued denial of coverage.

76.

By letter dated January 4, 2021, Zurich once again denied coverage under the Policy for Plaintiffs' TE/BI, Extra Expense, Civil Authority and other losses and continuing losses under the Policy due to COVID-19, the COVID-19 pandemic, the outbreak of COVID-19 within the City, the presence of COVID-19 in, on and at the Insured Locations, and the COVID-19 Orders. The bases of Zurich's continued denial of coverage under the Policy were the same bases that had been asserted in its initial denial and its August 19, 2020 denial, with the exception that in Zurich's January 4, 2021 denial, Zurich finally admitted that COVID-19 is not "**Fungi** or **Spores**" and is not excluded under the Policy's "Contamination" exclusion set forth in Section 3.03.01.01 of the Policy, as amended by the Louisiana Endorsement. The primary basis for Zurich's denial of coverage set forth in the January 4, 2021 letter continues to hinge on Zurich's contention that COVID-19 does not result in direct physical loss of or damage to property. Zurich also cited several exclusionary provisions that are not applicable.

77.

As stated in Paragraph 9 above, Section 1.01 of the Policy states that the Policy is an "all-risks" policy which covers losses from "all risks of direct physical loss or damage from any cause, unless excluded." Thus, COVID-19 is a covered cause of loss unless excluded.

78.

As Zurich has finally admitted, COVID-19 is *not* “**Fungi or Spores,**” as Zurich had claimed on more than one occasion and COVID-19 is *not* an excluded cause of loss under the Policy. In previously claiming that COVID-19 is excluded under the Policy, Zurich relied on definitions of “Contamination (Contaminated) and “Contaminants” that were superseded and replaced in the Policy by the Louisiana Amendatory Endorsement to the Policy (the “Louisiana Endorsement”), which became applicable to policies issued by Zurich in Louisiana on January 1, 2018. Accordingly, COVID-19 is a Covered Cause of Loss.

TE/BI Coverage under § 4.01.01 of the Policy

79.

Section 4.01.01 of the Policy provides coverage for TE losses. TE losses are losses of business income (BI). Section 4.01.01 states that:

The Company will pay for the actual Time Element loss the Insured sustains as provided in the Time Element Coverages, during the Period of Liability. The Time Element loss must result 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...caused by a **Covered Cause of Loss** at the **Location**....

80.

The Policy does not define “direct physical loss,” nor does it define any components of the phrase “direct physical loss.” The Policy also does not define “damage.” Accordingly, under Louisiana law (LSA-C.C. Article 2047) these terms must be given their ordinary and generally prevailing meanings.

81.

Section 4.01.01 of the Policy covers “direct physical loss of” *or* “damage to” Covered Property at an Insured Location from a Covered Cause of Loss. The terms are distinct and are used in the disjunctive. As used in § 4.01.01, “direct physical” modifies “loss of,” but not “damage to.” Had the Policy intended to cover only “physical” damage, or “direct physical” damage, it would have so stated. Accordingly, “damage” does not refer only to physical damage or alteration of property but can occur in the absence of physical alteration of the insured property.

82.

COVID-19 is a physical substance that lives on and is active on inert physical surfaces for indeterminate periods of time and is also emitted into the air. It is transmitted by touching surfaces on which the virus has landed and attached and through the air.

83.

It is generally accepted within the scientific and medical communities that COVID-19 can be carried and transmitted through the air and onto physical surfaces by individuals who have no symptoms of COVID-19.

84.

COVID-19 was widespread in the City in the months of March, April and May 2020 and has continued to be present in the City thereafter at varying levels. Since at least November 2020 the virus has again become widespread throughout the City.

88.

Customers, employees, staff and other visitors to the Insured Locations other than the Infected Employee were or may have been infected with COVID-19 prior to, on and after March 15, 2020 when Plaintiffs became aware that the Infected Employee had tested

positive for COVID-19. Thus, COVID-19 was physically present in, on and at the Insured Locations prior to, on and after March 15, 2020.

89.

COVID-19 was physically present in, on and at the Insured Locations prior to, on and after March 15, 2020 when Plaintiffs were notified that an employee had tested positive for COVID-19. COVID-19 attached to surfaces in the Insured Locations and was also present in the air at the Insured Locations prior to, on and after March 15, 2020. As a result, Plaintiffs were forced to suspend and/or dramatically reduce all operations in order to prevent physical damages to the Insured Locations resulting from the presence or proliferation of COVID-19 and the physical harm it could cause persons present there.

90.

The presence of COVID-19 in, at, on and around the Insured Locations deprived Plaintiffs of the use of the Insured Locations because it rendered them unsafe, uninhabitable and unusable, which resulted in a slowdown or cessation of Plaintiffs' business as contemplated in the Policy.

91.

As a result of the actual presence of COVID-19 in, at and on the Insured Locations, the Insured Locations suffered direct physical loss and damage, as contemplated in § 4.01 of the Policy. Accordingly, there is coverage under § 4.01 for Plaintiffs' TE/BI, Extra Expense and other losses resulting from COVID-19, beginning at least by March 15, 2020 and continuing and extending, pursuant to § 4.02.02, until such time as COVID-19 no longer presents a threat to Plaintiffs' Insured Locations, their employees, staff and customers, and Plaintiffs can reopen the Insured Locations at 100% occupancy.

TE/BI Coverage Resulting from Orders of Civil Authority under § 5.02.03

92.

Section 5.02.03 of the Policy provides a “Special Coverage” for losses resulting from orders of civil authorities. It states:

The Company will pay for the actual Time Element loss sustained by the Insured...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 [5 miles] of the Insured’s Location....

93.

The language of § 5.02.03 differs from the language of § 4.01.01 in that § 5.02.03 does not require that the civil authority orders causing the Suspension be in response to “direct physical loss of or damage to” property, but that the orders be issued in response to “direct physical loss of or damage *caused by*” a Covered Cause of Loss.

94.

As in § 4.01.01, the terms “direct physical loss of” and “damage caused by” are stated in the disjunctive in § 5.02.03 and “direct physical” qualifies “loss of,” but not “damage caused by.”

95.

The provisions of § 5.02.03 cover damage “caused by” a Covered Cause of Loss.” Had the Policy intended to impose a requirement of “physical” damage caused by a Covered Cause of Loss or “direct physical” damage caused by a Covered Cause of Loss, it would have so stated. Accordingly, the “damage caused by a Covered Cause of Loss”

language in Section 5.02.03 does not require physical destruction of or tangible physical alteration to property.

96.

Both the Governor and the Mayor have issued the COVID-19 Orders in response to the COVID-19 pandemic beginning in mid-March 2020 and continuing throughout the COVID-19 pandemic. A specific purpose for which the COVID-19 Orders were entered was and is to preserve and protect property within the State and City and prevent property from becoming contaminated with COVID-19.

97.

COVID-19 was physically present throughout the City at least by March 9, 2020 and became progressively pervasive throughout the City, including in and on property located in the City, including the Insured Locations, from that point forward until at least mid-May 2020. COVID-19 has remained constantly present in the air and in and in and on property throughout the City, including the Insured Locations, since March 9, 2020. In the fall of 2020, positive COVID-19 cases within the City again began to spike, prompting the Governor to return the State to the Phase 2 Guidelines, beginning November 25, 2020 and the Mayor to return the City to the Phase 1 Guidelines beginning January 6, 2021 in order to minimize the damage to the health and safety of individuals within Louisiana and the City, as well as to minimize COVID-19 contamination in, at and on property located within the State and the City, including the Insured Locations. COVID-19 remains a real and present threat to the health of the citizens of the City and to the safety of persons and property throughout the City.

98.

COVID-19 damaged and continues to damage property in the City, including the Insured Locations and property in the immediate vicinity to the Insured Locations, by being present in the air, being present on and remaining on surfaces and being present in and on buildings, thereby rendering them unsafe and unfit for their intended uses.

99.

The COVID-19 Orders were issued by the Governor and the Mayor to prevent “direct physical loss of or damage caused by a Covered Cause of Loss to property not owned, occupied, leased or rented to the Insured or insured under the Policy,” in the immediate vicinity of the Insured Locations.

100.

The COVID-19 Orders completely closed and shut down all properties and businesses within the City deemed non-essential beginning on March 16, through May 16, 2020.

101.

Because COVID-19 is a deadly virus that is pervasive and can survive on surfaces for indeterminate periods of time, any location where two or more people can congregate is within the COVID-19 disaster area.

102.

The COVID-19 Orders prohibited access to the Insured Locations. The Policy does not specify parties to whom access must be prohibited as a result of civil authority in order to trigger coverage under Section 5.02.03 of the Policy. Section 5.02.03 of the Policy does

not require that prohibition of access to the Insured Locations by orders of civil authority must be complete or total.

103.

As a direct result of the COVID-19 Orders, Plaintiffs suffered a necessary Suspension of their business activities within the meaning of § 7.56.01 of the Policy, which defines “Suspension” as a slowdown of business or a cessation of business.

104.

The COVID-19 Orders prevented Plaintiffs from conducting their business of providing on-site, in-restaurant dining by prohibiting customers from entering Plaintiffs’ restaurants for that purpose. Although the COVID-19 Orders allowed access to the Insured Locations for “take out” and “delivery” Plaintiffs’ customers were still prohibited from accessing the Insured Locations due to orders of civil authority because “take-out” customers could not enter Plaintiffs’ restaurants and sit down and consume a meal and “delivery” by definition does not involve customers entering the restaurants.

105.

Plaintiffs incurred and continue to incur a necessary slowdown or shutdown of their business activities at the Insured Locations as a result of orders of civil authorities issued in response to direct physical loss of or damage caused by COVID-19, a Covered Cause of Loss, to property in the immediate vicinity of the Insured Locations, that prohibit access to the Insured Locations and Plaintiffs’ losses are covered under § 5.02.03 of the Policy.

Extra Expense Coverage under § 4.02.03

106.

Section 4.02.03 of the Policy provides coverage for the “reasonable and necessary Extra Expenses incurred by the Insured...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...at a **Location.**”

107.

As a result of the physical presence of COVID-19 in the air and on surfaces inside the Insured Locations Plaintiffs incurred expenses and additional costs required to make the Insured Locations as safe as possible for its employees, staff and customers once the COVID-19 Orders permitted the restaurants to once again offer limited and diminished dine-in services, including the additional costs of training employees, cleaning, printing, signage, masks, hand sanitizers and other costs. These additional expenses, which are on-going, are covered under § 4.02.03 of the Policy.

The Policy is Ambiguous

108.

Section 1.01 of the Policy contains the Insuring Agreement, which is the umbrella under which all other insuring provisions of the Policy fall. It provides, in pertinent part:

This Policy insures against direct physical loss of or damage caused by a Covered Cause of Loss to Covered Property at an Insured Location...all subject to the terms, conditions and exclusions stated in this policy.

109.

In § 1.01 of the Policy, as well as all other applicable sections of the Policy, the language is disjunctive. The Policy covers “direct physical loss of,” **or** “damage caused by” a “Covered Cause of Loss to” Covered Property....” The object of “direct physical loss of,” as set forth in § 1.01 is “Covered Cause of Loss to Covered Property.” It is nonsensical, however, to read the Policy in that manner. The only reading of the phrase that makes sense is to read it as providing that the Policy covers “direct physical loss of...Covered Property [caused by a Covered Cause of Loss]” **or** “damage *caused by a Covered Cause of Loss.*”

110.

Although Zurich has contended otherwise in its letters denying coverage under the Policy for DBC’s TE/BI losses, damage, as used in § 1.01, as in all other sections of the Policy is not qualified by “direct physical” and is not limited to damage that results in physical alteration of the Insured Locations. Alternatively, to the extent that the Policy could be read to require that “damage” is qualified by “direct physical” then there are two equally reasonable interpretations of the then the term, rendering it ambiguous.

111.

Section 1.01 of the Policy states that the Policy covers “damage *caused by a Covered Cause of Loss,*” where a “Covered Cause of Loss” is defined in § 7.11 of the Policy as “[a]ll risks of direct physical loss or damage from any cause, unless excluded.” Section 1.01 does not say that the Policy covers “damage **to** Property” or “damage **to** Covered Property,” but rather, “damage from any cause.” Nor does § 7.11 require physical alteration of property in order for there to be “damage from any cause.”

112.

The phrase “direct physical loss of or damage caused by a Covered Cause of Loss, to Covered Property,” set forth in the Insuring Agreement of § 1.01 of the Policy is the same language used throughout the Policy, although not in § 4.01.01. In particular, this language is used in §§ 4.02.02 (Extra Expense) and 5.02.03 (Orders of Civil and Military Authority), both of which deal with TE/BI losses.

113.

The phrase “direct physical loss of or damage caused by a Covered Cause of Loss to Covered Property” found in the Insuring Agreement of § 1.01 of the Policy is also used in numerous other sections of the Policy, including §§ 5.02.05 (Contingent Time Element), 5.02.07 (Decontamination Costs), 5.02.08 (Deferred Payments), 5.02.09 (Errors and Omissions), 5.02.10 (Expediting Costs), 5.02.11 (Fine Arts), 5.02.14 (Increased Cost of Construction), 5.01.15 (Ingress/Egress), 5.02.16 (International Interdependency), 5.02.17 (Land and Water Contaminant Cleanup, Removal and Disposal), 5.02.18 (Land Improvements), 5.02.19 (Miscellaneous Personal Property), 5.02.20 (Miscellaneous Unnamed Locations), 5.02.21 (Newly Acquired), 5.02.22 (Off Premises Service Interruption Property Damage and Time Element Loss), 5.02.26 (Research and Development), 5.02.30 (Transit), 5.02.32 (New Construction and Additions), 5.03.01 (Breakdown of Equipment), 5.03.02 (Earth Movement), 5.03.03 (Flood), and 5.03.04 (Named Storm).

114.

Under Louisiana law an insurance policy is to be read as a whole and each provision must be read in light of the other provisions so that each is given meaning and one portion

of the policy is not construed separately at the expense of other provisions. *Peterson v. Schimek*, 98-1712 **5 (La.3/2/1999), 729 So.2d 1024, 1029; LSA C.C. Art. 2050. Accordingly, terms in an insurance policy cannot mean one thing in one provision and something different in another.

115.

The fact that § 4.01.01 of the Policy sets forth a coverage trigger based on direct physical loss or damage that is different than almost all other Policy sections including those relating to TE/BI coverage (*e.g.*, §§ 1.01, 4.02.02, 5.02.03, 5.02.05, 5.02.15 and 5.02.22) renders the Policy ambiguous.

116.

Louisiana law provides that insurance policies should be construed to effect rather than deny coverage and ambiguous provisions are to be construed against the insurer. *Schimek*, **4-5; 729 So.2d at 1028-29.

117.

Under the pertinent Policy language, interpreted under applicable Louisiana law, it is consistent with the intent of the parties, as embodied in the Policy as a whole, that the Policy affords coverage for Plaintiffs' TE/BI, Extra Expense and other losses caused by any and all risks, in this case, by COVID-19, which is not an excluded cause of loss under the Policy, as Zurich has admitted.

118.

The Policy should be interpreted in favor of Plaintiffs, as the Insureds, to provide coverage for damage *caused by* COVID-19, a Covered Cause of Loss under the Policy, to the full extent of their losses.

No Exclusion Applies

119.

In Zurich's various letters denying coverage under the Policy for DBC's TE/BI losses, Zurich claims that coverage is excluded under § 3.03.01.03, which excluded "[l]oss or damage arising from the enforcement of any law, ordinance, regulation or rule regulating or restricting the...operation or other use...of any property."

120.

The exclusion set forth in § 3.03.01.03 is inapplicable because the exclusions set forth in Section 3.03.01 only apply "unless stated elsewhere in this Policy," which § 5.02.03 clearly does. Section 5.02.03 expressly provides a Special Coverage for losses resulting from the necessary Suspension of business operations at Insured Locations in resulting from orders of Civil or Military Authority issued in response to direct physical loss or damage caused by a Covered Cause of Loss at locations in proximity to the Insured Locations. The COVID-19 Orders fall within the ambit of § 5.02.03.

121.

Zurich has also claimed in its denial letters that coverage is excluded under § 3.03.02.01 which excludes "[l]oss or damage arising from delay, loss of market, or loss of use" and under § 3.03.02.05 which excludes "[l]oss or damage resulting from the Insured's suspension of business activities except to the extent provided by this Policy."

122.

The exceptions set forth in §§ 3.03.02.01 and 3.03.02.05 are inapplicable because both apply only "unless specifically stated elsewhere in this Policy." The TE/BI coverage provisions, including §§ 4.01.01, 4.02.03 and 5.02.03, all of which provide coverage for

loss or damage resulting from the Insured's Suspension of business activities, are provisions that "specifically state[] elsewhere in [the] Policy."

123.

Zurich has also claimed in its denial letters that coverage is excluded under §§ 4.02.05.01.01 and 4.02.05.01.03, which exclude "[a]ny loss during any idle period that would have been experienced had the Suspension of business activities not occurred," including "when...operation, services...or any other business activities would have ceased, or would not have taken place or would have been prevented due to ...[a]ny reason other than physical loss or damage insured by this Policy."

124.

The exclusions set forth in §§ 4.02.05.01.01 and 4.02.05.01.03 do not apply. Plaintiffs would not have experienced any "idle period" had the necessary Suspension of its business activities had not occurred as a result of COVID-19 and the COVID-19 Orders. Further, Plaintiffs' losses were caused by direct physical loss or damage caused by a Covered Cause of Loss insured under the Policy.

125.

The premium paid by DBC to Zurich for Policy was based on Plaintiffs' intention and belief that should they incur TE/BI losses from any risk that caused their business activities to be suspended, in whole or in part, those losses would be covered under the Policy, including under the Special Coverages, unless the risk was specifically and expressly excluded under the Policy. COVID-19 is not an excluded risk under the Policy. None of the exclusionary provisions relied upon by Zurich as a basis for its denial of

coverage apply to Plaintiffs' claims under the Policy when the Policy is read as a whole, as required by law.

COUNT 1

(Declaratory Judgment)

126.

Except as they may be inconsistent with this Count 1, Plaintiffs reiterate and reaver each and every allegation set forth in Paragraphs 6 -125 as if set forth herein in their entirety.

127.

Plaintiffs are entitled to judgment declaring that COVID-19 is Covered Cause of Loss under the Policy.

128.

Plaintiff are entitled to judgment declaring that COVID-19 was present in, on and at the Insured Locations beginning at least by March 7, 2020.

129.

Plaintiffs are entitled to judgment declaring that COVID-19 caused direct physical loss and/or damage, as contemplated in the Policy's provisions covering TE/BI losses, including but not limited to §§ 1.01, 4.01.01, 4.02.03 and/or 5.02.03, resulting in a necessary Suspension of DBC's business activities at the Insured Locations, which Suspension has continued since that time, is continuing as of the date of filing this Complaint and will continue thereafter for an indeterminant amount of time.

130.

Plaintiffs are entitled to judgment declaring that the COVID-19 Orders were issued by the Governor and the Mayor, at least in part, to prevent direct physical loss of or damage caused by COVID-19, a Covered Cause of Loss under the Policy, to property throughout the City of New Orleans, and in particular, within the immediate vicinity of the Insured Locations, which resulted in a necessary Suspension of Plaintiffs' business activities, beginning on March 17, 2020 and which is on-going as of the date of the filing of this Complaint and will continue thereafter for an indeterminate amount of time.

131.

Plaintiffs are entitled to judgment declaring that the terms "direct physical loss," "direct physical loss of," "damage" and "damage caused by a Covered Cause of Loss" as used in the Policy are ambiguous and are to be interpreted in favor of the Plaintiffs, as Insureds, to effect coverage under the Policy.

132.

Plaintiffs are entitled to judgment declaring that the Policy provides coverage for Plaintiff's TE/BI losses.

COUNT 2

(Breach of Contract)

133.

Except as they may be inconsistent with this Count 2, DBC reiterates and reavers each and every allegation set forth in Paragraphs 6 -125 as if set forth herein in their entirety.

134.

Zurich has breached its contract, *i.e.*, the Policy, with Plaintiffs by denying coverage under the Policy for Plaintiffs' TE/BI, Extra Expense and other losses incurred as a result of COVID-19, a Covered Cause of Loss under the Policy, and as a result of the COVID-19 Orders.

135.

Since March 15, 2020, DBC has incurred TE/BI losses and Extra Expenses far in excess of the \$75,000 jurisdictional amount as a result of COVID-19 and the COVID-19 Orders and Zurich's denial of its TE/BI, Extra Expense, Civil Authority and other claims under the Policy. Plaintiffs are entitled to recover its damages consisting of its actual TE/BI losses, calculated in accordance with §§ 4.01 and 4.02.01 of the Policy and its Extra Expense losses, calculated in accordance with § 4.02.03 of the Policy, and any other losses under the Policy, in such amounts to be demonstrated at trial, together with interest thereon, from the date of judicial demand, until paid.

COUNT 3

(Breach of Duty of Good Faith and Fair Dealing)

136.

Except as they may be inconsistent with this Count 3, DBC reiterates and reavers each and every allegation set forth in Paragraphs 6 -125 as if set forth herein in their entirety.

137.

LSA-R.S. 22:1973(A) imposes a duty of good faith and fair dealing on insurers in adjusting claims and states that any insurer who breaches these duties shall be liable for any damages as a result of the breach.

138.

LSA-R.S. 22:1973(B) provides that it is a breach of the insurer's duties of good faith and fair dealing if the insurer misrepresents pertinent facts or insurance policy provisions relating to any coverages at issue.

139.

Zurich has breached its duty of good faith and fair dealing in the following particulars:

- a. Zurich denied coverage in April, 2020, in August, 2020 and in October, 2020 based on its contention that COVID-19 is not a Covered Cause of Loss under the Policy, despite the fact that in correspondence to Zurich, dated June 16, 2020, Plaintiffs pointed out that viruses, disease causing and illness causing agents had been specifically removed by Zurich from the definition of "Contaminants" and "Contamination" under the Policy through plain, unambiguous language of Section III (Paragraphs 1 and 2) of the Louisiana Endorsement. In fact, in its denial letter dated August 19, 2020, Zurich claimed, contrary to the provisions of its own Policy and contrary to any generally accepted definitions of the terms and all science, that viruses are the same thing as **Fungi or Spores**. It was not until January 4, 2021, after Plaintiffs had once again pointed out to Zurich in their correspondence of October 29, 2020, the

clear, unambiguous language of the Louisiana Endorsement relative to “Contaminants” and “Contamination” that Zurich finally admitted that COVID-19 is not excluded under the Policy;

- b. Based on its months’ long refusal to acknowledge that COVID-19 is a Covered Cause of Loss under the Policy, Zurich also persisted in asserting that the Exclusions set forth in §§ 3.03.01.03, 3.03.02.01, 4.04.05.01.01 and 4.02.05.01.01.03 excluded any of Plaintiffs’ claims for TE/BI and Extra Expense losses as a result of COVID-19 and the COVID-19 Orders;
- c. Zurich has contended since March 2020, and continues to contend, that Plaintiffs cannot demonstrate that COVID-19 or the COVID-19 Orders caused direct physical loss of or *direct physical* damage to Covered Property because, according to Zurich, there was no structural alteration of the Insured Locations. In making this contention, Zurich has simply ignored that the Policy distinguishes between “direct physical loss” and “damage” and that nowhere in the Policy is there a requirement that property suffer direct physical damage, and even if it did, Plaintiffs have satisfied that requirement;
- d. Even though Zurich has now acknowledged that COVID-19 is a Covered Cause of Loss under the Policy, it continues to press the Exclusions set forth in §§ 3.03.01.03, 3.03.02.01, 4.04.05.01.01 and 4.02.05.01.01.03 on the bogus assertion that COVID-19 does not cause direct physical loss of or *direct physical* damage to Covered Property, which, as stated above is not required under the Policy and even if it were, Plaintiffs have met that requirement;

- e. Zurich ignored and continued to ignore the fact that Plaintiffs informed Zurich in March 2020, by letter dated June 16, 2020 and again by letter dated October 29, 2020 that an employee of the Steakhouse had tested positive for COVID-19 on March 14, 2020, **before** any closure orders were issued by the Governor and the Mayor, stating in its latest denial letter dated January 4, 2021 that the employee tested positive **after** the closure orders were already in effect; and instead continues to maintain that the employee tested positive **after** the first of the Closure Orders went into effect; and,
- f. Zurich has made no effort to investigate and adjust Plaintiffs' particular claim(s) but instead is simply following a blanket policy within Zurich (and other providers of commercial all-risks insurance) to deny coverage under its all-risks policies regardless of the contents of the policy or whether COVID-19 contamination is a covered cause of loss by simply asserting that COVID-19 purportedly does not cause direct physical loss of or direct physical damage to property.

140.

LSA-R.S. 22:1973(C) provides that where the insurer has breached its duties of good faith and fair dealing, “[i]n addition to any general damages to which a claimant is entitled for breach of the imposed duty, the claimant may be awarded penalties against the insurer in an amount to exceed two times the damages sustained or five thousand dollars, whichever is greater.”

141.

Because Zurich has breached its duties of good faith and fair dealing in adjusting DBC's claim(s) under the Policy, Plaintiffs are is entitled to recover penalty damages from Zurich, in addition to the amount of its TE/BI and Extra Expense and other losses, in an amount of up to double the damages sustained by Plaintiffs as a result of Zurich's breach of its duties of good faith and fair dealing.

COUNT 4

(Professional Fees)

142.

Section 5.02.23 of the Policy provides that the Insured is entitled to recover the reasonable fees paid to professionals retained by the Insured, including accountants, auditors, or other professionals and the cost of using the Insured's employees, for producing and certifying any the Insured's books and records or other information or evidence required by the insurer resulting from the loss or damage payable under the Policy, for which the insurer has accepted liability.

143.

Should Plaintiffs be successful in this litigation they are entitled to recover the reasonable costs of professionals, including its attorneys, as well as the costs associated with using their employees, in preparing and presenting Plaintiffs' claims to Zurich, through and including January 4, 2021, the date of Zurich's last denial letter.

REQUEST FOR JURY TRIAL

Plaintiffs request trial by jury.

WHEREFORE, plaintiffs, Dickie Brennan & Company, L.L.C., Cousins Restaurants, Inc. and 716 Iberville, L.L.C. pray that after due proceedings are had, there be judgment herein in their favor and against defendants, Zurich American Insurance Company and American Guarantee and Liability Company, as follows:

1. Declaring that the Policy provides coverage to Plaintiffs for their Time Element (Business Interruption) losses due to COVID-19 and/or as a result of the orders issued by the Governor of the State of Louisiana and the Mayor of the City of New Orleans in response to COVID-19 in order to stem the spread of COVID-19 and to prevent damage to property within the City of New Orleans;
2. Awarding damages to Plaintiffs in the amount of the actual Time Element (Business Interruption) losses sustained by them, calculated in accordance with the provisions of the Policy, such amounts to be proven at trial, plus interest from the date of judicial demand until paid;
3. Awarding damages to Plaintiffs in the amount of the actual Extra Expenses incurred as a result of COVID-19 and/or the orders issued by the Governor of the State of Louisiana and the Mayor of the City of New Orleans, including but not limited to the extra expenses incurred for retraining of personnel, cleaning and sanitizing, providing disposable menus and providing masks to customers;
4. Finding that Defendants breached their duties of good faith and fair dealing in conjunction with adjusting Plaintiffs' claim(s) and awarding damages to Plaintiffs under LSA-R.S. 22:1973 as a result of Defendants' breach of their duties of good faith and fair dealing, as well as penalty damages under LSA-R.S. 22:1973(C) in an amount of up to two times the amount of damages

awarded to plaintiff under LSA-R.S. 22:1973, or five thousand dollars (\$5,000.00), whichever is greater;

5. In the event that Plaintiffs prevail in this litigation, awarding Plaintiffs the actual costs of the fees that it incurred from March 15, 2020 through and including January 4, 2021, the date of defendants' last denial letter, in conjunction with employing professionals, including accountants, auditors, attorneys and/or other professionals and the cost of using its employees in order to develop, prepare and present its claim(s) to defendants;
6. Ordering a jury trial in these proceedings; and,
7. Awarding Plaintiffs, Dickie Brennan & Company, L.L.C., Cousins Restaurants, Inc. and 716 Iberville, L.L.C., all general relief.

Respectfully submitted,

/s/ Gary J. Elkins

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PLEASE SERVE:

**Zurich American Insurance Company,
Through its Registered Agent for Service of Process:**

**Louisiana Secretary of State
8585 Archives Avenue
Baton Rouge, Louisiana 70809**

**American Guarantee and Liability Insurance Company
Through its Registered Agent for Service of Process:**

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