

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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ABP TRUST, HILL COUNTRY GALLERIA HOTEL	:
LLC, SCHAUMBURG ES LLC, AND AUBURN	:
HILLS ES LLC	:
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	:
Plaintiffs,	:
	:
- against -	:
	:
	:
NORTH AMERICAN ELITE INSURANCE	:
COMPANY,	:
	:
Defendant.	:
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**TO:** North American Elite Insurance Company  
c/o Nixon Peabody LLP  
900 Elm Street  
Manchester, NH 03101

**YOU ARE HEREBY SUMMONED** to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint. This is an insurance coverage action for declaratory judgment pursuant to CPLR § 3001, breach of contract, breach of the covenant of good faith and fair dealing, and violation of Section 349 of the New York Deceptive Practices Act.

Dated: New York, New York  
March 12, 2021

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**COMPLAINT**

ABP Trust, Hill Country Galleria Hotel LLC, Schaumburg ES LLC, and Auburn Hills ES LLC by and through their undersigned attorneys, make this Complaint for Declaratory Relief, Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, and violation of the New York Deceptive Practices Act, N.Y. Gen. Bus. Law § 349, against North American Elite Insurance Company in this Court pursuant to jurisdiction, venue and choice of law provisions in the relevant insurance policy as follows:

**I. INTRODUCTION**

1. Plaintiffs Hill Country Galleria Hotel LLC, Schaumburg ES LLC, and Auburn Hills ES LLC own and operate three Sonesta hotels located in Texas, Illinois and Michigan respectively.

2. These hotels are insured under the **LEADING EDGE ALL-RISK FORM** policy issued by North American Elite Insurance Company (“Elite Insurance” and/or the “insurer”)

from its offices in Kansas City, Missouri (hereinafter the “POLICY”).<sup>1</sup> The **First Named Insured** on this POLICY is ABP Trust et al.

3. The POLICY provides coverage against “all risks of direct physical loss or damage to INSURED PROPERTY while on INSURED LOCATION(S).”

4. These hotels (INSURED LOCATIONS) and the buildings and contents of the buildings (INSURED PROPERTIES) sustained direct physical loss and damage commencing on/about March 15, 2020 and continuing to present.<sup>2</sup>

5. Specifically, symptomatic, pre-symptomatic and asymptomatic guests and employees infected with COVID-19 (a highly contagious and potentially deadly communicable disease) have been on-site at each of these hotels on a frequent, regular and consistent basis over the course of this pandemic. Although symptomatic persons are quarantined or removed from the premises immediately, pre-symptomatic and asymptomatic individuals go undetected by even the most robust COVID-19 screening, control and mitigation protocols that the hotels use.

6. While on-site, these infected individuals shed SARS-CoV-2 (the causative agent of COVID-19) into the indoor air and onto surfaces throughout each of the properties.<sup>3</sup>

7. As a result of this shedding, infectious SARS-CoV-2 particles remain suspended in the indoor air and present on surfaces (both of which are INSURED PROPERTY under the POLICY) at the three hotels.

8. Due to the high-volume and high-turnover rate of guests at the hotels, the high-prevalence of infection rate among incoming guests and other persons, and the ongoing presence

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<sup>1</sup> Terms that are capitalized and/or bolded herein appear that way in the Policy.

<sup>2</sup> This case is not about purely economic losses incurred as a result of government orders.

<sup>3</sup> No legitimate medical journal (or any publication for that matter) has referred to the process of human shedding of infectious SARS-CoV-2 particles as “discharging...of CONTAMINANTS.”

of pre-symptomatic and asymptomatic infected guests, employees and other persons at the properties, COVID-19 and SARS-CoV-2 are consistently present at and constantly being re-introduced to the properties.

9. As a result, COVID-19 and infectious SARS-CoV-2 particles have been pervasive and omnipresent at the hotels over the course of this pandemic, and their complete elimination from the INSURED PROPERTY, including indoor air and surfaces, is physically impossible—that is, until the entire population is inoculated and/or herd immunity is achieved.

10. COVID-19 is transmitted by, among other means, inhalation of these airborne infectious SARS-CoV-2 particles, or contact with surfaces where they reside.

11. COVID-19 and SARS-CoV-2 cause direct physical loss and damage to the INSURED PROPERTY in a number of ways, including the following:

(a) Introduction of COVID-19 and SARS-CoV-2 to indoor air on-site at each of the hotels directly, physically, and tangibly changes, alters, and transforms the composition of the air—such that now it contains a concentration of SARS-CoV-2 infectious particles (whereas, before it did not).

(b) Presence of COVID-19 and SARS-CoV-2 at each of the hotels transforms the indoor air into a veritable petri dish for COVID-19 and a dangerous transmission mechanism for the communicable disease rendering the hotels uninhabitable, unsafe, unfit for occupancy, and/or totally inaccessible. This is the exact same impact that ammonia, asbestos fibers, toxic fumes (including carbon monoxide), pervasive odors and/or wildfire smoke have on air—all of which have been determined to cause direct physical loss or damage to property. The hotels have utilized extraordinary and extremely robust administrative and engineering controls to counteract and mitigate the

physical damage and loss caused by COVID-19 and SARS-CoV-2 as required by the POLICY. However, these controls, which significantly interfere and impede with business operations, have not (and cannot) entirely eliminate COVID-19 and SARS-CoV-2 from the property given the nature (airborne and on surfaces) and extent (pervasive and omnipresent) of the impact, damage, and loss.

(c) Presence of COVID-19 and SARS-CoV-2 at each of the hotels also transforms the surfaces in the exact same manner as described in subparagraph (b) above again rendering the hotels (absent extraordinary and extremely robust administrative and engineering controls that significantly interfere and impede with operations) uninhabitable, unsafe, unfit for occupancy, and/or totally inaccessible.

12. As a result of the actual presence of COVID-19 and SARS-CoV-2 on-site at each of the hotels, and the associated physical loss and damage experienced by each of the properties that is ongoing, all three hotels have experienced crippling business interruption losses (among other damages), which continue as efforts to repair, correct and mitigate the impact of COVID-19/SARS-CoV-2 and to return the property to operating conditions are underway.

13. Coverage is clear under various provisions in the POLICY, including but not limited to the following:

(a) **Communicable Disease Response**, which provides coverage for cleanup, removal and disposal of a COMMUNICABLE DISEASE (e.g. COVID-19) where (as here) it is actually present at the hotels, and an officer of the insured has “limited, restricted, or prohibited” access to the hotels because of it. (POLICY, p. 19)<sup>4</sup>

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<sup>4</sup> Attached as Exhibit A is a true and correct copy of the Policy.

(b) **Interruption by Communicable Disease**, which provides coverage for business interruption loss under the same conditions as the previous provision. (Id., p. 38)

(c) **Time Element**, which provides coverage for business interruption loss where (as here) the loss results from direct physical loss or damage to the INSURED PROPERTY. As described herein, including in par. 11 above, COVID-19 and SARS-CoV-2 cause direct physical loss and damage to the INSURED PROPERTY in several ways.

(d) Various other provisions of the POLICY, including but not limited to **Extra Expense** (id., p. 34), **Attraction Property** (id., p. 35), **Contingent Time Element** (id., p. 36), **Ingress/Egress** (id., p. 37), **Order of Civil or Military Authority** (id., p. 40) as described in more detail below.

14. The foregoing provisions are clearly triggered under the circumstances, yet the insurer failed to conduct any meaningful investigation of Plaintiffs' claim, ultimately rejected Plaintiffs' claim and denied coverage entirely and, perhaps most egregiously, after wasting the limited amount of time afforded to Plaintiffs to reach a claim settlement with Elite Insurance, the insurer rejected Plaintiffs' reasonable request to toll the POLICY's twelve (12) month suit limitation provision in an apparent attempt to force Plaintiffs to abandon its claim or incur the substantial cost of filing this suit.

15. The insurer's purported "investigation" into Plaintiffs' claim was a sham from the start. In response to Plaintiffs' June 3, 2020 notice of claim, the insurer's designated adjuster

(Engle Martin & Associates) sent Plaintiffs a list of questions, several of which it knew were impossible to answer and were solely designed to lead to one result: denial of the claim.

16. The adjuster and the insurer concluded their sham “investigation” and ultimately denied the claim on December 23, 2020—a little less than three months before a time limit in the POLICY expired, which the insurer would certainly have claimed acted as a statute of limitations to filing a lawsuit had Plaintiffs not done so.

17. In its denial, the insurer trumpets the POLICY’s “CONTAMINANTS” exclusion, which clearly and obviously does not apply for multiple reasons, including that COVID-19 (an idiopathic disease) and SARS-CoV-2 (its causative agent) in common parlance are not CONTAMINANTS, and they most certainly are not the result of “discharge, dispersal, seepage, migration, release or escape.” It is intellectually dishonest for the insurer to suggest otherwise.

18. Under the circumstances, Plaintiffs (quite reasonably) asked the insurer to enter into a tolling agreement, which would have allowed it more time to demonstrate the merits of its claim to the adjuster—a request that the insurer denied thereby forcing Plaintiffs to file this lawsuit.

19. The insurer’s conduct summarized above which, based on information and belief, has been systematically replicated by the insurer with other similarly damaged policyholders, constitutes a breach of contract, breach of the covenant of good faith and fair dealing, and bad faith and deceptive trade practices in violation of New York law warranting an award of multiple damages and legal fees.



## II. JURISDICTION AND VENUE

20. A declaratory judgment action is sought in this Court pursuant to CPLR § 3001 and under Judiciary Law § 140-b.

21. Personal jurisdiction over Elite Insurance is proper pursuant to CPLR § 301. The POLICY provides that Elite Insurance irrevocably submits to the exclusive jurisdiction of the Courts of the State of New York and that Elite Insurance expressly waives all rights to challenge or otherwise limit such jurisdiction.

22. Venue for this action is proper in this Court pursuant to CPLR § 501 under the exclusive forum provision of the POLICY.

23. Venue for this action also is proper in this county pursuant to CPLR § 503(a), as the county designated by Plaintiff, because none of the parties reside in the state and no substantial part of any events or omissions giving rise to the claim occurred in the state.

## III. PARTIES

24. ABP Trust is a Maryland statutory trust that has a principal office at Two Newton Place, 255 Washington Street, Newton, Massachusetts.

25. Hill Country Galleria Hotel LLC is a Texas limited liability company with a principal place of business at Two Newton Place, 255 Washington Street, Newton, Massachusetts.

26. Schaumburg ES LLC is a Maryland limited liability company with a principal place of business at Two Newton Place, 255 Washington Street, Newton, Massachusetts.

27. Auburn Hills ES LLC is also a Maryland limited liability company with a principal place of business at Two Newton Place, 255 Washington Street, Newton, Massachusetts.

28. Upon information and belief, Elite Insurance is a property and casualty insurance company organized and existing under the laws of the State of New Hampshire and licensed to do business in the State of New York.

#### **IV. BACKGROUND**

29. The three limited liability companies own and operate three Sonesta hotels: Sonesta Bee Cave (located in Austin, Texas); Sonesta ES Suites Chicago – Schaumburg (located in Schaumburg, Illinois); and, Sonesta ES Suites Auburn Hills (located in Auburn Hills, Michigan).

##### **A. Sonesta Bee Cave**

30. The Sonesta Bee Cave consists of an approximately 196,700 sq./ft. building, with a total of 195 hotel rooms and 3 convention rooms. There are approximately 101 employees at this facility.

31. Over the course of an average year (i.e., non-COVID-19), there are approximately 73,904 registered guests at this hotel, which equates to 202 guests per-day on-site. The average rate of occupancy is 73%.

##### **B. Sonesta ES Suites Chicago – Schamburg**

32. The Sonesta ES Suites Chicago – Schamburg consists of an approximately 82,588 sq./ft. building, with a total of 112 hotel rooms. There are approximately 16 employees at this facility.

33. Over the course of an average year (i.e., non-COVID-19), there are approximately 48,384 registered guests, which equates to 133 guests per-day on-site. The average rate of occupancy is 66.4%.

**C. Sonesta ES Suites Auburn Hill**

34. The Sonesta ES Suites Auburn Hill consists of an approximately 77,874 sq./ft. building, with a total of 118 hotel rooms. There are approximately 16 employees at this facility.

35. Over the course of an average year (i.e., non-COVID-19), there are approximately 38,819 registered guests, which equates to 106 guests per-day on-site. The average rate of occupancy is 68.2%.

**D. The POLICY**

36. The POLICY that Elite Insurance sold to Plaintiffs is an “all-risk” insurance policy, **Policy Number:** NAP 2003549 00.

37. Specifically the POLICY provides that it “insures all risks of direct physical loss or damage to INSURED PROPERTY while on INSURED LOCATION(S) provided the physical loss or damage occurs during the term of this POLICY.” (Id, p. 1/67) The **Policy Period** is June 30, 2019 through June 30, 2020. (Id. p. 7)

38. The three Sonesta hotels named above are on the Schedule of LOCATION(S) and, therefore, are INSURED LOCATION(S). (see id., p. 61)

39. INSURED PROPERTY is defined by the POLICY to include “[r]eal property” and “[p]ersonal property” owned by the Insured. (Id., p., 17). Accordingly, the hotel buildings and their contents belonging to the Insured (including the indoor air and all fixtures, equipment, furniture, etc.) are INSURED PROPERTY. (See id.)

40. As used in the POLICY, the term “physical loss” is separate, distinct, and has an independent meaning from the phrase “damage to” INSURED PROPERTY while on INSURED LOCATION(S).

### 1. Communicable Disease Response

41. The POLICY has a coverage extension for **Communicable Disease Response**. (Id., p. 19). It provides: “[i]f an INSURED LOCATION has the actual presence of COMMUNICABLE DISEASE and access to such INSURED LOCATION is limited, restricted or prohibited by: a. an order of an authorized governmental agency regulating the actual not suspected present of COMMUNICABLE DISEASE; or b. a decision of an Officer of the Insured as a result of the actual not suspected presence of COMMUNICABLE DISEASE.” (Id.)

42. This provision “covers the reasonable and necessary costs incurred by the Insured at such INSURED LOCATION with the actual not suspected present of COMMUNICABLE DISEASE for the: a. cleanup, removal and disposal of the actual not suspected presence of COMMUNICABLE DISEASES from INSURED PROPERTY....” (Id.)

### 2. Interruption by Communicable Disease

43. The POLICY has another coverage extension for **Interruption by Communicable Disease**. (Id., p. 38) It has the same the Communicable Disease Response provision sited in par. 13 above.

44. This provision “insures loss of **Gross Earnings** ... and **Extra Expense** incurred by the Insured during the **Period of Liability** at such INSURED LOCATION with the actual not suspected presence of COMMUNICABLE DISEASE.” (Id.)

45. Both of the foregoing provisions provide sublimited coverage of \$250,000. (Id. p. 10)

### 3. Time Element

46. The POLICY affords for coverage for business interruption loss up to \$40,000,000. (Id. p. 9) It provides: “[t]his POLICY insures TIME ELEMENT loss during the

**Period of Liability** directly resulting from direct physical loss or damage insured by this POLICY to INSURED PROPERTY at INSURED LOCATION(S) . . . subject to all terms and conditions within this POLICY.” (Id. p. 30)

47. The loss recoverable is **Gross Earnings**, which is defined as “the Actual Loss sustained by the Insured due to the necessary interruption of the Insured’s business during the **Period of Liability** . . . less all charges and expenses that do not, or did not necessarily, continue during such interruption.” (Id.)

48. The **Period of Liability** for Time Element coverage is “[f]or building and equipment, the period of time: I. starting on the date of the physical loss or damage insured by this POLICY to INSURED PROPERTY; and II. ending when with due diligence and dispatch the building and equipment could be repaired or replaced with current materials of like size, kind and quality and made ready for operations; under the same or equivalent physical and operating conditions that existed immediately prior to such physical loss or damage.” (Id., p. 32)

#### 4. Other Relevant Coverages

49. The POLICY affords various other relevant coverages (with different sublimits) including the following.

50. It provides coverage for **Extra Expense**, which are defined as “reasonable and necessary extra costs incurred by the Insured during the **Period of Liability** as respects the following: a. extra costs to temporary continue as nearly normal as practicable the conduct of the Insured’s business . . . .” (Id., p. 34)

51. It provides coverage for **Attraction Property**, which insures the “loss of **Gross Earnings** . . . and **Extra Expense** incurred by the Insured directly resulting from direct physical loss or damage as insured by the POLICY to property of the type insured, but not owned or

operated by the Insured, that directly attracts business to an INSURED LOCATION(S).” (Id., p. 35)

52. It provides coverage for **Contingent Time Element**, which insures the “loss of **Gross Earnings . . . and Extra Expense** incurred by the Insured during the **Period of Liability** directly resulting from direct physical loss or damage insured by this POLICY to any property . . . at any LOCATION(S) of suppliers or customers . . . .” (Id., p. 36)

53. It provides coverage for **Ingress/Egress**, which insures the “loss of **Gross Earnings . . . and Extra Expense** incurred by the Insured due to the necessary interruption of the Insured’s business, provided that: a. the interruption directly results from the prevention of direct ingress to or direct egress from INSURED LOCATION(S), whether or not INSURED PROPERTY at such INSURED LOCATION(S) is damaged; and (b) the prevention above is caused by direct physical loss or damage as insured by this POLICY to any property . . . .” (Id., p. 37)

54. It provides coverage for **Order of Civil or Military Authority**, which insures the “loss of **Gross Earnings . . . and Extra Expense** incurred by the Insured due to the necessary interruption of the Insured’s business, provided that: a. the interruption directly results from an order of civil or military authority that prohibits partial or total access to INSURED LOCATION(S); and b. the order referenced above is caused by direct physical loss or damage as insured by this POLICY to property . . . .” (Id., p. 40)

## 5. The Contamination Exclusion

55. The POLICY excludes “loss or damage due to the discharge, dispersal, seepage, migration, release or escape of CONTAMINANTS . . . .” (Id., p. 45)

56. The POLICY defines CONTAMINANTS as “[m]aterial that may be harmful to human health, wildlife or the environment. CONTAMINANTS include any impurity, solid, liquid, gaseous or thermal irritant or pollutant, poison, toxin, pathogen or pathogenic organism, disease-causing or illness-causing agent, asbestos, dioxin, polychlorinated biphenyls, agricultural smoke, agricultural soot, vapor, fumes, acids alkalis, chemicals, bacteria, virus, vaccines, waste and hazardous substances . . . .” (Id. p. 60).

**E. COVID-19/SARS-CoV-2 Was Actually Present and Actually Caused Physical Loss and Damage to Property**

57. COVID-19 (the communicable disease) and SARS-CoV-2 (its causative agent) have been continuously present (and regularly reintroduced) at each of the hotels beginning on March 15, 2020 through the present day.

58. Employees at each of the hotels (Sonesta Bee Cave, Sonesta ES Suites Chicago – Schamburg, and Sonesta ES Suites—Auburn Hills) have had COVID-19 while working on the property.

59. Guests at each of the hotels have had COVID-19 while on-site. Specifically, between 58-77 guests with COVID-19 were on-site at Sonesta Bee Cave during the time period of March through December 2020; between 128-156 guests with COVID-19 were on-site at Sonesta ES Suites Chicago – Schaumburg during the same time period; and, between 41-58 guests with COVID-19 were on-site at Sonesta ES Suites Auburn Hills during the same time period.

60. These employees and guests shed infectious SARS-CoV-2 particles into the indoor air and onto surfaces throughout each of the hotels.

61. This causes direct physical loss and damage to the INSURED PROPERTY as described above.

62. As a result of the actual presence of COVID-19 and SARS-CoV-2 on-site at each of the hotels, and the associated physical loss and damage experienced by each of the sites, all three hotels have experienced crippling business interruption losses. Specifically, from March through December 2020, each of the hotels has experienced a substantially reduced average occupancy level: Bee Cave at 20%; Sonesta ES Suites Chicago – Schamburg at 54%; and Sonesta ES Suites Auburn Hills at 37%.

63. The business interruption losses due to the facts as alleged in the preceding paragraph (and elsewhere herein) are: \$3.9 million for Bee Cave; \$695,208 for Sonesta ES Suites Chicago – Schamburg; and \$946,314 for Sonesta ES Suites Auburn Hills.

64. These business interruption losses are ongoing as efforts to repair, control and mitigate the physical impact of COVID-19/SARS-CoV-2 at each of the hotels continue.

**F. F. The Physical Loss and Damage Caused by COVID-19 Triggers Multiple Coverages Under the POLICY**

65. **Communicable Disease Response and Communicable Disease Business Interruption** coverages are triggered by, among other things, the actual presence of COVID-19 on-site at the three hotels (Sonesta Bee Cave, Sonesta ES Suites Chicago—Schamburg, and Sonesta ES Suites Auburn Hills) and by an officer of Plaintiffs limiting, restricting or prohibiting access to each of the hotels as a result thereof. These coverages provide for recovery for the cleanup, removal and disposal of COVID-19/SARS-CoV-2.

66. Because COVID-19 was actually present at each of the three hotels and because an officer of Plaintiffs limited, restricted or prohibited access to each of the three hotels as a result of that actual presence, the POLICY's **Communicable Disease Response and Communicable Disease Business Interruption** coverages have been triggered.



67. The **Communicable Disease Response** and **Communicable Disease Business Interruption** coverages are non-exclusive, meaning that the POLICY does not limit coverage for direct physical loss or damage, or resulting **Time Element** loss, to only the **Communicable Disease Response** and **Communicable Disease Business Interruption** coverages.

68. Nothing in the **Communicable Disease Response** and **Communicable Disease Business Interruption** coverages provides that those coverages are the only coverage under the POLICY that may be triggered by COMMUNICABLE DISEASE.

69. **Time Element** coverage is triggered by “direct physical loss or damage insured by the POLICY . . . or as otherwise provided in this section . . .”

70. As alleged above, coverage is provided under the POLICY for, among other things, direct physical loss or damage caused by COMMUNICABLE DISEASE.

71. Direct physical loss or damage caused by COMMUNICABLE DISEASE is “direct physical loss or damage insured by this POLICY.”

72. **Time Element** coverage is triggered by the direct physical loss and damage caused by COVID-19 and SARS-CoV-2 at the three hotels as described above.

73. Because the three hotels sustained direct physical loss and damage caused by COVID-19 and SARS-CoV-2, the POLICY’s **Time Element** coverage has been triggered.

74. **Attraction Property** coverage is triggered the direct physical loss and damage caused by COVID-19 and SARS-CoV-2 (in the same manner that it causes physical loss and damage at the subject hotels) at properties that directly attract business to the three hotels.

75. Because properties that directly attract business to the three hotels sustained direct physical loss and damage caused by COVID-19 and SARS-CoV-2, the POLICY’s **Attraction Property** coverage has been triggered.

76. **Contingent Time Element** coverage is triggered by the direct physical loss and damage caused by COVID-19 and SARS-CoV-2 (in the same manner that it causes physical loss and damage at the subject hotels) at properties of suppliers and customers of the three hotels.

77. Because properties of suppliers and customers of the three hotels sustained direct physical loss and damage caused by COVID-19 and SARS-CoV-2, the POLICY's **Contingent Time Element** coverage has been triggered.

78. **Ingress / Egress** coverage is triggered by the prevention of direct ingress to and egress from the three hotels caused by direct physical loss and damage at the three hotels.

79. Because the prevention of direct ingress to and egress from the three hotels was caused by direct physical loss and damage caused by COVID-19 and SARS-CoV-2, the POLICY's **Ingress / Egress** coverage has been triggered.

80. **Order of Civil or Military Authority** coverage is triggered by the interruption to the business of the three hotels directly resulting from civil authority orders caused by direct physical loss or damage at the three hotels that prohibited partial or total access to the three hotels.

81. Because the three hotels sustained necessary interruption to their business directly resulting from civil authority orders issued caused by direct physical loss and damage caused by COVID-19 and SARS-CoV-2, with such orders prohibiting partial or total access to the insured hotels, the POLICY's **Order of Civil or Military Authority** coverage has been triggered.

82. Under the circumstances, Plaintiffs (quite reasonably) asked the insurer to enter into a tolling agreement, which would have allowed it more time to demonstrate the merits of its claim to the adjuster—a request that the insurer denied thereby requiring Plaintiffs to file this lawsuit.

83. The insurer's conduct constitutes, among other things, bad faith and deceptive trade practices warranting an award of multiple damages and legal fees.

**G. The POLICY's CONTAMINANTS Exclusion Does Not Apply**

84. The POLICY's CONTAMINANTS exclusion precludes coverage for certain "[m]aterials" that cause "[l]oss or damage due to [their] discharge, dispersal, seepage, migration, release or escape." (Id., pp. 45 & 60)

85. Plaintiffs' claim does not involve any "discharge, dispersal, seepage, migration, release, or escape" of any "[m]aterials." (Id.)

86. COVID-19 is an idiopathic pandemic that spreads through modes of viral transmission (i.e., shedding)—there was not, is not and never will be a "discharge, dispersal, seepage, migration, release or escape" of COVID-19 and/or of SARS-CoV-2.

87. In addition, Plaintiffs reasonably understood the CONTAMINANTS exclusion to apply to localized environmental contamination, such as discharge or seepage of hazardous waste or similar environmental pollution liabilities, and not to a COMMUNICABLE DISEASE (COVID-19) and its causative agent (SARS-CoV-2).

88. The CONTAMINANTS exclusion also cannot apply because it directly conflicts with certain of the POLICY's affirmative coverage grants.

89. The POLICY cannot simultaneously provide coverage for **Communicable Disease Response** (i.e., the clean-up of the causative agent—SARS-CoV-2), yet purport to simultaneously exclude the SARS-CoV-2.

90. Similarly, the POLICY cannot simultaneously provide coverage for **Interruption by Communicable Disease** (i.e., business interruption loss from COVID-19), yet purport to simultaneously exclude its causative agent—SARS-CoV-2.

91. Conflicting provisions within the POLICY cannot be read to negate certain coverages or in ways that render some coverage provisions mere surplusage. In New York, the words of the POLICY must be read in a manner that gives meaning to all language, and leaves no provision without force and effect. Otherwise, the coverage would be illusory and the provisions, when read together, would make no sense. Consistent with these rules of construction and interpretation, the CONTAMINANTS exclusion obviously and evidently does not apply to COVID-19/SARS-CoV-2.

92. To the extent Elite Insurance even tries to contend that the POLICY's CONTAMINANTS exclusion bars coverage for loss caused by COVID-19/SARS-CoV-2, the POLICY is, at best, ambiguous because it is susceptible to more than one reasonable interpretation and, therefore, must be construed in favor of coverage.

93. In addition, the insurance industry has known the risks associated with pandemics for more than a century. These risks have been even more pronounced and evident to Elite Insurance in recent decades due to SARS, Ebola, MERS, H1N1, and Zika.

94. In fact, the 2017 and 2018 Annual Reports of Elite Insurance's parent company, Swiss Re, explicitly acknowledged "pandemics" and their chance of impacting "the frequency, severity and development of insured claim events" among the "known and unknown risks, uncertainties and other factors" that may adversely impact the "operations, financial condition, solvency ratios, capital or liquidity positions or prospects" of Swiss Re, Elite Insurance, and other insurers.

95. As far back as 2009 and in subsequent years, Swiss Re's Annual Reports have recognized that "pandemics" may "expose the Group to unexpectedly large losses," which Swiss Re characterized as part of "the Group's ordinary course operations."

96. Because such risks are well-known to both Elite Insurance and insurers generally, there are exclusions in common usage in the insurance industry that could have unambiguously excluded losses caused by communicable diseases, viruses, and pandemics, without also covering such risks in the policies.

97. However, Elite Insurance, a sophisticated insurer, decided not to include any such exclusions in the POLICY it sold to Plaintiffs. To the contrary, the POLICY contains two express grants of coverage for **Communicable Disease Response** and **Communicable Disease Business Interruption** such that losses from COMMUNICABLE DISEASE are affirmatively covered and are of the type insured under the POLICY.

98. Furthermore, because the POLICY affirmatively grants coverage for **Communicable Disease Response** and **Communicable Disease Business Interruption**, neither affirmative coverage can reasonably be understood to be an exception to any exclusion.

99. At a minimum, the CONTAMINANTS exclusion is ambiguous as applied to claims, like Plaintiffs', arising from the presence of COVID-19/SARS-CoV-2. Under settled principles of insurance law, such ambiguous exclusions must be construed in favor of coverage for Plaintiffs and against Elite Insurance.

100. Elite Insurance cannot meet its heavy burden to prove that the CONTAMINANTS exclusion clearly and unmistakably applies to Plaintiffs' claim and is not subject to any other reasonable interpretation.

101. Furthermore, no other exclusion contained in the POLICY applies to Plaintiffs' claim.

#### **H. Elite Insurance's Bad Faith And Deceptive Conduct**

102. The foregoing facts clearly trigger coverage under these and other provisions of the POLICY—nevertheless, the insurer rejected Plaintiffs' claim, denied coverage entirely and,

perhaps most egregiously, refused to enter into a tolling agreement allowing the insured additional time to respond to the insurer's requests for information.

103. The insurer's "investigation" into Plaintiffs' claim was a sham from the start. In response to Plaintiffs' June 3, 2020 notice of claim, the adjuster (Engle Martin & Associates) sent Plaintiffs a list of questions, several of which it knew were impossible to answer and were solely designed to lead to one result: denial of the claim.

104. For example, Engle Martin & Associates asks: "[h]ave you discovered the COVID-19 virus physically present on any surfaces at your properties? If so, when was it so discovered, was it considered contagious at the time, and if so what steps were taken to eradicate it and when?" At the time Engle Martin & Associates and the insurer knew that: no test kits for surfaces (or air for that matter) were readily available to the general public; and, the only way to test for "contagious" viral particles would have been to utilize the services of a BSL level 3 lab, which were not available for private testing of this nature.

105. Engle Martin & Associates also asks: "[h]as anyone who has been physically present at your property(ies) tested positive for COVID-19?" At the time, Engle Martin & Associates and the insurer knew that PCR testing of individuals was done on an extremely limited basis (generally only in the healthcare setting) and antigen testing was not even commercially available yet.

106. Engle Martin & Associates and the insurer concluded their sham "investigation" and ultimately denied the claim on December 23, 2020—a little less than three months before a time limit in the POLICY expired, which the insurer will certainly claim acts as a statute of limitations to filing a lawsuit. The POLICY's "Contamination" exclusion, which the insurer trumpets in its denial of Plaintiffs' claim, clearly and obviously does not apply.

**COUNT I**  
**(Declaratory Relief)**

107. Plaintiffs repeat and reallege the allegations in the preceding paragraphs.

108. The POLICY described above is a valid and enforceable insurance contract.

109. Plaintiffs performed all of their obligations and conditions precedent to coverage under the POLICY, and any POLICY conditions or requirements have been satisfied, waived, excused, or are otherwise inapplicable.

110. The POLICY provides coverage for, among other things, business income losses and extra expenses that Plaintiffs incurred as a result of the interruption of its business caused by a covered cause of loss.

111. Plaintiffs submitted a claim for loss as a direct result of a covered cause of loss. Plaintiffs were denied coverage, or Elite Insurance repudiated its obligations to provide coverage, under the POLICY based on Elite Insurance's improper position that, among other things, Plaintiffs had not suffered any direct physical loss or damage to its covered properties as a result of the actual or suspected presence of COVID-19 and that any claim comprised of loss or damage due to COVID-19 is excluded under POLICY.

112. An actual, justiciable controversy exists between Plaintiffs and Elite Insurance concerning the availability and amount of coverage under the POLICY for Plaintiffs' claim.

113. The controversy between Elite Insurance and Plaintiffs is ripe for judicial review.

114. As a result, Plaintiffs seek a declaration from the Court that: (a) Plaintiffs' claims trigger the various coverage provisions identified above; (b) the POLICY covers Plaintiffs' claim; (c) Plaintiffs sustained direct physical loss or damage from a covered cause of loss under the POLICY; (d) no exclusion applies to bar or limit coverage for Plaintiffs' claims; and (e) granting any other declaratory relief useful to resolving the dispute between the parties.

**COUNT II  
(Breach of Contract)**

115. Plaintiffs repeat and reallege the allegations in the preceding paragraphs.

116. The POLICY is a valid and enforceable contract between Plaintiffs and Elite Insurance.

117. Plaintiffs performed all of their obligations under the POLICY, and any POLICY conditions or requirements have been satisfied, waived, excused, or are otherwise inapplicable.

118. Elite Insurance breached the POLICY by improperly denying coverage to Plaintiffs' claim or by otherwise repudiating Elite Insurance's obligations to cover Plaintiffs' losses and expenses as expressly required under the POLICY.

119. Plaintiffs have sustained and continue to sustain damages as a result of Elite Insurance's breach of the POLICY.

120. Plaintiffs are entitled to damages as a result of Elite Insurance's breach in an amount to be determined at trial, including compensatory and consequential damages, pre-judgment and post-judgment interest, attorneys' fees and costs, and any other costs and relief that this Court deems appropriate.

**COUNT III  
(Breach of the Covenant of Good Faith and Fair Dealing)**

121. Plaintiffs repeat and reallege the allegations in the preceding paragraphs.

122. Elite Insurance is required to act in good faith, abstain from deception, and practice honesty and equity in all dealings with its policyholders, including Plaintiffs, under the insurance policies it sells.

123. The business of insurance affects the public interest.

124. Elite Insurance owes a covenant of good faith and fair dealing to Plaintiffs in light of the insurance relationship created by the POLICY.



125. The covenant of good faith and fair dealing obligates each party to the contract to refrain from taking any action that would deprive the other of the benefits of the contract or to cause undue hardship or harm to the other party.

126. Elite Insurance's conduct described in this Complaint and otherwise in investigating, handling, and denying Plaintiffs' Claim under the POLICY constitutes bad faith.

127. Specifically, Elite Insurance acted in bad faith with respect to Plaintiffs by and through Elite Insurance's unreasonable, malicious, reckless, grossly negligent or intentional failure to adequately adjust Plaintiffs' Claim and refusal to pay Plaintiffs the benefits to which it is entitled under the POLICY.

128. Elite Insurance's reaction to Plaintiffs' claims was to press Plaintiffs to respond to overly burdensome, premature or unnecessary information requests in an attempt to create time-consuming and costly work, to dissuade Plaintiffs from pursuing its Claim, and to paint an inaccurate picture that Plaintiffs were somehow delaying Elite Insurance's investigation or not cooperating and that Elite Insurance was investigating the Claim and evaluating coverage in good faith. The unreasonable nature of those tactics is further demonstrated by the fact that, because Elite Insurance denies that the presence of COVID-19 amounts to physical loss or damage, Elite Insurance always intended to deny coverage regardless of Plaintiffs' responses to those inquiries.

129. In violation of its duties to Plaintiffs and as a result of Elite Insurance's gross negligence, Elite Insurance acted in bad faith by, among other acts and omissions:

- (a) unreasonably, maliciously, recklessly, or intentionally denying its obligations to pay benefits or by repudiating its obligations to pay benefits to Plaintiffs when it knew or should have known it had an obligation to provide insurance coverage;

(b) failing and refusing to pay covered loss under the POLICY without a reasonable or arguable basis to do so and with the knowledge or reckless disregard of its lack of reasonable or arguable basis to refuse coverage;

(c) unreasonably, maliciously, reckless, or intentionally delaying payment of insurance proceeds due and owed Plaintiffs under the POLICY;

(d) failing to conduct a fair, complete and proper investigation of Plaintiffs' Claim before denying coverage or repudiating its obligation to provide coverage; and

(e) breaching its promise of security to Plaintiffs by unreasonably and without justification reneging on the all-risk commercial property insurance policy benefits it promised to provide Plaintiffs, leaving Plaintiffs without the benefits of their insurance assets to operate their business during a pandemic.

130. The bad faith acts and omissions by Elite Insurance described above is the type of egregious disregard for the obligations specified by the broad, standard-form, all-risk POLICY and the rights entitled to Plaintiffs under Elite Insurance's standard-form, all-risk commercial property insurance policies that would result in foreseeable losses and damages to the policyholder as to require the imposition of consequential damages.

131. Upon information and belief, Elite Insurance's bad faith conduct described above was perpetrated for the purposes of placing Elite Insurance's own pecuniary interests ahead of those of Plaintiffs' and for withholding from Plaintiffs the rights and benefits to which they are entitled under the POLICY.

132. As a result of Elite Insurance's bad faith breach of its obligations under the POLICY, Plaintiffs have suffered and will continue to suffer substantial damages in an amount to be proven at trial, including additional loss of business income, extra expense, and attorneys'

fees that it would not otherwise have needed to pay had Elite Insurance made full payment of Plaintiffs' losses covered under the POLICY.

133. Those damages were a natural and probable consequence of Elite Insurance's breach, were or should have been foreseeable to Elite Insurance, and were reasonably contemplated by the parties because, for example, the widespread financial, operational, and liquidity risks associated with pandemics have been known to the insurance industry for decades and were explicitly recognized by Elite Insurance as risks that could impact the frequency, severity, and development of insured claim events, yet Elite Insurance, unlike other insurers, decided not to clearly exclude losses by communicable diseases, viruses, and pandemics from its broad, all-risk commercial property insurance policies.

134. Because Elite Insurance had recognized for years that pandemics may impact its own operations, financial conditions, solvency, and capital and liquidity positions or prospects, it was or should have been reasonably foreseeable at the time it issued the POLICY that the refusal to afford protection under the broad, all-risk policy it sold to Plaintiffs for those same risks would have immediate and dire financial consequences to Plaintiffs, including, but not limited to, attorneys' fees, expenses, and other consequential damages, all directly resulting from Elite Insurance's placing its own pecuniary interests ahead of its policyholder and forcing Plaintiffs into litigation to recover the benefits under the POLICY.

135. Plaintiffs are entitled to damages as a result of Elite Insurance's breach of the covenant of good faith and fair dealing, including compensatory and consequential damages, punitive damages, pre- and post-judgment interest, attorneys' fees and costs, and any other costs and relief that this Court deems appropriate.

**COUNT IV**  
**(Violation of N.Y. Gen. Bus. Law § 349)**

136. Plaintiffs repeat and reallege the allegations in the preceding paragraphs.

137. Plaintiffs, like the thousands of other businesses who enter into insurance contracts with Elite Insurance, are individual consumers of insurance products.

138. The POLICY is comprised of standard-form language that is designed and intended to be purchased by the public at large in the State of New York and elsewhere.

139. Elite Insurance routinely and commonly utilizes the same standard-form policy language in issuing other policies, such that Elite Insurance's acts and practices potentially affects similarly-situated consumers suffering losses arising from COVID-19 and have purchased policies from Elite Insurance with materially identical wording.

140. Elite Insurance's acts and practices in investigating, handling, and denying Plaintiffs and other policyholders' claims based on the same or similar policy language has a broad impact on insurance consumers at large.

141. In fact, other policyholders have filed lawsuits against Elite Insurance in New York (and elsewhere) raising coverage disputes involving COVID-19-related losses under Elite Insurance's all-risk commercial property insurance policy forms like the POLICY at issue in this action. Those other insurance coverage lawsuits allege, among other things, that Elite Insurance knew that its all-risk policies provided coverage for COVID-19-related losses but nevertheless denied claims without any genuine investigation, taking the same improper, blanket approach to denying claims as what occurred with Plaintiffs. Another lawsuit filed against Elite Insurance during the pandemic under the same "leading edge all-risk form" policy alleges that Elite Insurance employed a pattern of unreasonable delay throughout the claims adjustment process, denying payment without reasonable basis to do so, impairing the benefit of the bargain

purchased under the all-risk policy, and resulting in additional consequential damages to the policyholder's business.

142. Thus, the dispute in this action is not limited to a challenge regarding coverage made on the facts unique to Plaintiffs but rather relates to consumer-oriented conduct affecting the public at large.

143. Elite Insurance's consumer-oriented practices were materially misleading and deceptive, including when Elite Insurance failed to pay benefits due to Plaintiffs under the terms of the standard-form POLICY.

144. In addition to failing to pay benefits due under Elite Insurance's standard all-risk commercial property insurance policy forms, through the misleading and deceptive acts discussed herein, Elite Insurance engaged in a scheme to discourage or obstruct Plaintiffs from recovering under the POLICY.

145. As a result of Elite Insurance's consumer-oriented, materially misleading and deceptive acts or practices, Plaintiffs have suffered and will continue to suffer substantial damages in an amount to be proven at trial.

146. Plaintiffs are entitled to damages as a result of Elite Insurance's deceptive acts and practices, including compensatory and consequential damages, treble damages, punitive damages, pre- and post-judgment interest, attorneys' fees and costs, and any other costs and relief that this Court deems appropriate.

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Declare that:
  - (a) Plaintiffs' Claim triggers the various coverage provisions identified in this Complaint;
  - (b) the POLICY covers Plaintiffs' Claim;
  - (c) Plaintiffs sustained direct physical loss or damage from a covered cause of loss under the POLICY;
  - (d) no exclusion applies to bar or limit coverage for Plaintiffs' Claim; and
  - (e) granting any other declaratory relief useful to resolving the dispute between the parties;
2. Order Elite Insurance to provide coverage for Plaintiffs' Claim under the POLICY;
3. Award damages, including actual, compensatory, consequential, special, exemplary, and punitive damages, against Elite Insurance in an amount to be determined at trial;
4. Award pre-judgment, post-judgment, and statutory interest;
5. Award attorneys' fees and costs of suit incurred; and
6. Grant such other and further relief, including any equitable relief, as the Court deems just and proper.

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