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19 Attorneys for Plaintiffs  
20 Out West Restaurant Group Inc.; Cerca Trova Restaurant Group, Inc.;  
21 Cerca Trova Steakhouse, L.P.; and Cerca Trova Southwest Restaurant Group, LLC

22 UNITED STATES DISTRICT COURT  
23 NORTHERN DISTRICT OF CALIFORNIA

24 OUT WEST RESTAURANT GROUP  
25 INC.; CERCA TROVA RESTAURANT  
26 GROUP, INC.; CERCA TROVA  
27 STEAKHOUSE, L.P.; AND CERCA  
28 TROVA SOUTHWEST RESTAURANT  
GROUP, LLC,

Plaintiffs,

v.

AFFILIATED FM INSURANCE  
COMPANY,

Defendant.

CASE NO.:

**COMPLAINT AND DEMAND FOR  
JURY TRIAL**

**COMPLAINT**

1  
2 Plaintiffs OUT WEST RESTAURANT GROUP INC.; CERCA TROVA  
3 RESTAURANT GROUP, INC.; CERCA TROVA STEAKHOUSE, L.P.; and  
4 CERCA TROVA SOUTHWEST RESTAURANT GROUP, LLC (collectively, “Out  
5 West”), file this Complaint for damages, declaratory relief, and punitive damages  
6 against Defendant AFFILIATED FM INSURANCE COMPANY (“AFM”), alleging  
7 the following:

**INTRODUCTION**

8  
9 1. This diversity action arises from AFM’s improper investigation and  
10 refusal to pay Out West’s claim for insurance coverage under an “all risks” insurance  
11 policy that AFM sold to Plaintiff Cerca Trova Restaurant Group, Inc., the ultimate  
12 parent of the other Plaintiffs in this litigation.

13 2. Like many businesses throughout the country, Out West has sustained  
14 devastating monetary losses because of physical loss of and/or damage to, property  
15 from COVID-19 and government orders that resulted from same.

16 3. COVID-19, and what flowed therefrom, caused direct and/or imminent  
17 physical loss and/or damage to property and the AFM policy unambiguously provides  
18 coverage for Out West’s COVID-19 related losses.

19 4. Out West had a reasonable expectation that the AFM All Risks Policy  
20 would cover its COVID-19 related losses and promptly made a claim to AFM.

21 5. In response, AFM tried to wrongfully shoehorn Out West’s claim into a  
22 narrow and limited grant of coverage, while contending – without textual support in  
23 the Policy – that all other coverage is excluded.

24 6. In denying coverage, AFM ignored long accepted constructions of the  
25 operative insurance policy terms, and the well-established policy of California courts  
26 to, wherever reasonably possible, construe ambiguities in standard form policy  
27 wording against its drafter.

28 7. At a minimum, this would merely mean the policy terms would be

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1 ambiguous, in which case they would be construed in Out West's favor, as AFM's  
2 interpretation is not the only reasonable interpretation. The fact that decisions by  
3 federal court judges in *Studio 417, Inc., et. al. v. The Cincinnati Insurance Co.*, No.  
4 20-cv-03127-SRB (W.D. Mo. Aug. 12, 2020) and in *Urogynecology Specialist of*  
5 *Florida LLC v. Sentinel Insurance Co.*, No. 6:20-cv-1174 (M.D. Fla. Sept. 24, 2020),  
6 and by a New Jersey state court judge in *Optical Services USA/CI v. Franklin Mutual*  
7 *Insurance Co.*, No. BER-L-3681-20 (N.J. Super. Ct. Aug. 13, 2020) accepted the  
8 Policyholder's construction makes this construction *per se* reasonable.

9 8. By this action, Out West seeks to compel AFM to provide the insurance  
10 benefits it committed to provide when it sold the insurance policy. Further, given  
11 AFM's wrongful denial of coverage, its denial of Out West's claim without a  
12 reasonable investigation, its intentional misconstruction of the express terms of the  
13 insurance policy, its wrongful attempt to coerce Out West to forego a covered claim,  
14 and its flagrant disregard for California law, pursuant to which the policy provisions  
15 must be interpreted, Out West seeks punitive damages and other damages deemed  
16 appropriate by the Court.

### PARTIES

17  
18 9. Plaintiff Out West Restaurant Group, Inc. is a California restaurant  
19 management company with its principal place of business in San Diego. It is the  
20 exclusive franchisee of Outback Steakhouse restaurants in Arizona, Colorado,  
21 Nevada, and New Mexico, and the predominate franchisee in California, operating  
22 approximately 100 Outback Steakhouse restaurants across those states.

23 10. Plaintiff Cerca Trova Steakhouse, L.P. is a California limited partnership  
24 that holds the leases for all California restaurants. Its principal place of business is in  
25 San Diego, California.

26 11. Plaintiff Cerca Trova Southwest Restaurant Group, LLC is a Florida  
27 limited liability company that holds all of the leases for the non-California restaurants.  
28 Its principal place of business is in San Diego, California and its manager and

1 president resides in San Diego, CA. Cerca Trova Southwest Restaurant Group, LLC's  
 2 sole member is Cerca Trova Restaurant Group Holdings, Inc., a Delaware corporation  
 3 with its principal place of business in San Diego, California.

4 12. Plaintiff Cerca Trova Restaurant Group, Inc., ("Cerca Trova") is the  
 5 ultimate parent of the Out West entities. It is incorporated under the laws of the State  
 6 of Delaware and has its principal place of business in San Diego, California.

7 13. Defendant AFM is incorporated under the laws of the State of Rhode  
 8 Island, has its principal place of business in Johnston, Rhode Island, is licensed to do  
 9 business in California, maintains an office in Walnut Creek, California<sup>1</sup> and is  
 10 required to comply with California insurance requirements and law. AFM is a  
 11 member of the FM Global Group.<sup>2</sup>

## 12 JURISDICTION AND VENUE

13 14. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1332,  
 14 because the parties are completely diverse in citizenship and the amount in  
 15 controversy exceeds \$75,000 exclusive of interest and costs.

16 15. Venue is proper in this Court pursuant to 28 U.S.C. §1391(b)(1 and 2),  
 17 §1391(c)(2) and §1391(d) because AFM does business in California and is an  
 18 authorized property and casualty insurer in California, because AFM maintains an  
 19 office in Walnut Creek, California, and because a substantial part of the events or  
 20 omissions giving rise to the claim occurred, and/or a substantial part of property that is  
 21 the subject of the action is situated in, this District.

## 22 FACTUAL BACKGROUND

### 23 **A. Out West's Operations**

24  
 25 <sup>1</sup> *Find an AFM Office*, AFFILIATED FM, [https://www.affiliatedfm.com/report-contact-](https://www.affiliatedfm.com/report-contact-page/find-an-afm-office-in-the-united-states)  
 26 [page/find-an-afm-office-in-the-united-states](https://www.affiliatedfm.com/report-contact-page/find-an-afm-office-in-the-united-states) (last visited Sept. 29, 2020) (identifying a San  
 27 Francisco AFM office at 1333 N. California Blvd. Suite 200 Walnut Creek, California  
 94596).

28 <sup>2</sup> *Business Profile*, AFFILIATED FM, <https://www.affiliatedfm.com/about/business-profile>  
 (last visited Sept. 29, 2020).

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1 16. Out West operates approximately 100 Outback Steakhouse locations  
2 across Arizona, California, Colorado, Nevada, and New Mexico.

3 17. Outback Steakhouse is a chain of Australian-inspired steakhouse  
4 restaurants that is beloved worldwide for its steak cuts, chicken, ribs, seafood, pasta,  
5 and the famous Bloomin' Onion®.

6 18. Outback Steakhouse distinguishes itself by emphasizing consistently high  
7 quality delicious food delivering a warm, welcoming environment.

8 19. The freshness of Outback Steakhouse's food inventory is critical to its  
9 business operations and emblematic of its reputation and brand.

10 20. In addition, its excellent customer service and friendly and welcoming  
11 atmosphere at its physical locations are critical to its business operations, reputation,  
12 and brand.

13 21. Outback Steakhouses are not quick-service restaurants, "fast casual"  
14 restaurants, or fast food restaurants. Rather, Outback Steakhouse, and thus Out  
15 West's business, focuses on in-restaurant dining with in-house bars serving signature  
16 drinks.

17 22. The vast majority of each relevant Outback Steakhouse's physical space  
18 are dedicated exclusively to in-restaurant dining, and this accounts for the  
19 overwhelming bulk of Out West's revenues. Indeed, the restaurant dining rooms are  
20 designed to accommodate "a party of any size."<sup>3</sup>

21 23. The closure of Out West's in-restaurant dining rooms and in-house bars  
22 significantly impaired its business operations. As a result, the restaurants themselves  
23 were unable to be used for their intended purposes.

24 **B. COVID-19 as a Deadly Communicable Disease**

25 24. COVID-19 is a deadly communicable disease caused by the most  
26

27 <sup>3</sup> See, e.g., *Our Restaurants*, BLOOMIN' BRANDS INC.,  
28 <https://franchise.bloominbrands.com/global/brands/outback-steakhouse/our-restaurant> (last  
visited Sept. 29, 2020).

1 recently discovered coronavirus.<sup>4</sup>

2 25. On March 11, 2020, the World Health Organization (the “WHO”)
3 declared the COVID-19 outbreak a pandemic.<sup>5</sup>

4 26. As of September 29, 2020, COVID-19 has infected over 7 million people
5 in the United States and caused more than 204,000 deaths.<sup>6</sup> California has had over
6 802,300 confirmed cases of COVID-19, Colorado has had over 69,000 confirmed
7 cases of COVID-19, Arizona has had over 217,200 confirmed cases of COVID-19,
8 New Mexico has had over 28,800 confirmed cases of COVID-19, and Nevada has had
9 over 78,800 confirmed cases of COVID-19.<sup>7</sup>

10 **THE POLICY**

11 27. To protect itself from catastrophic losses, Out West’s parent company,
12 Cerca Trova Restaurant Group, Inc., purchased an insurance policy from AFM.

13 28. The AFM Policy issued to Out West is policy no. MN263 (the “AFM
14 Policy” or the “Policy”) and has an effective date of February 15, 2020 to December
15 1, 2020. A true copy of the Policy is attached as Exhibit A and incorporated herein *in*
16 *hac verbem*.

17 29. The AFM Policy is on AFM’s “proVision® 4100 Policy” form.

18 30. The Policy contains a “Location Schedule” that identifies 100 Out West
19 locations as insured locations, referred to as “described locations” in the Policy.

20 \_\_\_\_\_
21 <sup>4</sup> Press Release, Centers for Disease Control and Prevention (“CDC”), *First Travel-related*
22 *Case of 2019 Novel Coronavirus Detected in United States* (Jan. 21, 2020),
23 <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html> (last
visited Sept. 29, 2020).

24 <sup>5</sup> Heath Kelly, *The classical definition of a pandemic is not elusive*, 89 Bulletin of the World
25 Health Organization 7, at 540-41 (2011), <https://www.who.int/bulletin/volumes/89/7/11-088815/en/#:~:text=A%20pandemic%20is%20defined%20as> (last visited Sept. 29, 2020).

26 <sup>6</sup> CDC, *Cases in the U.S.* (last updated Sept. 27, 2020),
27 <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited
Sept. 28, 2020).

28 <sup>7</sup> CDC, *CDC COVID Data Tracker* (last updated Sept. 27, 2020),
<https://covid.cdc.gov/covid-data-tracker/#cases> (last visited Sept. 28, 2020).

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1           31. The Policy covers Out West for “all risks of physical loss or damage,”  
2 except as excluded, to property, as described in the Policy. (Ex. A at COMPLAINT-  
3 00005.) Thus all risks, not otherwise excluded, are covered causes of loss.

4           32. The Policy contains numerous different coverage parts, each with an  
5 applicable deductible and limit or sublimit of liability. The majority of the coverage  
6 parts are not mutually exclusive. Thus, a policyholder’s loss may trigger several  
7 different coverage parts.

8           **A. Named Insured**

9           33. The Policy identifies Cerca Trova Restaurant Group, Inc. as the Named  
10 Insured “and its wholly or majority owned subsidiaries and any interest which may  
11 now exist or hereinafter be created or acquired which are owned, controlled or  
12 operated by any one or more of those named insureds.” (Ex. A at COMPLAINT-  
13 00007.)

14           34. Cerca Trova Restaurant Group, Inc. wholly owns the other Plaintiffs.  
15 Accordingly, all Plaintiffs are Named Insureds as defined by the Policy.

16           35. The Policy provides up to \$100,000,000 total limit of liability, including  
17 any insured Business Interruption loss, as a result of any one occurrence, subject to  
18 any applicable sublimits. (Ex. A at COMPLAINT-00007.)

19           36. The substantial premium that AFM charged for the Policy was based on  
20 the nature of Out West’s business, which as stated above, was dedicated to in-  
21 restaurant dining at the 100 locations listed on the Policy’s Location Schedule.

22           37. The Policy provisions applicable to this case are standard form and were  
23 drafted by AFM.<sup>8</sup>

24  
25  
26 <sup>8</sup> See e.g., *proVision 4100 All-Risk Property Policy*, AFM, MEMBER OF THE FM GLOBAL  
27 GROUP, [https://www.affiliatedfm.com/property-coverage/-](https://www.affiliatedfm.com/property-coverage/-/media/74E064A2594B4B9B84D8ED8312DC80A3.ashx)  
28 [/media/74E064A2594B4B9B84D8ED8312DC80A3.ashx](https://www.affiliatedfm.com/property-coverage/-/media/74E064A2594B4B9B84D8ED8312DC80A3.ashx) (last visited Sept. 28, 2020) (“The  
proVision® 4100 policy was designed to simplify the interactions between AFM and our  
broker partners, creating winning solutions for clients.”).



1           **B.    AFM Issued the Policy in February 2020 Without a Pandemic or**  
 2           **COVID-19 Exclusion, Despite AFM's Knowledge of COVID-19**

3           38.    On January 21, 2020, the United States Centers for Disease Control  
 4 (CDC) confirmed the first case of the 2019 Novel Coronavirus in the United States.<sup>9</sup>

5           39.    On January 26, 2020, the CDC confirmed the first case of the 2019 Novel  
 6 Coronavirus in Arizona, specifically in Maricopa County.<sup>10</sup>

7           40.    By February 2, 2020, there were six confirmed cases of the 2019 Novel  
 8 Coronavirus in California.<sup>11</sup> That same week, the United States government  
 9 evacuated several planes full of Americans from China to military bases in Riverside  
 10 (within 60 miles of 13 insured locations), Fairfield (within 60 miles of 9 insured  
 11 locations), and San Diego, California (within 60 miles of 8 insured locations) for  
 12 quarantine.<sup>12</sup>

13           41.    On February 6, 2020, the first U.S. novel coronavirus death occurred in  
 14 Santa Clara County, California, suggesting that the virus had been in the community  
 15 and spreading for at least several weeks, if not months.<sup>13</sup>

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17 <sup>9</sup> *Supra* n. 6.

18 <sup>10</sup> Carrie Feibel, *Coronavirus Case Confirmed in Arizona, Bringing U.S. Total to 5*, NPR  
 19 (Jan. 26, 2020),  
 20 <https://www.npr.org/sections/goatsandsoda/2020/01/26/799726161/coronavirus-case-confirmed-in-arizona-bringing-u-s-total-to-5> (last visited Sept. 29, 2020).

21 <sup>11</sup> Ian Wheeler, *Orange County coronavirus patient released, in good condition, health officials say*, ORANGE COUNTY REGISTER (Feb. 4, 2020),  
 22 <https://www.ocregister.com/2020/02/04/risk-of-catching-coronavirus-in-so-cal-is-low-health-officials-say/> (last visited Sept. 29, 2020); *see also* Press Release, Cal. Dep't of Public  
 23 Health Office of Public Affairs, *Six Confirmed Cases of Novel Coronavirus in California*  
 24 (Feb. 2, 2020), <https://www.cdph.ca.gov/Programs/OPA/Pages/NR20-003.aspx> (last visited Sept. 29, 2020).

25 <sup>12</sup> Miriam Jordan and Julie Bosman, *Hundreds of Americans Were Evacuated from the*  
 26 *Coronavirus Epicenter. Now Comes the Wait*, N.Y. TIMES (Feb. 5, 2020),  
 27 <https://www.nytimes.com/2020/02/05/us/coronavirus-flights-wuhan.html> (last visited Sept. 29, 2020).

28 <sup>13</sup> *See e.g.*, Matt Hamilton, Paige St. John, Rong-Gong Lin II, *Autopsies reveal first confirmed U.S. coronavirus-related deaths occurred in California in February*, LOS



1           42. On February 11, 2020, several days before the Policy’s inception date,  
2 the International Committee on Taxonomy of Viruses (ICTV) announced “severe  
3 acute respiratory syndrome coronavirus 2” or “SARS-CoV-2” as the name of this new  
4 coronavirus.<sup>14</sup>

5           43. AFM issued a binder for the Policy to Out West’s agent at Marsh USA  
6 on February 13, 2020 and the Policy incepted on February 15, 2020.

7           44. On or about February 4, 2020, FM Global’s Vice President and Manager  
8 of Research told Business Insurance magazine that FM Global had already received  
9 notices from clients of business interruptions as a result of the novel coronavirus  
10 (2019-nCoV, later named COVID-19).<sup>15</sup>

11           45. The Policy was issued weeks after the first cases of COVID-19 were  
12 confirmed in the United States,<sup>16</sup> including in California<sup>17</sup> and Arizona<sup>18</sup> – both states  
13 where Out West has insured locations that were listed on the Policy’s Schedule.

14 \_\_\_\_\_  
15 ANGELES TIMES (April 21, 2020), <https://www.latimes.com/california/story/2020-04-21/autopsies-reveal-first-confirmed-u-s-coronavirus-deaths-occurred-in-bay-area-in-early-february> (last visited Sept. 29, 2020).

16  
17 <sup>14</sup> WHO, *Why do the virus and the disease have different names?*,  
18 [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it) (last  
19 visited Sept. 29, 2020).

20 <sup>15</sup> Matthew Lerner and Claire Wilkinson, *Coronavirus should trigger risk management*  
21 *protocols: Experts*, BUSINESS INSURANCE (Feb. 4, 2020),  
22 <https://www.businessinsurance.com/article/20200204/NEWS06/912332881/Coronavirus-should-trigger-risk-management-protocols-Experts> (last visited Sept. 29, 2020).

23 <sup>16</sup> Press Release, CDC, *First Travel-related Case of 2019 Novel Coronavirus Detected in*  
24 *United States* (Jan. 21, 2020), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html> (last visited Sept. 29, 2020).

25 <sup>17</sup> Press Release, Cal. Dep’t of Public Health Office of Public Affairs, *Six Confirmed Cases of*  
26 *Novel Coronavirus in California* (Feb. 2, 2020),  
<https://www.cdph.ca.gov/Programs/OPA/Pages/NR20-003.aspx> (last visited Sept. 29, 2020).

27 <sup>18</sup> Carrie Feibel, *Coronavirus Case Confirmed in Arizona, Bringing U.S. Total to 5*, NPR  
28 (Jan. 26, 2020),  
<https://www.npr.org/sections/goatsandsoda/2020/01/26/799726161/coronavirus-case-confirmed-in-arizona-bringing-u-s-total-to-5> (last visited Sept. 29, 2020).

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1           46. The Policy does not contain any COVID-19, pandemic, or communicable  
2 disease exclusions, despite the fact that AFM knew of these imminent risks when it  
3 sold the Policy to Out West.

4           47. While the Insurance Services Office (“ISO”), an entity charged with  
5 drafting standard form policy language for use by the insurance industry, developed a  
6 standard form and broadly worded “virus exclusion,” numbered CP 01 40 0706 and  
7 titled “loss due to Virus or Bacteria” in 2006, AFM did not include that exclusion  
8 here.

9           48. Before selling Out West the Policy, and unbeknownst to Out West at the  
10 time it did purchase the Policy, AFM had adopted a company-wide directive on  
11 coverage (or lack thereof) for COVID-19 claims to ensure that AFM’s adjusters  
12 reached the same conclusion for all COVID-19 claims. Claims personnel are  
13 instructed to follow “Talking Points” (hereinafter “AFM Talking Points”), without  
14 regard to any individual investigation of each individual claim. A true copy of the  
15 AFM Talking Points is attached as Exhibit B.

16           49. AFM instructed all of its claims personnel to deny coverage under  
17 several pertinent coverage grants across the board and regardless of what the claims  
18 handler’s investigation revealed.

19           50. The AFM Talking Points are titled “Talking Points on the 2019 Novel  
20 Coronavirus (2019-nCoV)” and refer to COVID-19 only as the “2019 Novel  
21 Coronavirus (2019-nCoV).” “2019 Novel Coronavirus (2019-nCoV)” was the prior  
22 name of COVID-19, and was changed to COVID-19 (short for Coronavirus Disease  
23 2019) by the WHO on February 11, 2020. By referring to COVID-19’s prior name,  
24 AFM apparently issued the AFM Talking Points before the name change, which  
25 occurred on or before February 11, 2020.

26           51. Thus, AFM issued the AFM Talking Points before AFM issued the  
27 Policy to Out West.  
28

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1           **C. COVID-19 is a “Communicable Disease” and “Communicable**  
2           **Disease” is a Covered Cause of Loss**

3           52. “Communicable Disease” is defined in the Policy in relevant part, as  
4 “disease which is transmissible from human to human by direct or indirect contact  
5 with an affected individual or the individual’s discharges.” (Ex. A at COMPLAINT-  
6 00063.)

7           53. AFM has itself admitted in letters to Out West that COVID-19 is a  
8 “Communicable Disease.” See a true copy of letter from AFM to Out West dated  
9 April 17, 2020, attached as Exhibit C.

10           54. As discussed more fully below, the Policy includes “Communicable  
11 Disease – Property Damage” coverage as part of the “All Risks” coverage part. This  
12 demonstrates that COVID-19, as a “Communicable Disease” is a covered cause of  
13 loss.

14           55. Further, there is no exclusion in the Policy for Communicable Disease,  
15 making it a covered cause of loss under a plain reading of the “All Risks” coverage.

16           **D. COVID-19 Has Caused and Continues to Cause Physical Loss or**  
17           **Damage to Property**

18           56. The relevant coverage grants in the Policy are triggered by physical loss  
19 or damage to specified property: either Out West’s property (the insured locations  
20 identified on the Schedule) or certain other specified property, such as the property of  
21 others in Out West’s supply chain or the property of third-parties within a designated  
22 mile-radius of Out West’s insured locations.

23           57. COVID-19 causes physical loss and/or damage to property.

24           •       Physical “Damage” to Property

25           58. The Policy does not provide a definition of “damage” and the term  
26 reasonably encompasses some and/or all of the loss Out West has sustained.

27           59. AFM construes the undefined term “damage” narrowly, enabling it to  
28 avoid covering Out West’s losses, an assertion contrary to generally accepted rules of

1 construction in California which provide that wherever reasonably possible, courts  
2 will construe ambiguities in a standard form policy against the drafter.

3 60. AFM’s position is also in conflict with the terms of the Policy.

4 61. As discussed more fully below, the Policy includes, in addition to, and  
5 not in lieu of, other coverages in the Policy, a coverage grant titled “Communicable  
6 Disease – Property Damage.”

7 62. The fact that the coverage is named “Communicable Disease – Property  
8 Damage” must mean, contrary to FM’s recent coverage position, that Communicable  
9 Disease causes damage to property.

10 63. The Communicable Disease – Property Damage coverage provides  
11 coverage for costs incurred in the “cleanup, removal and disposal of . . .  
12 communicable disease.” Thus, the Policy explicitly recognizes that Communicable  
13 Disease, including COVID-19, causes a physical, tangible alteration to the integrity of  
14 the property.

15 64. As set forth in AFM’s regulatory filings, the prior version of this policy  
16 form listed the Communicable Disease – Property Damage coverage under the  
17 heading “Additional Property Damage Coverages.”<sup>19</sup> The heading was changed in  
18 2016 to “Additional Coverages” with the intent to “simplify the coverage wordings  
19 and to provide enhanced cover.”<sup>20</sup>

20 65. The Policy also provides, in addition to, and not in lieu of, the other  
21 coverages in the Policy, Communicable Disease – Business Interruption Coverage.

22 66. The deductible provision further demonstrates that, under the Policy,  
23 Communicable Disease causes physical damage to property. It states that the Policy’s  
24 specific Communicable Disease Business Interruption Deductible is determined in  
25 reference to “the 100% actual annual business interruption value that would have been  
26 \_\_\_\_\_

27 <sup>19</sup> Affiliated FM Insurance Company, Product AFM-2016-3, at COMPLAINT-000121,  
28 00123-24, 65-66 (New York, filed Aug. 18, 2020), attached as Exhibit F.

<sup>20</sup> *Id.*

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1 earned had no loss occurred at the location where the physical damage happened . . .  
2 .” (Exhibit A at COMPLAINT-00010 (emphasis added)).

3 • Physical “Loss” to Property

4 67. Moreover, the AFM All Risks Policy does not define the term “loss” and  
5 the term reasonably encompasses some and/or all of the loss Out West has sustained.

6 68. AFM construes the undefined term “loss” narrowly, attempting to avoid  
7 covering Out West’s losses, a construction contrary to generally accepted rules of  
8 construction in California which provide that wherever reasonably possible, courts  
9 will construe ambiguities in a standard form policy against the drafter.

10 69. The term “loss” has a separate and distinct meaning from the term  
11 “damage,” including, but not limited to, loss of use, loss of functionality for intended  
12 purpose, or loss of value, any and all of which would be reasonable constructions of  
13 the term “loss.”

14 • How COVID-19 Causes Physical Loss and/or Damage to Property

15 70. Where COVID-19 is on-site at a location, it causes physical loss and/or  
16 damage to that property.

17 71. Some studies find that COVID-19 present in the air causes physical loss  
18 and/or damage to the property.

19 72. A cloud of droplets of saliva or nasal discharge of an infected person,  
20 which may be released by a cough, a sneeze, or loud speech, can linger in the air for a  
21 period of minutes to hours, and can be pulled into air circulation systems.<sup>21</sup>

22 73. This is a particular risk to restaurants. The CDC published a study in  
23 July 2020 concluding that “droplet transmission was prompted by air-conditioned  
24 ventilation” that caused an outbreak among people who dined in the same air-  
25

26  
27 <sup>21</sup> Ramon Padilla & Javier Zarracina, *Coronavirus might spread much farther than 6 feet in*  
28 *the air. CDC says wear a mask in public.* USA Today (last updated Sept. 21, 2020),  
[www.usatoday.com/in-depth/news/2020/04/03/coronavirusprotection-how-masks-might-stop-spread-throughcoughs/5086553002/](http://www.usatoday.com/in-depth/news/2020/04/03/coronavirusprotection-how-masks-might-stop-spread-throughcoughs/5086553002/) (last visited Sept. 29, 2020).

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1 conditioned restaurant.<sup>22</sup>

2 74. The CDC notes that more studies are required to understand COVID-19  
3 transmission, but the uncertainty has serious implications for food services safety.  
4 Indeed, the CDC’s risk assessment graphic for the restaurant industry demonstrates  
5 that restaurants and bars that provide outdoor or indoor seating with no spacing  
6 restrictions create the highest risk for the spread of COVID-19.<sup>23</sup>

7 75. The presence of COVID-19 in the air at a property renders the property  
8 unusable, uninhabitable, and/or unfit for its normal occupancy.

9 76. COVID-19 also can spread through surface- or object-to-person  
10 transmission after an infected person has touched a surface.<sup>24</sup>

11 77. The SARS-CoV-2 can remain on various objects and surfaces for a  
12 period of hours to numerous days.<sup>25</sup>

13 78. Thus, the presence of COVID-19 causes physical alteration of the  
14 property.

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17 <sup>22</sup> Jianyun Lu, *et al.*, *COVID-19 Outbreak Associated with Air Conditioning in Restaurant, Guangzhou, China, 2020*, 26 *Emerging Infectious Diseases* 7 (July 2020),  
18 [https://wwwnc.cdc.gov/eid/article/26/7/20-0764\\_article](https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article) (last visited Sept. 29, 2020).

19 <sup>23</sup> CDC, *Restaurants and Bars: Reduce the Spread of COVID-19*,  
20 [https://www.cdc.gov/coronavirus/2019-ncov/images/community/Rest\\_Bars\\_RiskAssessment.jpg](https://www.cdc.gov/coronavirus/2019-ncov/images/community/Rest_Bars_RiskAssessment.jpg) (last visited Sept. 29, 2020).

21 <sup>24</sup> WHO, *How does COVID-19 spread?*, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses#> (last visited Sept. 29, 2020).

22  
23 <sup>25</sup> Alex W H Chin, *et al.*, *Stability of SARS-CoV-2 in different environmental conditions*, *The Lancet* (Apr. 2, 2020), [https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247\(20\)30003-3/fulltext](https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247(20)30003-3/fulltext) (last visited Sept. 29, 2020); *The New England Journal of Medicine*, *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, (Mar. 17, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMc2004973> (last visited Sept. 29, 2020); Boris Pastorino, *et al.*, *Prolonged Infectivity of SARS-CoV-2 in Fomites*, 26 *Emerging Infectious Diseases* 9 (Sept. 2020), [https://wwwnc.cdc.gov/eid/article/26/9/20-1788\\_article](https://wwwnc.cdc.gov/eid/article/26/9/20-1788_article) (last visited Sept. 29, 2020); National Institutes of Health, *New coronavirus stable for hours on surfaces* (Mar. 17, 2020, <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last visited Sept. 29, 2020)).



1 79. The existence of COVID-19 on surfaces renders that property unsafe or  
2 unusable.<sup>26</sup>

3 **E. COVID-19 Caused Physical Loss and/or Damage to Out West’s**  
4 **Property and Other Relevant Property**

5 80. AFM’s All Risk Policy does not require physical presence of COVID-19  
6 at an Insured Location in order to trigger coverage – all that is required is the  
7 property’s loss of use or loss of functionality for its intended purpose.

8 81. COVID-19 in the air at and/or near the insured locations caused an  
9 imminent threat to the property which constitutes “loss” and/or “damage.”

10 82. While the AFM All Risk Policy does not require physical presence of  
11 COVID-19 at an Insured Location, Out West is currently aware of over 100  
12 employees testing positive for COVID-19 across numerous of its insured locations.

13 83. There may be several more insured locations where customers visiting  
14 the insured location to pick-up food for takeout may have tested positive shortly  
15 before or after visiting the insured location, unbeknownst to Out West.

16 84. These situations, too, trigger coverage as Out West suffers physical loss  
17 and/or damage as a result.

18 85. Out West undertakes full deep cleaning and sanitation procedures  
19 immediately after it becomes aware of a positive test or positive exposure to COVID-  
20 19, and additionally undertakes significant efforts to prevent the presence of COVID-  
21 19 onsite.

22 86. The CDC estimates that infection rates for COVID-19 likely are at least  
23 ten times higher than reported,<sup>27</sup> meaning that COVID-19 is omnipresent, particularly  
24

25 <sup>26</sup> See generally, Leah F. Moriarty, *et al.*, *Public Health Responses to COVID-19 Outbreaks*  
26 *on Cruise Ships — Worldwide, February–March 2020*, CDC (Mar. 27, 2020),  
27 [https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.htm?s\\_cid=mm6912e3\\_w](https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.htm?s_cid=mm6912e3_w) (last  
visited Sept. 29, 2020).

28 <sup>27</sup> Erika Edwards, *CDC says COVID-19 cases in U.S. may be 10 times higher than reported*,  
NBC News (June 25, 2020), <https://www.nbcnews.com/health/health-news/cdc-says-covid->

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1 in Arizona and California – states where 70% of Out West’s restaurants are located.

2 87. There may be instances where COVID-19 was present onsite at an  
3 insured location, including with respect to a customer, but the individual was pre-  
4 symptomatic, such that Out West was not aware of the presence of the virus.

5 88. During the incubation period, or “pre-symptomatic” period, infected  
6 persons can be contagious, and disease transmission can occur before the infected  
7 person shows any symptoms or has any reason to believe he or she has become  
8 infected.<sup>28</sup> Thus, COVID-19 can be onsite at an insured location even if the infected  
9 person is not showing symptoms of infection.

10 89. For the reasons discussed *supra*, the presence of COVID-19 at Out  
11 West’s insured locations, including on surfaces, and/or other properties causes  
12 physical alteration of the integrity of the property, causing physical loss and/or  
13 damage.

14 90. For the reasons discussed *supra*, the presence of COVID-19 in the air at  
15 Out West’s insured locations and/or other properties caused physical loss and/or  
16 damage, including, but not limited to, by rendering the locations unusable,  
17 uninhabitable and/or unsuitable for the property’s intended purpose.

18 91. For the reasons discussed *supra*, the presence of COVID-19 and damage  
19 to property at and/or within five miles of Out West insured locations led to the  
20 enactment of governmental orders which prevented access to Out West’s insured  
21 locations and directly caused Out West to incur loss and/or damage.

22 92. COVID-19 and Governmental Orders issued as a result thereof, have  
23 caused physical loss of and/or damage to Out West’s property by impairing the  
24 “value, usefulness, or normal function of” Out West’s premises, rendering them  
25

26 \_\_\_\_\_  
19-cases-u-s-may-be-10-n1232134 (last visited Sept. 29, 2020).

27 <sup>28</sup> WHO, *Coronavirus disease 2019 (COVID-19) Situation Report – 73* (Apr. 2, 2020),  
28 [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7\\_2](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_2) (last visited Sept. 29, 2020).

1 unusable and/or unfit for their normal business operations until such time as the  
2 relevant governmental agencies determine it is safe to reopen, and otherwise by  
3 damaging Out West’s property. Out West has suffered covered financial loss as a  
4 result.

5 93. Specifically, unless and until the relevant governmental agencies  
6 determine it is safe and permit it to fully reopen, Out West cannot resume its normal  
7 operations because, in light of the factors alleged above, there is a near certainty  
8 and/or imminence that COVID-19 will spread and/or further spread at such locations.

9 94. Out West’s loss of use of its property and/or damage to its property, due  
10 to COVID-19 is “physical” because Out West has been deprived of the use and  
11 function of its buildings, land on which the buildings are located, and the immovable  
12 objects within these buildings (all of which are physical) and/or because the virus  
13 itself is physical.

14 95. In addition, property loss or damage caused by COVID-19 caused Out  
15 West to suspend all use of its dining rooms – the mainstay of its business – and  
16 restricted Out West’s services to carry out and delivery at all locations for several  
17 months.

18 96. Further, the Policy requires Out West to take reasonable actions to  
19 mitigate its losses, a requirement which, in conjunction with COVID-19, the  
20 Pandemic and/or the Governmental Orders, caused Out West to limit its operations at  
21 its restaurants to delivery and takeout. These services replaced a small portion of the  
22 revenues lost from the suspension of in-restaurant dining and these circumstances  
23 continue to devastate Out West’s gross earnings and gross profits.

24 97. Out West has incurred covered losses as a direct result of physical loss  
25 and/or damage of the type insured.

26 **F. Additional Applicable Coverages**

27 98. Coverage also is afforded under at least the following coverage grants:  
28 (1) where infected persons are or have been on-site an insured location such that

1 COVID-19 causes physical loss and/or damage to the insured location; (2) where  
 2 infected persons are, and/or physical loss and/or damage due to COVID-19 occurs, at  
 3 third-party properties so as to impact the insured’s ingress or egress, supply chain, or  
 4 “attraction properties”; and/or (3) where infected persons are and/or physical loss  
 5 and/or damage occurs resulting in an order of a civil or military authority that impacts  
 6 the insured’s business.

7 99. Additionally, Out West has suffered covered loss and/or damage due to  
 8 COVID-19 under various additional coverage grants in the Policy. These additional  
 9 relevant coverage sections include but are not limited to those identified below:

10 **1. Communicable Disease Coverage**

11 100. The Policy provides, in addition to, and not in lieu of, the other coverages  
 12 in the Policy, a Communicable Disease – Property Damage coverage grant and a  
 13 Communicable Disease – Business Interruption coverage grant. Both coverage grants  
 14 apply when a Communicable Disease has caused property damage to one of Out  
 15 West’s insured locations due to: (a) the actual, not suspected, presence of  
 16 Communicable Disease on-site at that insured location owned, rented by, or leased to  
 17 Out West; ***and*** (b) access to the location is limited, restricted or prohibited by a  
 18 government order regulating the presence of the Communicable Disease or an officer  
 19 of Out West limits access; ***and*** (c) the access is prohibited for at least 48-hours.

20 101. The Policy does ***not*** limit coverage for loss and/or damage to COVID-19  
 21 to only the Communicable Disease – Property Coverage and Communicable Disease –  
 22 Business Interruption coverages.

23 102. Unlike other policies issued by AFM’s parent company, FM Global, the  
 24 Communicable Disease coverages here ***do not*** say that the sublimits provided for the  
 25 Communicable Disease – Property Damage and Communicable Disease – Business  
 26 Interruption coverages are the only amounts that the insurer will pay with respect to  
 27 interruption by a Communicable Disease.

28 103. FM Global offers other the “Global Advantage” All Risk policy form –

1 not used here – which expressly limits the policyholder’s ability to claim losses due to  
2 Communicable Disease under multiple coverage grants. That form states in the  
3 Declarations that “[t]he Company’s maximum limit of liability for INTERRUPTION  
4 BY COMMUNICABLE DISEASE and this coverage [Communicable Disease  
5 Response] combined shall not exceed USD [insert appropriate limit] in the aggregate  
6 during any policy year regardless of the number of locations, coverages or  
7 occurrences involved.”

8 104. The Policy does not contain this or any other limitation as to what  
9 coverage grants may be triggered by loss and/or damage caused by Communicable  
10 Disease. Thus, where COVID-19 causes loss and/or damage that triggers other  
11 coverage sections in the Policy, those coverage sections apply, too.

12 105. Alternatively, if as AFM suggests, coverage for losses incurred as a result  
13 of physical loss and/or property damage due to COVID-19 at Out West’s insured  
14 locations is limited to the Communicable Disease coverages only, the Communicable  
15 Disease Coverages are ambiguous and must be interpreted against the drafter, AFM.

16 106. Alternatively, even if coverage for business interruption loss due to  
17 *property damage* from COVID-19 at insured locations is limited to the  
18 Communicable Disease coverages, the Communicable Disease coverages do not limit  
19 coverage for business interruption loss incurred as a result of *physical loss* due to  
20 COVID-19 at insured locations.

## 21 2. *Protection and Preservation of Property – Property Damage*

22 107. The Policy provides Protection and Preservation of Property – Property  
23 Damage Coverage, which covers the reasonable and necessary costs incurred for, in  
24 relevant part, actions to temporarily protect or preserve insured property; provided  
25 such actions are necessary due to actual, or to prevent immediately impending, insured  
26 physical loss or damage to such insured property. (Ex. A at COMPLAINT-00035-36.)

27 108. Out West has triggered the Protection and Preservation of Property –  
28 Property Damage coverage because Out West has incurred and continues to incur

1 reasonable and necessary costs for actions to temporarily protect or preserve insured  
2 property due to actual, and/or to prevent imminent insured physical loss or damage to  
3 such insured property caused by COVID-19.

4 **3. Business Interruption**

5 109. The Policy insures Business Interruption loss as a direct result of physical  
6 loss or damage of the type insured to property, described in and not otherwise  
7 excluded by the Policy, used by Out West while at a location or while in transit,  
8 during the Period of Liability identified in the Policy.

9 110. COVID-19 has caused physical loss or damage of the type insured to Out  
10 West's property so as to trigger the Business Interruption coverage.

11 **4. Extra Expense**

12 111. As a result of physical loss of, or damage to Out West's property, due to  
13 COVID-19, Out West has triggered Extra Expense Coverage under the Policy because  
14 it has incurred and continues to incur reasonable and necessary Extra Expense to  
15 temporarily continue as close to normal the conduct of its business.

16 112. These expenses include, but are not limited to expenses for paper menus  
17 and other single use products, increased disinfection and cleaning costs, expenses  
18 related to "touch free" operations, and personal protective equipment for employees.  
19 In addition, Out West initiated tent operations in at least fifteen locations, incurring  
20 additional cost of purchasing, erecting and lighting the tents, and the cost of tables,  
21 chairs, and associated food serving, handling and warming equipment.

22 **5. Attraction Property**

23 113. The Policy covers the Business Interruption Coverage loss incurred by  
24 Out West directly resulting from physical loss or damage of the type insured to  
25 property that attracts business to one of Out West's insured locations and is within one  
26 (1) statute mile of the insured location. (Ex. A at COMPLAINT-00045.)

27 114. COVID-19 has triggered Attraction Property Coverage under the Policy  
28 because Out West has incurred and continues to incur Business Interruption Coverage

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1 loss directly resulting from physical loss or damage from COVID-19 to property of  
 2 the type insured that attracts business to Out West locations and is within one (1)  
 3 statute mile of Out West locations.

4 115. For example:

- 5 a. Anaheim, California: Disney theme park, one mile from one of Out  
 6 West's insured locations was closed for months and reportedly continues  
 7 to find employees testing positive for COVID-19.<sup>29</sup>
- 8 b. Las Vegas, Nevada: Wynn Resorts, less than one mile from Out West's  
 9 insured location, tallied 548 positive tests for COVID-19 and three deaths  
 10 among its employees as of September 17, 2020.<sup>30</sup>
- 11 c. Santa Fe, New Mexico: A Santa Fe municipal court that is less than one-  
 12 mile from Out West's insured location shut down for two weeks due to  
 13 an employee testing positive for COVID-19.<sup>31</sup>
- 14 d. Albuquerque, New Mexico: A state motor vehicles division office that is  
 15 within one-mile from Out West's insured location shut down due to an  
 16 employee testing positive for COVID-19.<sup>32</sup>
- 17 e. Colorado Springs, Colorado: The Colorado Department of Public Health  
 18

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19  
 20 <sup>29</sup> Graeme Guttman, *Disney World Reportedly Allowing COVID-Positive Employees To*  
 21 *Work*, ScreenRant (Sept. 7, 2020), <https://screenrant.com/disney-world-coronavirus-positiive-workers-cover-up/> (last visited Sept. 29, 2020).

22 <sup>30</sup> Associated Press, *Vegas Resort Tallies 548 COVID-19 Positives, 3 Worker Deaths* (Sept.  
 23 17, 2020), <https://www.usnews.com/news/best-states/nevada/articles/2020-09-17/vegas-resort-tallies-548-positive-covid-19-tests-in-workers> (last visited Sept. 29, 2020).

24 <sup>31</sup> Robert Nott, *Santa Fe Municipal Court closes for 2 weeks after worker tests positive for*  
 25 *virus*, SANTA FE NEW MEXICAN (July 28, 2020),  
 26 [https://www.santafenewmexican.com/news/local\\_news/santa-fe-municipal-court-closes-for-2-weeks-after-worker-tests-positive-for-virus/article\\_75152ada-d0e5-11ea-846e-37b08729ce60.html](https://www.santafenewmexican.com/news/local_news/santa-fe-municipal-court-closes-for-2-weeks-after-worker-tests-positive-for-virus/article_75152ada-d0e5-11ea-846e-37b08729ce60.html) (last visited Sept. 29, 2020).

27 <sup>32</sup> Press Release, *MVD office closed after employee tests positive for COVID-19*, The State of  
 28 New Mexico (July 9, 2020), <https://www.newmexico.gov/2020/07/09/mvd-office-closed-after-employee-tests-positive-for-covid-19/> (last visited Sept. 29, 2020).

1 & Environment confirms that a Colorado State Patrol Office less than  
2 one mile from Out West’s insured location experienced an “outbreak” of  
3 COVID-19.<sup>33</sup> Additionally, a local manufacturing company, Electronic  
4 Metal Finishing, located one mile from Out West’s insured location  
5 experienced an “outbreak” of COVID-19.<sup>34</sup>

- 6 f. Castle Rock, Colorado: The Douglas County Jail, approximately one  
7 mile from Out West’s insured location closed to visitors, including  
8 attorneys, after an outbreak of COVID-19 at the jail.<sup>35</sup> The jail is located  
9 in the Douglas County Justice Center, which also largely closed to  
10 visitors other than for “public safety matters” and halted most in-person  
11 hearings and all jury trials for several months as a result of COVID-19.<sup>36</sup>
- 12 g. Tucson, Arizona: Tucson Medical Center is located less than one mile  
13 from Out West’s insured location, where patients are treated for COVID-  
14 19 and where at least one nurse has tested positive for COVID-19.<sup>37</sup>

## 15 6. *Civil or Military Authority*

16 116. The Policy covers the Business Interruption Coverage loss incurred by  
17

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19 <sup>33</sup> *Colorado COVID-19 Outbreak Map*, Colorado Dep’t Public Health & Environment (last  
20 updated Sept. 23, 2020),  
21 <https://cdphe.maps.arcgis.com/apps/SimpleViewer/index.html?appid=8f375dc9b2b64a45b65b9f36b6e8c8f4> (last visited Sept. 29, 2020).

22 <sup>34</sup> *Id.*

23 <sup>35</sup> Elliott Wenzler, *Douglas County Jail Protocol Pushes Back Against COVID-19*,  
24 HIGHLANDS RANCH HERALD (May 20, 2020), <https://highlandsranchherald.net/stories/jail-protocol-pushes-back-against-covid-19,299719> (last visited Sept. 29, 2020).

25 <sup>36</sup> Second Amended Chief Judge Order 20-03 (Mar. 27, 2020), Eighteenth Judicial District:  
26 Arapahoe, Douglas, Elbert and Lincoln Counties, Colorado, available at  
27 <https://www.da18.org/wp-content/uploads/SECOND-AMENDED-CJO-20-03-COVID-19-Courthouse-Operations.pdf> (last visited Sept. 29, 2020).

28 <sup>37</sup> Hannah Tiede, *Tucson Medical Center nurse tests positive for COVID-19, isolates at home*, KOLD (Mar. 26, 2020), <https://www.kold.com/2020/03/27/tucson-medical-center-nurse-tests-positive-covid-isolates-home/> (last visited Sept. 29, 2020).

1 Out West if an order of civil or military authority prohibits access to an insured  
 2 location provided such order is the direct result of physical damage of the type insured  
 3 at a location or within five (5) miles of it. (Ex. A at COMPLAINT-00045.)

4 117. Out West has triggered Civil or Military Authority Coverage under the  
 5 Policy because Out West has incurred and continues to incur Business Interruption  
 6 Coverage loss due to numerous governmental orders that prohibit at least partial, if not  
 7 full, access to Out West's insured locations.

8 118. These governmental orders were issued as a result of physical damage to  
 9 property within five miles of an Out West location.

10 119. For example, the Solano County (California) Order of Health Officer No.  
 11 2020-04, issued on March 30, 2020, limited restaurants, including Out West, to  
 12 delivery and take-out, stating "this Order is given because of the propensity of the  
 13 virus to spread person to person and also because the virus physically is causing  
 14 property loss or damage due to its proclivity to attach to surfaces."

15 120. These governmental orders include, but are not limited to those set forth  
 16 in the attached Exhibit D.

### 17 7. *Ingress/Egress*

18 121. The Policy covers the Business Interruption Coverage loss incurred by  
 19 Out West due to the necessary interruption of Out West's business when ingress to or  
 20 egress from an insured location is physically prevented, either partially or totally, as a  
 21 direct result of physical loss or damage of the type insured to property of the type  
 22 insured whether or not at a described location. (Ex. A at COMPLAINT-00048.)

23 122. Out West has triggered Ingress/Egress Coverage under the Policy  
 24 because Out West has incurred and continues to incur Business Interruption Coverage  
 25 loss due to the necessary interruption of Out West's business because ingress to and/or  
 26 egress from certain Out West locations is physically prevented, either partially or  
 27 totally, as a direct result of physical loss or damage from COVID-19.

28 123. For example: The Outback Steakhouse located inside the Aquarius

1 Casino Resort in Laughlin, Nevada was closed from March 18, 2020 to June 6, 2020,  
2 and the Outback Steakhouse located inside the Best Western Casino Royale was  
3 closed from March 18, 2020 to June 6, 2020, both, due to the hotels' and casinos'  
4 shutdown due to COVID-19. In addition, the Outback Steakhouse located on Las  
5 Vegas Boulevard, was closed from March 18, 2020 to June 8, 2020 because the hotels  
6 and casinos in the area were closed, and delivery drivers and guests would not go to  
7 Las Vegas Blvd. to pick up food during the pandemic.

### 8 **8. Supply Chain**

9 124. The Policy covers the Business Interruption Coverage loss incurred by  
10 Out West directly resulting from physical loss or damage of the type insured to  
11 property of the type insured at the premises of any of the following within the Policy's  
12 Territory: (a) Out West's direct suppliers, direct customers or direct contract service  
13 providers; (b) any company under any royalty, licensing fee or commission agreement  
14 with Out West; or (c) any company that is a direct or indirect supplier, customer or  
15 contract service provider of those described in (a) above. (Ex. A at COMPLAINT-  
16 00052.)

17 125. Out West has triggered Supply Chain Coverage under the Policy because  
18 Out West has incurred and continues to incur Business Interruption Coverage loss  
19 directly resulting from physical loss or damage from COVID-19 to property of the  
20 type insured at the premises of: (a) Out West's direct suppliers, direct customers or  
21 direct contract service providers; (b) companies under any royalty, licensing fee or  
22 commission agreement with Out West; and/or (c) companies that are a direct or  
23 indirect supplier, customer or contract service provider of those described in (a)  
24 above.

25 126. As more facts develop and COVID-19 continues to impact Out West,  
26 additional coverages set forth in the Policy may be triggered.

### 27 **9. Professional Fees Coverage**

28 127. The Policy provides coverage for the reasonable and necessary expenses

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1 incurred by Out West for auditors, accountants, other professionals, and the Insured’s  
2 own employees for producing and certifying details to determine the amount of loss  
3 payable under the Policy for which this Company has accepted liability.

4 128. In this action, Out West seeks a determination of coverage so that this  
5 coverage will be triggered and its relevant costs insured.

6 **G. No Exclusion in the Policy Precludes or Limits Coverage for Out**  
7 **West’s Losses due to COVID-19**

8 129. No exclusions in the Policy preclude or limit coverage, in whole or in  
9 part, for Out West’s claimed losses.

10 130. Specifically, the Policy’s Contamination Exclusion does not preclude or  
11 limit coverage, in whole or in part, for Out West’s claim.

12 131. First, the contamination exclusion does not apply to “Additional  
13 Coverages” set forth in the “All Risks” coverage form or to the “Business  
14 Interruption” coverage form or “Business Interruption Coverage Extensions” set forth  
15 therein. Thus, it does not apply to any of the coverage grants specifically addressed in  
16 this Complaint and for which Out West seeks coverage under.

17 132. Second, the Contamination Exclusion does not and was never meant to  
18 apply to “Communicable Disease” such as COVID-19.

19 133. Indeed, the Contamination Exclusion directly conflicts with the Policy’s  
20 affirmative coverage grant for Communicable Disease. If the contamination exclusion  
21 did apply to a “Communicable Disease” like COVID-19 as AFM suggests, the  
22 exclusion would swallow the Communicable Disease coverages whole since neither  
23 the Communicable Disease coverage parts nor the contamination exclusion contain a  
24 carve-out stating that the exclusion does not apply to the Communicable Disease  
25 coverages.

26 134. Thus, the references to “pathogen or pathogenic organism”, “virus”, or  
27 “disease causing or illness causing agent,” as used in the definition of  
28 “contamination,” cannot include a “Communicable Disease.”

1 135. To the extent AFM intended the Policy’s Contamination Exclusion to  
 2 apply to communicable diseases such as COVID-19, for which coverage expressly is  
 3 provided in the Policy, AFM could have included, but did not include Communicable  
 4 Disease in the Policy’s definition of contaminant and/or contamination.

5 136. Further, even if COVID-19 could cause “contamination,” as AFM has  
 6 represented to insurance regulators, “[t]he policy covers all risks, and damage arising  
 7 from contamination . . . is covered when it directly results from insured physical  
 8 damage.”<sup>38</sup>

9 137. Thus, because the Policy’s Contamination Exclusion does not exclude  
 10 coverage for communicable disease, it clearly and unambiguously does not preclude  
 11 coverage for Out West’s claimed losses due to COVID-19.

12 138. Even if application of the Contamination Exclusion to COVID-19 was  
 13 unclear (it is clear and does not apply), the exclusion is ambiguous, and such  
 14 ambiguity must be construed in favor of coverage.

15 139. Third, pursuant to the doctrine of *ejusdem generis*, general words  
 16 appearing in a series with words of a particular and specific meaning must be  
 17 construed narrowly to apply to persons and things of the same general kind or class as  
 18 those specifically mentioned. Thus, the words “virus” and “disease or illness causing  
 19 agent” in the Contamination Exclusion must be construed as applying to  
 20 circumstances similar to those that would apply with respect to the other words in the  
 21 series, such as disease causing fungus, mold, or mildew, or a similar “pollutant.”

## 22 **H. AFM’s Breach of Good Faith and Fair Dealing**

23 140. AFM’s failure to diligently pursue a thorough, fair, and objective  
 24 investigation of Out West’s claim and its improper denial of coverage constitute a  
 25 breach of the covenant of good faith and fair dealing that is implied in every insurance  
 26 policy.

27 \_\_\_\_\_  
 28 <sup>38</sup> Affiliated FM Insurance Company, Product AFM-2016-3, Ex. F at COMPLAINT-00119,  
 00121 (New York, filed Aug. 18, 2020).



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1 141. AFM’s denial of coverage misstates the terms of the Policy and fails to  
2 adequately address the multiple coverages to which Out West is entitled under the  
3 Policy for its claim, as alleged in this Complaint.

4 142. AFM’s bad faith denial of coverage for Out West’s claim, in direct  
5 contradiction to the Policy’s plain and unambiguous terms, is evident from the  
6 circumstance that AFM acknowledged that COVID-19 constitutes a Communicable  
7 Disease as defined in the Policy. AFM nevertheless maintains that COVID-19 also  
8 falls within the Contamination Exclusion, which does not define contamination to  
9 include a communicable disease such as COVID-19, for purposes of all other  
10 coverages under the Policy.

11 143. Further, AFM demanded additional information to investigate the loss,  
12 after such information was already provided to it.

13 144. AFM’s conduct as respects Out West is consistent with and part of an  
14 orchestrated campaign that AFM has engaged in throughout the country,  
15 misrepresenting policy terms and making burdensome information requests to  
16 innumerable other AFM policyholders, with the objective of dissuading them from  
17 pursuing covered insurance claims.

18 145. Out West learned after submission of its claim that AFM had already  
19 adopted a company-wide position on coverage for COVID-19 claims, and issued  
20 guidelines to all of its claims handlers across the company to ensure that AFM’s  
21 adjusters reached the same conclusion for all COVID-19 claims. Claims personnel  
22 are instructed to follow the AFM Talking Points (Ex. B), without regard to any  
23 individual investigation of each individual claim. Thus, AFM instructed all of its  
24 claims personnel to blanket deny coverage under several pertinent coverage grants  
25 regardless of what the claims handler’s investigation revealed.

26 146. By issuing a blanket directive to all of its claims personnel on what  
27 portions of every COVID-19 claim to accept and/or deny, the AFM Talking Points  
28 ensure that its claims personnel do not undertake any proper or independent

1 investigation of the claim to arrive at an independent coverage determination.

2 147. Further, the AFM Talking Points were issued even before Out West  
3 procured the Policy. Thus, AFM accepted Out West's premium payment after  
4 determining it would deny coverage for any resulting COVID-19 claim and without  
5 including a COVID-19 or pandemic exclusion to make clear to Out West that AFM  
6 did not intend to cover potential losses.

7 148. Further, Out West's conduct in this claim contradicts even its own  
8 internal procedures. AFM's "Talking Points on the 2019 Novel Coronavirus," which  
9 were sent to all of its claims personnel as instructions for handling COVID-19 claims,  
10 state that "yes," "an employee at a location who is affected with the communicable  
11 disease [shall] be considered the 'actual presence' of a communicable disease" are  
12 sufficient to trigger at least the Policy's communicable disease coverages. Despite  
13 Out West advising AFM that employees had tested positive for COVID-19, AFM  
14 asked Out West whether the *property itself* had been tested for COVID-19 and for Out  
15 West to provide testing reports of same.

16 149. This conduct conflicts with AFM's representations to its customers,  
17 including that it is "recognized across the industry, as second to none in paying claims  
18 promptly, fairly and professionally."<sup>39</sup>

19 150. The premium that AFM charged for the Policy was based, in significant  
20 part, on the size of the properties and operations on such properties that the Policy was  
21 intended to insure.

22 151. Out West had a reasonable expectation that loss of use of any portion of a  
23 location (*e.g.*, in-restaurant dining), would be covered even if Out West undertook  
24 other actions (*e.g.*, take out services) to mitigate its losses and therefore the magnitude  
25 of its claim.

26 152. By misconstruing the terms of the Policy to exclude any coverage for Out  
27

28 <sup>39</sup> *Why AFM: Client Benefits, Affiliated FM Insurance*,  
<https://www.affiliatedfm.com/about/why-afm> (last visited Sept. 29, 2020).

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1 West’s claim, AFM seeks to be unjustly enriched by the premium it charged for  
2 property that is uninhabitable and/or unusable for its intended purpose, but for which  
3 AFM denies coverage.

4 153. AFM’s actions throughout the history of this claim were unreasonable  
5 and designed with the sole intent and purpose of denying Out West’s claim, no matter  
6 what AFM’s investigation uncovered. This constitutes bad faith.

7 154. AFM’s bad faith conduct as described herein and otherwise as the facts  
8 will show also violates California insurance laws and regulations.

9 155. California Insurance Code §790.03(h) provides that it constitutes unfair  
10 methods of competition, and unfair and deceptive acts or practices, in the business of  
11 insurance to knowingly commit or perform with such frequency as to indicate a  
12 general business practice any of the following unfair claims settlement practices:

- 13 (1) Misrepresenting to claimants pertinent facts or insurance policy  
14 provisions relating to any coverages at issue.
- 15 (2) Failing to acknowledge and act reasonably promptly upon  
16 communications with respect to claims arising under insurance policies.
- 17 (3) Failing to adopt and implement reasonable standards for the prompt  
18 investigation and processing of claims arising under insurance policies.
- 19 ...
- 20 (5) Not attempting in good faith to effectuate prompt, fair, and equitable  
21 settlements of claims in which liability has become reasonably clear.
- 22 (6) Compelling insureds to institute litigation to recover amounts due  
23 under an insurance policy by offering substantially less than the amounts  
24 ultimately recovered in actions brought by the insureds, when the  
25 insureds have made claims for amounts reasonably similar to the amounts  
26 ultimately recovered.
- 27 ...
- 28 (11) Delaying the investigation or payment of claims by requiring an  
insured, claimant, or the physician of either, to submit a preliminary  
claim report, and then requiring the subsequent submission of formal  
proof of loss forms, both of which submissions contain substantially the  
same information.

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(12) Failing to settle claims promptly, where liability has become apparent, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

(13) Failing to provide promptly a reasonable explanation of the basis relied on in the insurance policy, in relation to the facts or applicable law, for the denial of a claim or for the offer of a compromise settlement.

156. The California Fair Claims Settlement Practices Regulations states in §2695.7(b)(1) that, “Where an insurer denies or rejects a first party claim, in whole or in part, it shall do so in writing and shall provide to the claimant a statement listing all bases for such rejection or denial and the factual and legal bases for each reason given for such rejection or denial which is then within the insurer’s knowledge. Where an insurer’s denial of a first party claim, in whole or in part, is based on a specific statute, applicable law or policy provision, condition or exclusion, the written denial shall include reference thereto and provide an explanation of the application of the statute, applicable law or provision, condition or exclusion to the claim.”

157. Additionally, on April 14, 2020, California Insurance Commissioner Ricardo Lara issued the notice, titled “Requirement to Accept, Forward, Acknowledge, and Fairly Investigate All Business Interruption Insurance Claims Caused by the COVID-19 Pandemic” (the “Department of Insurance Notice”). A true copy of the Notice is attached as Exhibit E.

158. The Department of Insurance Notice acknowledges that to help combat the spread of COVID-19, government officials have issued emergency public health orders and “shelter-in-place” directives, and that the COVID-19 pandemic “has severely curtailed activities of policyholders in both personal and commercial lines, causing significant and widespread economic loss in California.” The Notice states, among other things, that after receipt of a notice of claim “every insurer is required to conduct and diligently pursue a thorough, fair, and objective investigation of the reported claim, and is prohibited from seeking information not reasonably required for

1 or material to the resolution of a claim dispute before determining whether the claim  
2 will be accepted or denied, in whole or in part. (Regulations, section 2695.7(d).)” (*Id.*  
3 at COMPLAINT-00103.)

4 159. AFM’s failure to diligently pursue a thorough, fair, and objective  
5 investigation of Out West’s claim and improper denial of coverage constitutes a  
6 violation of the California common law principles of good faith, California Insurance  
7 Code and the UCI which are implied in insurance contracts.

8 **CAUSES OF ACTION**

9 **COUNT I**  
10 **Declaratory Judgment**

11 160. Out West repeats and realleges the allegations in the preceding  
12 paragraphs.

13 161. Out West seeks a declaration of the parties’ rights and duties under the  
14 Policy pursuant to 28 U.S.C. §2201. A justiciable controversy exists between Out  
15 West and AFM concerning the availability of coverage under the Policy for Out  
16 West’s claim.

17 162. The controversy between Out West and AFM is ripe for judicial review.

18 163. Accordingly, Out West seeks a declaration from the Court that:

- 19 (1) Each coverage provision identified herein is triggered by Out  
20 West’s claim;  
21 (2) No exclusion in the Policy applies to bar or limit coverage for Out  
22 West’s claim;  
23 (3) The Policy covers Out West’s claim;  
24 (4) AFM violated the implied covenant of good faith and fair dealing;  
25 and  
26 (5) Any other declaratory relief that would be useful to the resolution  
27 of the dispute between the parties.

28 **COUNT II**  
**Breach of Contract**

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1  
2 164. Out West repeats and realleges the allegations in the preceding  
3 paragraphs.

4 165. The Policy is a valid and enforceable contract between Out West and  
5 AFM.

6 166. Out West has sustained covered loss under the Policy and, accordingly,  
7 submitted its claim to AFM.

8 167. AFM has wrongfully refused to provide coverage for Out West's claim in  
9 breach of the Policy.

10 168. As set forth above, the Policy provides coverage for Out West's losses.

11 169. No exclusions apply to preclude or limit coverage.

12 170. Out West has fully complied with all of the terms and conditions of the  
13 Policy and has satisfied any and all conditions precedent to coverage under the Policy,  
14 including but not limited to paying premiums, providing timely notice of the claim,  
15 taking all reasonable steps to protect the property from further damage.

16 171. To the extent Out West has not complied with a condition in the Policy, it  
17 is because the condition does not apply or has been waived by AFM.

18 172. AFM's failure to pay amounts due and its actions in handling Out West's  
19 claim under the Policy constitutes a breach of contract.

20 173. In consequence of AFM's breach of contract, Out West has suffered and  
21 continues to suffer significant damages.

22 174. Out West is entitled to coverage up to the Policy's limit of liability or any  
23 applicable sublimits.

24 175. Out West is entitled to damages as a result of AFM's breach of contract  
25 in an amount to be determined at trial, including pre- and post-judgment interest and  
26 any other costs and relief that this Court deems appropriate.

27 **COUNT III**

28 **Breach of the Implied Covenant of Good Faith and Fair Dealing**

176. Out West repeats and realleges the allegations in the preceding



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1 paragraphs.

2 177. Out West has suffered loss covered under the Policy.

3 178. Out West properly presented its claim to AFM to be compensated for its  
4 losses.

5 179. AFM failed to conduct a full, fair, prompt, and thorough investigation of  
6 all of the bases of Out West's claim.

7 180. When investigating Out West's claim, AFM had a duty to diligently  
8 search for and consider evidence that supported coverage for the claimed loss.

9 181. In connection with its efforts to sell the Policy, AFM represented that it  
10 would evaluate claims on a good faith basis consistent with the plain language of the  
11 Policy and pursuant to the law governing the interpretation of that Policy.

12 182. Instead of doing what it represented it would do, AFM implemented a  
13 claims handling practice that was intended to deprive Out West of the coverage that  
14 AFM was contractually required to provide under the Policy.

15 183. Rather than pay Out West's claim, and without even investigating it,  
16 AFM refused to acknowledge coverage and refused to pay Out West's losses.

17 184. AFM's improper claims handling practices include the following ongoing  
18 misconduct at the expense of its insured: (i) failing to diligently pursue a thorough,  
19 fair, and objective investigation of Out West's claim; (ii) improperly denying  
20 coverage based on its position that there was no direct physical loss of or damage to  
21 property, which is incorrect; and (iii) improperly asserting that the Contamination  
22 Exclusion bars coverage for Out West's claimed losses due to COVID-19, where such  
23 exclusion clearly and unambiguously does not exclude coverage for a communicable  
24 disease such as COVID-19 and where such exclusion directly contradicts affirmative  
25 coverage grants in the Policy and contradicts AFM's own representations to the public  
26 and to various insurance regulators.

27 185. In handling Out West's claim under the Policy, AFM has failed to  
28 faithfully apply the language of the Policy that it drafted, ignored longstanding

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1 principles of California insurance law, failed to conduct a reasonable investigation,  
2 and failed to consider the facts relevant to the claim against the language of the Policy  
3 as interpreted pursuant to California law.

4 186. AFM’s conduct, including its practice of avoiding its obligations under  
5 the Policy at the expense of Out West, is unlawful because, as discussed *supra*, such  
6 conduct violated and continues to violate California common law principles of good  
7 faith, which are implied in every insurance contract, which has caused Out West to  
8 incur substantial losses that should have been paid by AFM under the Policy.

9 187. AFM’s conduct is unfair because it offends the established California  
10 public policies that require an insurer to act in good faith in dealings with its insured;  
11 to treat the interests of its insured as it would its own; to diligently pursue a thorough,  
12 fair, and objective investigation of claims; to construe ambiguous policy terms in  
13 favor of coverage; to construe the grants of coverage broadly in favor of coverage and  
14 exclusions or other limiting terms narrowly; to not unreasonably delay in providing  
15 insurance benefits under a policy; and to not place its own interests above the  
16 insured’s. Additionally, or alternatively, AFM’s conduct is unfair because it is  
17 immoral, unethical, oppressive, unscrupulous and/or substantially injurious to  
18 consumers.

19 188. Out West has been harmed by AFM’s conduct.

20 189. AFM’s failure to properly investigate Out West’s claim was a substantial  
21 factor in causing Out West’s harm.

22 190. For the reasons set forth above, AFM’s withholding of the benefits due is  
23 unreasonable and constitutes bad faith.

24 191. AFM’s wrongful conduct, including, but not limited to, its denial of  
25 coverage was unreasonable based on the information available to AFM at the time of  
26 such conduct.

27 192. Due to AFM’s conduct, Out West has suffered and continues to suffer an  
28 ascertainable loss, and Out West will continue to incur reasonable attorneys’ fees in

1 order to enforce its rights.

2 193. AFM's unlawful and bad faith conduct was a substantial factor in causing  
3 Out West's losses.

4 194. Due to AFM's conduct, Out West was forced to retain the services of the  
5 undersigned to vindicate Out West's rights and pursue coverage owed under the  
6 Policy and is entitled to attorneys' fees pursuant to *Brandt v. Superior Court.*, 37 Cal.  
7 3d 813 (1985) and otherwise to the extent permissible under the law.

8 **PRAYER FOR RELIEF**

9 **Wherefore**, Out West prays for judgment against AFM as follows:

- 10 (1) A declaration from the Court that:
- 11 (a) Each of the coverage provisions identified herein is triggered by Out  
12 West's claim;
- 13 (b) No exclusion under the Policy applies to bar or limit coverage for  
14 Out West's claim;
- 15 (c) The Policy covers Out West's claim;
- 16 (d) AFM breached the implied covenant of good faith and fair dealing;  
17 and
- 18 (e) Any other declaratory relief that would be useful to the resolution of  
19 the dispute between the parties;
- 20 (2) For special and consequential damages against AFM in an amount to be  
21 proved at trial in excess of \$75,000;
- 22 (3) For punitive and exemplary damages as provided by law;
- 23 (4) Pre- and post-judgment interest as provided by law;
- 24 (5) An award of attorney's fees and costs of suit incurred;
- 25 (6) For such other and further relief as the Court deems just and proper.

26 **DEMAND FOR JURY TRIAL**

27 Out West demands trial by jury on all issues so triable.  
28

1 DATED: September 29, 2020

HUNTON ANDREWS KURTH LLP

2  
3 By: /s/ Scott P. DeVries

4 Scott P. DeVries

5 Walter J. Andrews

6 Andrea DeField

7 Michael L. Huggins

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10 *Trova Restaurant Group, Inc.;*

11 *Cerca Trova Steakhouse, L.P.; and*

12 *Cerca Trova Southwest Restaurant*  
13 *Group, LLC*

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