

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

INFINITY REAL ESTATE, LLC,
INFINITY 158 WOOSTER LLC,
INFINITY WOOSTER LLC,
IUC 215 MADISON AVENUE LLC,
LW 12TH STREET HOLDINGS, LLC,
22 LITTLE WEST 12TH STREET LLC,
INFINITY J STREET LLC,
49 EAST 21ST STREET, LLC,
INFINITY-XERXES 1464 LLC,
INFINITY FULTON STREET, LLC,
INFINITY-SEVEN BLEECKER, LLC,
INFINITY 8TH AVENUE RETAIL LLC,
INFINITY NORSTRAND AVE LLC,
INFINITY CHESTNUT STREET LLC,
IRE 1625 WALNUT C/O INFINITY,
KI 678 FRANKLIN LLC,
INFINITY 587 5TH LLC,
FIFTH 587 A LLC,
DARO REALTY LLC (1600),
DARO REALTY LLC (ARCHER),
DARO REALTY LLC (1900 LAMONT),
DARO REALTY LLC (SEDGWICK GARDENS)
,DARO REALTY LLC (PHOENIX),
DARO REALTY LLC (PARKWAY),
DARO REALTY LLC (PARKWEST),
DARO REALTY LLC (RODMAN),
DARO REALTY LLC (RODNEY),
INFINITY NESCONSET RETAIL LLC,
INFINITY-IUP KENYON ACQUISITION, LLC,
INFINITY-UIP NEW QUIN, LLC,
IRE 353 NEWBURY LLC,
IUC 159 WEST 85TH STREET LLC, &
IRE-NG 1715 E 13TH STREET, LLC,

Plaintiffs,

v.

CASE NO.:

TRAVELERS EXCESS AND SURPLUS
LINES COMPANY,

Defendant.

COMPLAINT

Plaintiff Infinity Real Estate, LLC (“Infinity”)—and its affiliates, Plaintiffs Infinity 158 Wooster LLC; Infinity Wooster LLC; IUC 215 Madison Avenue LLC; LW 12th Street Holdings, LLC; 22 Little West 12th Street LLC; Infinity J Street LLC; 49 East 21st Street, LLC; Infinity-Xerxes 1464 LLC; Infinity Fulton Street, LLC; Infinity-Seven Bleecker, LLC; Infinity 8th Avenue Retail LLC; Infinity Norstrand Ave LLC; Infinity Chestnut Street LLC; IRE 1625 Walnut c/o Infinity; KI 678 Franklin LLC; Infinity 587 5th LLC; Fifth 587 A LLC; Daro Realty LLC (1600); Daro Realty LLC (Archer); Daro Realty LLC (1900 Lamont); Daro Realty LLC (Sedgwick Gardens); Daro Realty LLC (Phoenix); Daro Realty LLC (Parkway); Daro Realty LLC (Parkwest); Daro Realty LLC (Rodman); Daro Realty LLC (Rodney); Infinity Nesconset Retail LLC; Infinity-IUP Kenyon Acquisition, LLC; Infinity-UIP New Quin, LLC; IRE 353 Newbury LLC; IUC 159 West 85th Street LLC; and IRE-NG 1715 E 13th Street, LLC (collectively, the “Affiliates”) (together with “Infinity,” the “Insureds”)—by and through their undersigned counsel, hereby sue Defendant Travelers Excess and Surplus Lines Company (“Travelers Excess and Surplus”), and allege as follows:

INTRODUCTION

1. The Insureds own commercial and residential real property throughout Pennsylvania; New York; Connecticut; Arkansas; Washington, D.C.; and Massachusetts, all of which have been affected by federal, state, and/or local government orders, *inter alia*, mandating the closure of “non-essential” businesses relating to the COVID-19 pandemic. Beginning in March 2020, like many others, all of the foregoing states—and many counties, cities and/ or municipalities therein—implemented sweeping restrictions on the operation of many, if not most, businesses. As

a result of the pandemic, the governmental orders closing businesses, and/or other related acts, conditions, and circumstances, the Insureds' property was damaged, the Insureds lost the use of their property, the Insureds and their commercial tenants were forced to halt their operations, and the Insureds suffered a decrease in rent payments.

2. In turn, Infinity sought insurance coverage on behalf of itself and the Affiliates for this property loss/damage from Travelers Excess and Surplus pursuant to a commercial property insurance policy that that insurer had sold to Infinity and for which Infinity had paid **more than \$265,000 in premium**. That policy—Travelers Excess and Surplus policy number KTQ-CMB-5J80409-7-19 (May 30, 2019 – May 30, 2020) (the “Policy”)—obligated Travelers Excess and Surplus to, *inter alia*, (a) “pay for direct physical loss of or damage to Covered Property” as well as (b) “pay for the actual loss of Business Income and/or Rental Value sustained by the Insured, due to the necessary ‘suspension’ of the Insured’s ‘operations’ during the ‘period of restoration.’”

3. Within just 15 days of receiving notice of the Insureds’ “direct physical damage” and “losses”—and without any real investigation of the claim—Travelers Excess and Surplus outright denied the claim. Travelers Excess and Surplus predicated its coverage denial under various parts of the Policy on the grounds that it (erroneously) believed that the Insureds had not suffered any “direct physical loss of or damage to property.” In denying the Insureds’ claim for coverage, Travelers Excess and Surplus also cited a couple of the Policy’s exclusions, including the so-called “virus exclusion,” which, for multiple reasons, is inapplicable here.

4. Travelers Excess and Surplus’ knee-jerk denial of the Insureds’ claim was far from surprising given that, shortly after the pandemic’s outbreak, Travelers—of which Travelers Excess and Surplus is a unit—wrote to certain of its policyholders, informing them that, without regard to any specific policy language or any specific facts, there would be no coverage available.

5. Even at the start of the local orders closing businesses across the county, Travelers immediately issued this statement, demonstrating its bad faith intent in denying these claims from the outset, as opposed to evaluating each claim on a case-by-case basis, as it should.

6. By failing to provide coverage to the Insureds for its damages/loss, Travelers Excess and Surplus has breached the terms of the Policy. Travelers Excess and Surplus also has acted in bad faith. Simply put: The insurer failed to conduct any reasonable investigation of the claim before reflexively issuing its arbitrary and wholesale denial of the Insureds' claim. Rather than reviewing the facts and circumstances of the specific claim presented by the Insureds, Travelers Excess and Surplus placed its own financial interests ahead of that of its policyholder and employed the "one-size-fits-all" approach to denying coverage that it had already previewed in its letter to policyholders.

7. Travelers Excess and Surplus has persisted in outright, bad-faith denial of coverage despite various courts across the country ruling that COVID-19 does—or, at least, may—cause direct physical loss and/or damage to property. *See, e.g., Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-cv-03127-SRB, 2020 U.S. Dist. LEXIS 147600 (W.D. Mo. Aug. 12, 2020); *Taps & Bourbon on Terrace LLC v. Underwriters at Lloyd's, London*, No. 200700375 (Pa. Com. Pl. Oct. 26, 2020) (Order) (unpub.) (overruling preliminary objections); *Infinity Biscayne Myrtle Members, LLC v. National Fire & Marine Ins. Co.*, No. 2020-020577-CA-01 (Fla. Cir. Ct. Dec. 15 2020) (Order Denying Defendants' Motion to Dismiss) (unpub.); *JGB v. Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, Case No. A-20-816628-B (Nev. Dist. Ct. Nov. 20, 2020) (Order Denying Defendant Starr Surplus Lines Insurance Company's Motion to Dismiss Compliant Without Prejudice) (unpub.); *North State Deli, LLC, v. Cincinnati Ins. Co.*, No. 20-CVS-02569 (N.C. Sup.

Ct. Oct. 7, 2020) (Order Granting Plaintiffs' Rule 56 Motion for Partial Summary Judgment) (unpub.). As the North Carolina state court explained in *North State Deli*:

[T]he ordinary meaning of the phrase “direct physical loss” includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions. . . . [T]herefore, “direct physical loss” describes the scenario where businessowners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property. This is precisely the loss caused by the Government Orders. Plaintiffs were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured. In ordinary terms, this loss is unambiguously a “direct physical loss,” and the Policies afford coverage.

PARTIES

8. Through the Affiliates, Infinity, a Delaware limited liability company, owns commercial and residential real properties located throughout the country, including property in Pennsylvania that is located at (a) 1805 Chestnut Street in Philadelphia, Pennsylvania, and (b) at 1625 Walnut Street in Philadelphia (together, the “Pennsylvania Properties”).

9. The Pennsylvania Properties comprise two buildings, one of which is fully retail and the other of which consists of both retail and residential units. Indeed, the Pennsylvania Properties generate revenues in the high-six figures and house a substantial number of commercial and residential tenants that employ a substantial number of Pennsylvanians.

10. In addition to the residential tenants, the tenants currently occupying the Pennsylvania Properties include local shops, restaurants, and other businesses, which collectively contribute to the economic welfare of Pennsylvania. For example, the current commercial tenants include, but are not limited to, (a) Free People (an apparel and lifestyle retailer), (b) SLT (a boutique Pilates gym), and (c) Blue Sole Shoes (a local shoe store).

11. Travelers Excess and Surplus is a Connecticut corporation with its principal place of business in Hartford, Connecticut.

12. Travelers Excess and Surplus is an “eligible surplus lines insurance company” in Pennsylvania, according to the Pennsylvania Insurance Department (the “Insurance Department”). According to the Insurance Department, “[a]n eligible surplus lines insurance company [is] approved to transact the business of insurance in this commonwealth” and “is subject to limited regulation.”

13. As such, Travelers Excess and Surplus routinely transacts business in Pennsylvania by, at a minimum, issuing insurance policies to the citizens of Pennsylvania, collecting premiums from them, and/or covering properties located in Pennsylvania (such as it did here).

JURISDICTION

14. Jurisdiction is proper in this Court pursuant to, at a minimum, 28 U.S.C. § 1332, as the dispute involves citizens of different states¹ and the amount in controversy is in excess of \$75,000.

15. This Court has jurisdiction over Travelers Excess and Surplus pursuant to, at minimum, 42 Pa. C.S.A. § 5322 and the Fifth and Fourteenth Amendments to the U.S. Constitution.

16. Moreover, according to the Policy:

In the event of [the insurer’s] failure to pay any amount claimed to be due [under the Policy, Travelers Excess and Surplus] at the request of the insured ..., **will submit to the jurisdiction of any court of competent jurisdiction** within the United States and will comply with all requirements necessary to give such court jurisdiction and **all matters arising hereunder shall be determined in accordance with the law and practice of such court.**

See Ex. B (emphasis added).

VENUE

17. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1391 because, at a minimum, a substantial part of the events or omissions giving rise to the claim occurred in this

¹ A copy of the detailed list of the Insureds and their respective states of incorporation is attached hereto as **Exhibit A**.

district and/or a substantial part of the property that is the subject of this action is situated in this district.

FACTUAL BACKGROUND

I. The Policy

18. In exchange for a significant premium, which was paid in full, Travelers issued the Policy to Infinity, which was identified as the “Named Insured” on the Policy. A true and correct copy of the Policy is attached hereto as **Exhibit B**.

19. Additionally, by endorsement, other entities are named as “Additional Insureds” on the Policy. Pursuant to the “Additional Insured” endorsement’s Schedule, each “Additional Insured” is identified on a “Schedule on file with” Travelers Excess and Surplus. The “Insured Premises Address” and the “Description of Covered Property,” as it relates to each Additional Insured, are also included on that schedule.

20. A copy of the detailed list of locations covered by the Policy (the “Covered Properties”) is attached hereto as **Exhibit C**.

21. Among other limits set forth in the Policy are the following: (a) “Buildings and Business Personal Property”: \$248,500,104; (b) “Rental Value, in any one occurrence”: \$35,713,247; and (c) “Extra Expense, in any one occurrence”: \$500,000.

22. Section A (“COVERAGE”) of the Policy’s “Property Coverage Form” provides, in relevant part, that Travelers Excess and Surplus “will pay for direct physical loss or damage to Covered Property caused by or resulting from a Covered Cause of Loss.”

23. Included within the Policy’s “Covered Costs and Expenses” are (i) “Claim Data Expense – Direct Damage;” and (ii) “Ordinance or Law.” The Policy also lists other “Covered Costs and Expenses,” certain of which may also be applicable here.

24. Additionally, Section A (“COVERAGE”) of the Policy’s “Business Income and/or Rental Value Coverage Form Excluding Extra Expenses” (the “Business Income Form”) provides, in relevant part:

When a Limit of Insurance is shown in the Supplemental Coverage Declarations for Business Income and/or Rental Value, the Company will pay for the actual loss of Business Income and/or Rental Value sustained by the Insured due to the necessary “suspension” of the Insured’s “operations” during the period of restoration.”

The “suspension” must be caused by direct physical loss of or damage to property at the Insured’s premises where coverage applies

25. The Policy defines “Rental Value” to mean “the sum of:

- a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred by the Insured as rental income from tenant occupancy of the Insured’s premises, including fair rental value of any portion of such premises that is occupied by the Insured; plus
- b. Continuing normal operating expenses incurred by the Insured in connection with such premises, including the amount of all charges that are the legal obligation of the tenants and that would otherwise be the obligation of the Insured.

26. Section B (“COVERAGE EXTENSIONS”) of the Business Income Form also identifies certain “Coverage Extensions.”

27. One such extension, which is titled “Civil Authority,” provides, in relevant part:

The insurance provided by this coverage form for loss of Business Income and/or loss of Rental Value is extended to apply to such loss of Business Income and/or loss of Rental Value incurred by the Insured caused by the action of civil authority that prohibits access to the Insured’s premises where such coverages apply:

- (1) Due to direct physical loss or damage to property other than property at the Insured’s premises, caused by or resulting from a Covered Cause of Loss, provided both of the following apply:
 - (a) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the Insured’s premises are

within that area but are not more than 10 miles from the damaged property; and

- (b) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damages, or the action is taken to enable a civil authority to have unimpeded access to damaged property.

28. Another such coverage extension, which is titled “Ingress or Egress,” provides in relevant part:

The insurance provide by this coverage form for loss of Business Income and/or loss of Rental Value is extended to apply to such loss of Business Income and/or loss of Rental Value incurred by the Insured when ingress to or egress from the Insured’s premises where such coverages apply is prevented (other than as provided in the Civil Authority Coverage Extension) as a direct result of loss or damage to property that is away from, but within 1 mile (or the revised number of miles shown for this Coverage Extension in the Supplemental Coverage Declarations) of the Insured’s premises, caused by or resulting from a Covered Cause of Loss.

29. There is a limit for Ingress or Egress coverage specified in the Supplemental Coverage Declarations form.

30. Other Coverage Extensions set forth in the Policy include, but are not limited to, “Extended Business Income or Rental Value,” “Dependent Property,” and “Expenses to Reduce Loss.”

31. The Policy also provides coverage for “extra expenses.” Section A (“Coverage”) of the “Extra Expense Coverage Form” provides, in relevant part:

When a Limit of Insurance is shown in the Supplemental Coverage Declarations for Extra Expenses, [Travelers Excess and Surplus] will pay the actual and necessary Extra Expenses incurred by the Insured during the “period of restoration.”

The Extra Expenses must be caused by direct physical loss of or damage to property at the Insured’s premises where Extra Expense coverage applies ... caused by or resulting from a Covered Cause of Loss.

32. There are also various “Coverage Extensions” within the Extra Expenses Coverage Form, including for “Civil Authority,” “Ingress or Egress,” and “Dependent Property.”

33. There is a limit for Extra Expense coverage specified in the Supplemental Coverage Declarations form.

34. Additionally, the Policy provides coverage (via endorsement) for “Tenant Move Back Expenses.”

35. Section B (“COVERED PROPERTY AND COVERED COSTS AND EXPENSES”) provides: “Covered Property means the type of property, as described in this Section B.1 and limited in Section C, Property and Costs Not Covered, for which a Limit of Insurance is shown the Supplemental Coverage Declarations.”

36. Pursuant to the Policy, the term “Covered Property” includes “Buildings,” which is defined to mean, in relevant part, “the buildings or other structures at the Insured’s premises for which a Building value is shown in the most recent Statement of Values or other documentation on file with” Travelers Excess and Surplus.

37. The Policy covers the Covered Properties, which are also listed on the applicable statement of values.

38. Also included within “Covered Property” in the Policy are “Accounts Receivable.”

II. The COVID-19 Pandemic

39. In the fall of 2019, a new mutation of coronavirus was detected in China, which the World Health Organization (“WHO”) later named SARS-CoV-2, more commonly known as COVID-19.

40. Within months of its detection, the novel COVID-19 rapidly spread to other countries, including the United States.

41. On or about January 30, 2020, the WHO declared the novel coronavirus pandemic a public health emergency of international concern. As of that time, a total of 9,976 cases of COVID-19 had been reported in at least 21 countries, including the first confirmed case in the United States, which was reported on or about January 20, 2020.

42. On or about March 11, 2020, the WHO declared the COVID-19 outbreak a worldwide pandemic for which humans have no natural immunity. As of that time, at least 118,000 people were reported to have contracted COVID-19 in more than 114 countries, with those countries reporting more than 4,300 deaths due to COVID-19.

43. As of December 21, 2020, more than 77 million cases of COVID-19 had been reported globally, according to the Johns Hopkins University of Medicine Coronavirus Resource Center (“JHU”). According to JHU, there have been more than 17.8 million cases in the United States alone. And, according to JHU, nearly 1.7 million people have died from COVID-19 globally—more than 317,000 of the deaths having occurred in the United States. Sadly, all of these numbers continue to increase on a daily basis.

44. COVID-19, which contaminates property, is spread in multiple ways. For example, the U.S. Centers for Disease Control and Prevention stated: “Respiratory droplets can . . . land on surfaces and objects. It is possible that a person could get COVID-19 by touching a surface or object that has COVID-19 on it and then touching their own mouth, nose, or eyes.”

45. The WHO likewise has explained that “[t]hese droplets can land on objects around the person such as tables, doorknobs and handles. People can become infected by touching these objects or surfaces, then touching their eyes, nose or mouth.”

46. Similarly, the Pennsylvania Department of Health explains on its website that “COVID-19 is . . . highly contagious . . . Human coronaviruses spread just like the flu or a cold: . . . [including by t]ouching an object or surface with [COVID-19] on it.”

47. As a result, countries throughout the world are employing various methods to disinfect real and personal property in an effort to, *inter alia*, halt the spread of COVID-19, including broadly spraying disinfectant in parks, on public transportation, in office buildings, and inside commercial business spaces, offices, restaurants, hotels, service businesses, and elsewhere.

III. Governmental Closure Orders

48. On March 13, 2020, U.S. President Donald Trump declared a national state of emergency, effective March 1, 2020. Then on March 16, 2020, the United States issued social-distancing guidelines, encouraging all Americans, including the young and healthy, to avoid gathering in groups of more than 10 people, avoid discretionary travel, work remotely, attend school by video-conference, and avoid eating and drinking at bars, restaurants, and public food courts. On March 29, 2020, those social-distancing guidelines were further extended through August 31, 2020.

49. In addition to the social-distancing guidelines imposed by the federal government, many, if not most, states, counties, cities, and other municipalities across the United States have issued various orders to protect their citizens and their property. Indeed, all of the jurisdictions in which the Covered Properties are located issued such orders.

A. Pennsylvania

50. For example, on March 6, 2020, Tom Wolf, Governor of Pennsylvania, issued a “Proclamation of Disaster Emergency,” wherein he declared the existence of a disaster emergency in Pennsylvania.

51. Then, on March 19, 2020, Governor Wolf specifically implemented a prohibition on the operation of businesses that were not life-sustaining. In the “Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closures of All Businesses that are not Life Sustaining,” Governor Wolf ordered that “[n]o person or entity shall operate a place of business in the Commonwealth that is not a life sustaining business regardless of whether the business is open to members of the public.”

52. Shortly thereafter, on March 23, 2020, Governor Wolf issued another order, directing “[a]ll individuals residing in Allegheny County, Bucks County, Chester County, Delaware County, Monroe County, Montgomery County, and Philadelphia County . . . to stay at home except as needed to access, support, or provide life sustaining business, emergency, or government services.” That March 23 order also provided: “[G]atherings of individuals outside of the home are generally prohibited except as may be required to access, support or provide life sustaining services.”

53. On that same day, March 23, 2020, Dr. Rachel Levine, the Secretary of the Pennsylvania Department of Health, also issued an order that required that “[a]ll individuals residing in Allegheny County, Bucks County, Chester County, Delaware County, Monroe County, Montgomery County, and Philadelphia County to stay at home except as needed to access, support or provide life-sustaining business, emergency or government services.” That order too provided that “gatherings of individuals outside of the home are generally prohibited except as may be required to access, support or provide life sustaining business, emergency or government services.”

54. Thereafter, on April 1, 2020, Governor Wolf signed an order, directing all Pennsylvania residents to stay at home: “All individuals residing in the Commonwealth are ordered to stay at home except as needed to access, support, or provide life-sustaining business, emergency,

or government services.” That order again emphasized that “gatherings of individuals outside of the home are generally prohibited except as may be required to access, support, or provide life-sustaining services.”

55. On that same day, Secretary Levine also issued a similar order.

56. The “Amendment to Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay at Home” and the “Amendment to the Order of the Secretary of the Pennsylvania Department of Health to Stay at Home” were issued on April 20, 2020, extending the stay-at-home directive for Pennsylvania’s residents until May 8, 2020.

57. And, another “Amendment to Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay at Home” and the “Amendment to the Order of the Secretary of the Pennsylvania Department of Health to Stay at Home” were issued on May 7, 2020, extending the stay-at-home directive for Pennsylvania’s residents “through June 4, 2020.”

58. Governor Wolf also has made clear on a Commonwealth website that his “[a]dminstration supports local officials who chose to maintain additional restrictions.”

59. The City of Philadelphia, for example, has issued a number of orders imposing strict restrictions on its residents and businesses.

60. For example, on March 12, 2020, Dr. Thomas A. Farley, the City of Philadelphia’s Health Commissioner, issued an order prohibiting mass gatherings.

61. Thereafter, on March 17, 2020, James A. Kenney, Mayor of the City of Philadelphia, and Commissioner Farley jointly issued an “Emergency Order Temporarily Prohibiting Operation of Non-Essential Businesses” By that March 17 order, Mayor Kenney and Commissioner Farley prohibited the operations of all non-essential businesses from March 16, 2020 through March 27, 2020. That ban was subsequently extended.

62. Upon information and belief, state, county, city, and/or other municipal governments in Pennsylvania have issued other orders and/or guidance affecting the Insureds, their property, and/or their business as well.

B. Arkansas

63. On March 11, 2020, Ana Hutchinson, Governor of Arkansas, issued Executive Order No. 20-03, declaring a state of emergency in Arkansas.

64. Shortly thereafter, on March 26, 2020, Governor Hutchinson issued Executive Order 20-10. In a subsequent executive order, he explained that in his March 26 order, he “declared the state of Arkansas a disaster area in which ingress and egress to and from, the movement of persons within, and the occupancy of premises therein, may be controlled.”

65. On April 4, 2020, Hutchinson then issued Executive Order 20-13, placing further restrictions on “[a]ll businesses, manufacturers, construction companies, and places of worship.”

66. On May 5, 2020, Governor Hutchinson issued Executive Order 20-25, which, *inter alia*, extended the declaration of emergency in Arkansas.

C. Connecticut

67. Similarly, on March 10, 2020, Ned Lamont, Governor of Connecticut, issued a “Declaration of Public Health and Civil Preparedness Emergencies,” declaring a “public health emergency and civil preparedness emergency throughout [Connecticut], pursuant to Sections 19a-131a and 28-9 of the Connecticut General Statutes.”

68. Soon thereafter, Governor Lamont issued Executive Orders No. 7A – 7H, wherein he, among other efforts, imposed an array of stringent restrictions on the operations of businesses, limited gatherings of persons in large crowds, closed public schools, and placed restrictions on workplaces for non-essential businesses.

69. In particular, in Executive Order 7F, Governor Lamont closed “Large Shopping Malls” and “Places of Public Amusement.”

70. Thereafter, on March 20, 2020, Governor Lamont, in Executive Order 7H, directed that “all businesses and not-for-profit entities in the state shall employ, to the maximum extent possible, any telecommuting or work from home procedures that they can safely employ.” He continued: “Non-essential businesses or not-for-profit entities shall reduce their in-person workforces at any workplace locations by 100% not later than March 23, 2020.”

71. On March 26, 2020, Governor Lamont then issued Executive Order 7N, which, in relevant part, imposed additional restrictions on “social and recreational gatherings,” restaurants, and retail operations.

72. Upon information and belief, state, county, city, and/or other municipal governments in Connecticut have issued other orders and/or guidance affecting the Insureds, their property, and their business as well.

D. Massachusetts

73. In Massachusetts, Charles Baker, Governor of Massachusetts, declared a State of Emergency on March 10, 2020, “effective immediately.”

74. At about the same time, Governor Baker issued orders limiting the number of people who could gather in one place.

75. Thereafter on March 23, 2020, Governor Baker issued Order No. 13, which mandated that “[a]ll businesses and other organizations that do not provide COVID-19 Essential Services shall closer their physical workplaces and facilities . . . to workers, customers, and the public” for a stated period of time. This order also generally limited gatherings across the state to no more than 10 people. It was thereafter extended by Governor Baker on more than one occasion.

76. Upon information and belief, state, county, city, and/or other municipal governments in Massachusetts have issued other orders and/or guidance affecting the Insureds, their property, and their business as well.

E. New York

77. On March 7, 2020, Andrew Cuomo, Governor of New York, issued Executive Order 202, declaring a state of emergency under Section 28 of Article 2-B of the state's Executive Law.

78. Thereafter, Governor Cuomo issued multiple, additional executive orders "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency."

79. For example, on March 18, 2020, Governor Cuomo issued Executive Order No. 202.5, which ordered, *inter alia*, "all indoor common portions of retail shopping malls within excess of 100,000 square feet of retail space available for lease shall close and cease access to the public."

80. Also, on March 18, 2020, Governor Cuomo issued Executive Order No. 202.6. That order provided, in relevant part: "All businesses and not-for-profit entities in the state shall utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize. Each employer shall reduce the in-person workforce at any work locations by 50% no later than March 20 at 8 p.m."

81. Then, on March 20, 2020, Governor Cuomo issued Executive Order No. 202.8, revising his prior directive and requiring "[a]ll businesses and not-for-profit entities in the state shall utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize. Each employer shall reduce the in-person workforce at any work locations by 100% no later than March 22 at 8 p.m."

82. Additionally, on March 12, 2020, Bill de Blasio, Mayor of New York City, issued Emergency Executive Order No. 98, declaring a state of emergency within that city.

83. On March 13, 2020, Mayor de Blasio also issued, *inter alia*, “New Restrictions and Guidance for Establishments.”

84. Then, on March 16, 2020, Mayor de Blasio issued Emergency Executive Order No. 100 wherein stringent restrictions were imposed, mandating the closure of, *inter alia*, all establishments, entertainment venues, and commercial gyms. That order, like many other issued by Mayor de Blasio states that it “is given because of the propensity of [COVID-19] to spread person to person and also because the physically is causing property loss and damage.”

85. On March 20, 2020, Mayor de Blasio issued Emergency Executive Order No. 102, which shuttered certain businesses, including “all places of public amusement.” After noting that “[COVID-19] physically is causing property loss and damage,” that order also stated, in relevant part: “All indoor common portions of retail shopping malls with in excess of 100,000 square feet of retail space available for lease shall close and cease access to the public.”

86. Thereafter, on March 25, 2020, Mayor de Blasio issued Emergency Executive Order No. 103, which also referenced the physical loss and damage caused by COVID-19. Therein, he directed that “[a]ll businesses and not-for-profit entities in the City shall utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize[,]” and, with limited exception, “each such business and not-for-profit entity shall reduce its in-person workforce at any locations by 100%.”

87. In that order, Mayor de Blasio also directed:

- a. All indoor common portions of retail shopping malls within excess of 100,000 square feet of retail space available for lease shall close and cease access to the public. Any stores located within shopping malls that have their own external entrances open to the public, separate from the general

mall entrance, may remain open provided that any interior entrances to common areas of the mall remain closed and locked. Any restaurants located within shopping malls that have their own external entrances open to the public, separate from the general mall entrance, may remain open for the sole purpose of providing take-out or delivery service, provided that such persons follow social distancing protocols, and that any interior entrances to common areas of the mall remain closed and locked.

- b. In order to avoid the mass congregation of people in public places . . . any non-essential gathering of individuals of any size for any reason shall be cancelled or postponed.

88. On May 24, 2020, Mayor de Blasio issued Emergency Executive Order No. 115, which, in relevant part stated: “In order to avoid the mass congregation of people in public places . . . any non-essential gathering of individuals of any size for any reason shall be cancelled or postponed, provided however that gatherings of ten (10) or fewer individuals where such individuals adhere to applicable social distancing protocols and cleaning and disinfection protocols are permitted.” This order too acknowledged the physical loss and damaged caused by COVID-19.

89. Upon information and belief, state, county, city, and/or other municipal governments in New York have issued other orders and/or guidance affecting the Insureds, their property, and their business as well.

F. Washington, D.C.

90. Muriel Bowser, Mayor of the District of Columbia, declared a public emergency via Order 2020-045 on March 11, 2020. Therein, Mayor Bower observed: “Mandatory quarantines, self-isolation, business supply chain interruptions, and cancellations of college classes and conventions are increasingly affecting peoples’ [sic] lives and livelihoods.”

91. On March 24, 2020, Mayor Bowser issued Order 2020-053, which closed all non-essential businesses and prohibited large gatherings in the District of Columbia.

92. On March 30, 2020, Mayor Bowser issued a stay-at-home order for the residents of Washington, D.C.

93. On April 15, 2020, Mayor Bowser issued Order 2020-063, which “extend[ed] the public emergency and public health emergency in the District of Columbia”

94. Upon information and belief, other orders and/or guidance issued by the District of Columbia have affected the Insureds, their property, and their business as well.

IV. The Insureds’ Insurance Claim and Travelers Excess and Surplus’ Denial Thereof

95. Beginning on March 16, 2020, the tenants of the Insureds, which include retail businesses and residential tenants, were forced to close and/or suspend their operations, thereby destroying the intended use of the Covered Properties, which in turn caused the Insureds to suffer substantial losses in rental income and to incur substantial additional expenses. Neither the Insureds’ operations nor their tenants’ operations have all returned to normal, pre-pandemic levels.

96. As a result of the aforementioned various government orders, and/or other related acts, conditions, and circumstances, the Insureds have suffered a loss of approximately \$30 million, including, but not limited to, lost rent from both commercial and residential tenants.

97. Therefore, on April 22, 2020, in accordance with its obligations under the Policy, Infinity notified Travelers Excess and Surplus that the Covered Properties “sustained direct physical loss or damage as a result of a damage incident covered by the Policy”:

We are writing to notify you that we are hereby submitting a claim on behalf of the Insured against the commercial property policy No. KTQCMB5J80409719 (the “Policy”) that was issued by Travelers Excess and Surplus Lines Company on July 24, 2019. On or about March 16, 2020, the Insured sustained direct physical damage as a result of a damage incident covered by the Policy. The Insured has sustained the following losses as a result of the damage caused by a covered peril: Accounts Receivable; Claim Data Expense; Ordinance or Law and Increased Cost of Construction; Business Income; Rental Value; Extra Expense; Extended Coverage(s); and Tenant Move Back Expenses.

Please be advised that the nature and extent of the Insured's losses are ongoing and that the Insured is still in the process of fully measuring/determining the loss measure.

98. Attached to its notice letter was a list of affected "Property Locations," identifying each and every of the Covered Properties.

99. Despite agreeing to cover the Insureds for all risks of physical loss or damage unless specifically excluded in the Policy, Travelers Excess and Surplus has employed calculated claims-handling strategies designed to deny the Insureds recovery under its Policy.

100. Travelers Excess and Surplus did not take any action to truly evaluate the factual particulars of the claim, as it is obligated to do. Instead, on May 7, 2020, within approximately just two weeks of receiving the Insureds' notice of the claim, and without so much as conducting any investigation of the claim, Travelers Excess and Surplus promptly denied the claim. A true and correct copy of the letter that Travelers Excess and Surplus sent denying coverage is attached hereto as **Exhibit D**.

101. In relevant part, Travelers Excess and Surplus' letter denying coverage for the Insureds' claim stated: "[W]e have concluded that [the P]olicy does not provide coverage for the claimed loss of income."

102. Travelers Excess and Surplus' denial of coverage—precisely when the Insureds needed coverage the most—threatens the very commercial survival and existence of the Insureds.

103. Travelers Excess and Surplus' denial of coverage was improper. For one, the Insureds are entitled to coverage because they suffered direct physical loss to the Covered Properties in that, *inter alia*, (a) they and their tenants were denied access to the properties and could not use them for their intended purposes; and (b) customers were prevented from accessing the properties as well. The insurer's position that coverage is not triggered absent a physical

alteration to property is unsupported by both the Policy and the law. As the recent related judicial decisions cited above demonstrate, loss of use is sufficient to trigger coverage.

104. Most recently, an affiliate of the Insureds filed a lawsuit in Miami-Dade County, Florida, state court, alleging that it is entitled to coverage for similar property loss and/or damage to that at issue here pursuant to an insurance policy that, for all intents and purposes, is the same as that at issue here.

105. The insurer moved to dismiss the policyholder's complaint, claiming, *inter alia*, that the various Government Closure Orders did not constitute a "direct physical loss" and that, regardless, there were numerous exclusions that precluded coverage. After extensive briefing by both parties, the Court denied the insurer's motion to dismiss, finding that the policyholder stated plausible claims for Business Income (and Extra Expense) and Civil Authority coverages. A copy of the 12/15/2020 Order Denying the Motion to Dismiss is attached hereto as **Exhibit E**.

106. Furthermore, COVID-19, which can survive on surfaces for some period of time, does and has contaminated and otherwise damaged property. Indeed, various government orders and proclamations have specifically acknowledged that COVID-19 causes property loss and/or damage.

107. For example, the City of New York Emergency Order No. 100 dated March 16, 2020 (emphasis added) provides, in pertinent part,

"this order is given because of the propensity of [COVID-19] to spread person to person and also because [**COVID-19**] physically is **causing property loss and damage.**"

108. The City of Miami Beach Declaration of State of Emergency dated March 26, 2020 similarly stated:

"there is reason to believe that COVID-19 may spread amongst the population by various means of exposure, including the propensity to spread person-to-person and

the propensity to attach to surfaces for prolonged period of time, thereby spreading from surface to person and **causing property loss and damage in certain circumstances.**”

109. The City of New Orleans “Mayoral Proclamation to Promulgate Emergency Orders During the State of Emergency Due to COVID-19” also stated:

“there is reason to believe that COVID-19 may be spread amongst the population by various means of exposure, including the propensity to spread person to person and the propensity to attach to surfaces for prolonged periods of time, thereby spreading from surface to person and **causing property loss and damage in certain circumstances.**”

110. Broward County in Florida issued Emergency Order 20-03 contained the following clause:

“this Emergency Order is necessary because of the propensity of [COVID-19] to spread person to person and also because [COVID-19] **physically is causing property damage** due to its proclivity to attach to surfaces for prolonged periods of time.”

111. Moreover, if not present in each of the Covered Premises, then there was, upon information and belief, at least COVID-19 present within one mile of each of the properties. Indeed, COVID-19 was omnipresent not just in Pennsylvania, Arkansas, Connecticut, Massachusetts, New York, and Washington, D.C., but throughout communities across the United States.

112. The *Reading Eagle*, for example, reported on December 1, 2020 that, according to the Pennsylvania Department of Education, “[t]he risk of community spread of coronavirus is substantial in all but one county in Pennsylvania.”

V. The Insurer Did Not Include The Virus Exclusion and CRITICAL Exclusions INTENTIONALLY Missing from the Policy

113. Travelers Excess and Surplus’ reliance on the Policy’s so-called “virus exclusion” is also misplaced. Such exclusion should not be given effect when viewed against the available exclusions created by the insurance industry for situations such as the COVID-19 pandemic.

114. Importantly, there were **two critical exclusions** that were created by the insurance industry prior to the issuance of this Policy, which were intentionally **NOT** included in this Policy, namely:²

Communicable Disease Exclusion: “This policy does not apply to: Personal injury or property damage which arises out of the transmission of a communicable disease.” The term “communicable disease” is defined as: “a contagious disease or illness arising out of or in any manner related to an infectious or biological virus or agent or its toxic products which is transmitted or spread, directly or indirectly, to a person from an infected person, plant, animal or anthropoid, or through the agency of an intermediate animal, host or vector of the inanimate environment or transmitted or spread by instrument or any other method of transmission.”

Pandemic Exclusion: “This insurance does not cover any loss directly or indirectly arising out of any loss directly or indirectly arising out of, contributed to by, or resulting from any loss, expense or liability directly or indirectly arising out of, attributable to or resulting from Severe Acute Respiratory Syndrome (SARS) and/or Atypical Pneumonia and/or Avian Flu and/or Swine Flu and/or any other flu variant recognized as a pandemic, whether phase 1, 2, 3, 4, 5 or 6 as determined by the World Health Organization or the threat or fear thereof (whether actual or perceived).”

115. **Neither of these exclusions were incorporated into the Policy.**

116. Indeed, Travelers Excess and Surplus, which drafted the Policy, had the ability to incorporate either of the above exclusions, but specifically chose not to include either of the above exclusions in the Policy.

117. The failure to include any exclusions for losses caused by communicable diseases or pandemics (such as COVID-19) was of particular import when the courts in *Studio 417, Inc.*, *North State Deli, LLC*, and *Taps & Bourbon on Terrace, LLC* ruled in favor of coverage for the insureds.

² These exclusions were taken from other insurance policies that were issued on or before the Policy was issued.

118. Indeed, since the purpose of insurance is to provide coverage, courts liberally construe insuring agreements broadly and in favor of coverage.³ Exclusionary clauses and ambiguities, on the other hand, are narrowly and strictly construed against the insurer in a way that tries to afford coverage to the insured.⁴

119. Further, the virus exclusion is buried in the Policy; as such, the Insureds did not have adequate notice that such an exclusion even existed in the Policy. Upon information and belief, Travelers Excess and Surplus did not ever specifically inform the Insureds that the Policy (and/or any prior policy) contained such an exclusion.

120. The Insureds did not specifically negotiate for the inclusion of the virus exclusion in the Policy (or any prior policy).

121. The Insureds did not receive any premium reduction for the inclusion of the virus exclusion in the Policy.

122. The Insureds did not receive any other benefit or consideration for the inclusion of the virus exclusion in the Policy.

123. Application of the virus exclusion to loss/damages caused by a pandemic is contrary to the reasonable expectations of the Insureds, or any reasonable policyholder.

124. Travelers Excess and Surplus' invocation of the virus exclusion was part of its predetermined plan to avoid providing coverage for COVID-19-related insurance claims. In

³ See *Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.*, 606 Pa. 584, 608, 2 A.3d 526, 540 (2010) ("If doubt or ambiguity exists it should be resolved in insured's favor"); *Madison Const. Co. v. Harleysville Mut. Ins. Co.*, 557 Pa. 595, 606 ("Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement") (internal citations omitted).; *Techalloy Co. v. Reliance Ins. Co.*, 338 Pa. Super. 1, 7, 487 A.2d 820, 823 (1984) ("If, however, a term is susceptible to two interpretations or subject to reasonable question, it should be liberally construed in favor of the insured").

⁴ See *Rother v. Erie Ins. Exch.*, 2012 PA Super 228, 57 A.3d 116, 118 (2012) ("Generally, exclusions from coverage are to be narrowly construed") coverage; see also *Dutch Run-Mays Draft, LLC v. Lawyers Title Ins. Corp.*, 2013 WL 11250726, at *3 (Pa. Super. Ct. Nov. 13, 2013).

addition to preemptively writing to certain of its policyholders to tell them that COVID-19 did not cause “direct physical loss or damage” to property, Travelers also wrote in that same letter to certain of its policyholders:

Even if there has been direct physical loss or damage to property, your policy contains a number of exclusions that are likely to apply to business interruption losses. The most important exclusion to note is the exclusion for losses resulting from a virus or bacteria, which would include coronavirus.

COUNT I – BREACH OF CONTRACT
(FAILURE TO INDEMNIFY/PROVIDE COVERAGE)

125. The Insureds adopt and reallege the allegations contained in Paragraphs 1-124, *supra*, as if realleged in full herein.

126. The Policy is a valid and binding contract for which the Insureds paid material consideration in the form of a significant premium.

127. Pursuant to the terms and conditions of the Policy, the Insureds are entitled to coverage for the direct physical loss and/or damage caused by the Government Closure Orders; various federal, state, county, city, and local government orders and guidance; and/or other related acts, conditions, and circumstances.

128. The Insureds have complied with all applicable provisions of, and performed all of their obligations under, the Policy, and/or those provisions and/or obligations have been waived by Travelers Excess and Surplus.

129. Travelers Excess and Surplus, which has acted arbitrarily and capriciously, has breached the Policy by, at a minimum, refusing to provide coverage for the Insureds’ loss/damage.

130. As a result of Travelers Excess and Surplus’ breaches of the Policy, the Insureds have sustained, and continue to sustain, substantial damages for which Travelers Excess and Surplus is liable, in an amount to be established at trial.

COUNT II – BREACH OF COVENANT OF GOOD-FAITH AND FAIR DEALING

131. The Insureds adopt and reallege the allegations contained in Paragraphs 1-124, *supra*, as if realleged in full herein.

132. Travelers Excess and Surplus has an implied contractual obligation to act in good faith toward and to deal fairly with the Insureds. Travelers Excess and Surplus, which has acted arbitrarily and capriciously, has materially breached its implied contractual obligation to the Insureds by putting its own financial interests ahead of the policyholders' financial interests and in many other ways, including, but not limited to failing to adopt, implement, and follow proper standards for the investigation of the Insureds' claims; failing to properly adjust, handle, and investigate the Insureds' claims; and misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue in connection with the Government Closure Orders pertaining to COVID-19.

133. Travelers Excess and Surplus lacks a reasonable basis for denying the Insureds' claim for coverage under the Policy.

134. Travelers Excess and Surplus knew or recklessly disregarded its lack of a reasonable basis in denying coverage.

135. Travelers Excess and Surplus' refusal to honor its obligations under the Policy is frivolous and unfounded.

136. By using predetermined conclusions to evaluate the Insureds claims without the benefit of any reasonable investigation, Travelers Excess and Surplus breached its contractual obligations and violated the Insureds' rights as a policyholder.

137. Travelers Excess and Surplus knew or should have known that it lacked reasonable basis to deny coverage and it failed and/or refused to assess the full nature and extent of the Insureds' losses.

138. Travelers Excess and Surplus, which has an incentive to deny claims to increase profits, has acted out of a motive of self-interest and/or ill-will. As a result of Travelers Excess and Surplus' breaches of the Policy, the Insureds sustained, and continue to sustain, substantial damages for which Travelers Excess and Surplus is liable, in an amount to be established at trial.

COUNT III – STATUTORY BAD FAITH

139. The Insureds adopt and reallege the allegations contained in Paragraphs 1-124, *supra*, as if realleged in full herein.

140. Pennsylvania's "bad-faith" statute (42 Pa. C.S.A. § 8371) provides as follows:

In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith towards the insured, the court may take all of the following actions:

- (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3 percent.
- (2) Award punitive damages against the insurer.
- (3) Assess court costs and attorney fees against the insurer.

141. Other bad-faith (or other) statutes may also govern and apply to Travelers Excess and Surplus; its conduct; and its claims adjustment, handling, and/or investigation.

142. Travelers Excess and Surplus has acted in bad faith in violation of the applicable statute(s) by putting its own financial interests ahead of the policyholders' financial interests and in many other ways, including, but not limited to failing to adopt, implement, and follow proper standards for the investigation of the Insureds' claims (and other insureds claims); failing to properly adjust, handle, and investigate the Insureds' claims (and other insureds claims); and

misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue in connection with the Government Closure Orders pertaining to COVID-19.

143. Travelers Excess and Surplus lacks a reasonable basis for denying the Insureds coverage under the Policy.

144. Travelers Excess and Surplus knew or recklessly disregarded its lack of a reasonable basis in denying coverage.

145. Travelers Excess and Surplus' refusal to honor its obligations under the Policy is frivolous and unfounded.

146. Travelers Excess and Surplus, which has an incentive to deny claims to increase profits, has acted out of a motive of self-interest and/or ill-will.

147. As a result of Travelers Excess and Surplus' bad-faith conduct, the Insureds sustained, and continue to sustain, substantial damages for which Travelers Excess and Surplus is liable, in an amount to be established at trial.

PRAYER FOR RELIEF

WHEREFORE, the Insureds respectfully request that judgment be entered in their favor and against Travelers Excess and Surplus with respect to Counts I-III hereof in an amount to be established at trial and that they also be awarded the following relief:

1. compensatory, consequential, and any other damages to the full extent permitted by law, including, but not limited to 42 Pa. C.S.A. § 8371 or any other applicable bad-faith statute (including, but not limited to, punitive, consequential, and/or nominal damages) and the Policy;
2. pre- and post-judgment interest and court costs to the full extent permitted by law, including, but not limited to, 42 Pa. C.S.A. § 8371 or any other applicable bad-faith statute;
3. reasonable attorneys' fees to the full extent permitted by the law, including, but not limited to, by 42 Pa. C.S.A. § 8371 or any other applicable bad-faith statute; and
4. such other further relief as this Court may deem just and appropriate.

DEMAND FOR JURY TRIAL

The Insureds demand a trial by jury on all issues so triable under Pennsylvania law and the laws of the United States.

Dated: December 21, 2020.

Respectfully submitted,

/s/ John J. Jacko III

John J. Jacko III (PA Attorney No. 67477)
Michel H. Sampson (PA Attorney No. 92574)
(Application for Admission to be Filed)
LEECH TISHMAN FUSCALDO & LAMPL, LLC
1417 Locust Street, 3rd Floor
Philadelphia, Pennsylvania 19102
Telephone: (267) 938-4562
Facsimile: (267) 938-4588
jjacko@leechstishman.com
msampson@leechtishman.com

Robert Zarco
(Application for *Pro Hac Vice* Admission to be Filed)
Colby Conforti
(Application for *Pro Hac Vice* Admission to be Filed)
ZARCO EINHORN SALKOWSKI & BRITO, P.A.
One Biscayne Tower
2 S. Biscayne Blvd., 34th Floor
Miami, Florida 33131
Telephone: (305) 374-5418
Facsimile: (305) 374-5428
rzarco@zarcolaw.com; mguedes@zarcolaw.com
cconforti@zarcolaw.com; aabel@zarcolaw.com

Counsel for Plaintiffs