

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FELD ENTERTAINMENT, INC. and FELD  
MOTOR SPORTS,

Plaintiffs,

vs.

CERTAIN UNDERWRITERS AT LLOYD'S  
LONDON SUBSCRIBING TO POLICY  
NUMBERS B0595NOJE42647019,  
B0595NOJE42648019,  
B0595NOJE42649019, and  
B095NOJE46883019.

Defendants.

CASE NO.:

2021 14027

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JOHN T. FREY  
CLERK, CIRCUIT COURT  
FAIRFAX, VA

### COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs Feld Entertainment, Inc. ("FEI") and Feld Motor Sports ("FMS") (collectively, "Plaintiffs"), appearing through their undersigned counsel, bring this civil action for relief against Defendants Certain Underwriters at Lloyd's London Subscribing to Policy Numbers B0595NOJE42647019, B0595NOJE42648019, B0595NOJE42649019 (the "FEI Defendants"), and B095NOJE46883019 (the "FMS Defendants") (collectively "Defendants"), and allege as follows:

#### NATURE OF THE ACTION

1. This is a declaratory judgment and breach of contract case filed by two insureds, the Plaintiffs, whose business is to produce and promote live family entertainment that tours all over the globe playing to audiences in arenas, stadiums, and theatres. Defendants are the

insurance underwriters who sold Plaintiffs the event cancellation insurance policies at issue in this case (the "Policies").

2. The Policies are event cancellation policies, *not* business interruption policies. Event cancellation policies are, consistent with their name, insurance against losses for the cancellation of live events. Unlike business interruption insurance, physical loss to property is not required to trigger coverage. Moreover, in the Policies, the amount of loss associated with each insured event was agreed to by the insureds and the insurers in advance of the actual date of the events.

3. The issue to be determined in this instance is therefore one of coverage: Whether the cancellation of more than 110 insured events, from February to June 2020, is covered under the Policies that Plaintiffs purchased from Defendants.

4. The insured events were cancelled due to government restrictions or prohibitions on gatherings – measures instituted in an effort to slow the spread of the SARS-CoV-2 virus and the resulting communicable disease, COVID-19 – which made it impossible for the events to be performed for audiences in arenas, stadiums, and theatres. The cancellation of these events resulted in substantial financial losses to Plaintiffs.

5. Defendants have denied any and all coverage under the Policies, claiming that an exclusion regarding communicable disease applies to bar coverage for *anything* even remotely related to COVID-19. Some communicable disease exclusions, including those in subsequent policies later sold by Defendants to Plaintiffs in October 2020 and Spring 2021, are broadly drafted. The operative exclusion in the Policies, however, is qualified and applies only when certain requirements, not applicable here, are met. Rather than reading the exclusion as it is

written in the Policies, Defendants seek to avoid their coverage obligations by reading it as it was written in other policies not at issue here.

6. To date, Defendants have not reimbursed Plaintiffs for even one dollar of their event cancellation losses. Despite this, in the subsequent October 2020 and Spring 2021 policies that FEI Defendants later sold to FEI, they included a clawback provision calling for Plaintiffs to pay more than \$530,000 in additional premiums if Defendants had to pay Plaintiffs more than \$1.5 million for Plaintiffs' event cancellation losses under the Policies, *i.e.*, the losses at issue in this lawsuit (the "Clawback Provision"). In other words, while refusing to reimburse Plaintiffs' losses, Defendants also made sure that Plaintiffs would have to reimburse Defendants if they ever paid on Plaintiffs' losses under the Policies.

7. By this lawsuit, Plaintiffs seek: (1) declaratory relief under Virginia Code § 8.01-184 confirming that they are entitled coverage for their losses under the Policies; and (2) damages for breach of contract and the implied covenant of good faith and fair dealing.

#### **JURISDICTION AND VENUE**

8. Pursuant to Virginia Code § 17.1-513, this Court has original jurisdiction over this action because it is a civil action at law with more than \$100 at issue.

9. Pursuant to Virginia Code § 8.01-328.1, this Court has personal jurisdiction over Defendants because, among other reasons, Defendants transacted business in this Commonwealth with Plaintiffs and contracted to insure any person, property, or risk located within this Commonwealth at the time of contracting. Among other things, the address listed on the Policies is that of Plaintiffs' legal department in Vienna, Virginia.

10. Pursuant to Virginia Code, § 8.01-260, *et seq.*, venue is proper in this Court because the moving or aggrieved party resides and regularly or systematically conducts affairs or

business activity in this County. Among other things, the address listed on the Policies is that of Plaintiffs' legal department in Vienna, Virginia.

11. Jurisdiction and venue are further proper in this Court pursuant to the event cancellation policies that FEI Defendants sold to FEI. The event cancellation policies sold to FEI contain FEI Defendants' agreement to submit to the jurisdiction of any court in the United States. Specifically, the Service of Suit Clause in the policies sold to FEI provides that, "It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the insured, will submit to the jurisdiction of a Court of competent jurisdiction within the United States."

12. Jurisdiction and venue are further proper in this Court pursuant to the event cancellation policy that FMS Defendants sold to FMS. The event cancellation policy sold to FMS contains FMS Defendants' agreement to submit to the jurisdiction of any court in the United States. Specifically, the Service of Suit Clause in the event cancellation policy sold to FMS provides that, "It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the insured, will submit to the jurisdiction of a Court of competent jurisdiction within the United States."

#### THE PARTIES

13. FEI is a corporation organized under the laws of Delaware, and has its principal place of business at 800 Feld Way, Palmetto, FL, 34221. FEI maintains its legal offices at 8607 Westwood Center Drive, Vienna, Virginia, 22182, and the policies sold to FEI list that address as the address of the insured.

14. FMS is a corporation organized under the laws of Delaware, and has its principal place of business at 800 Feld Way, Palmetto, FL, 34221. FMS maintains its legal offices at 8607

Westwood Center Drive, Vienna, Virginia, 22182, and the policy sold to FMS lists that address as the address of the insured.

15. Plaintiffs are informed and believe, and on that basis allege, that Certain Underwriters at Lloyd's London Subscribing to Policy Numbers B0595NOJE42647019, B0595NOJE42648019, B0595NOJE42649019, and B095NOJE46883019 (collectively, "Defendants") include those syndicates underwriting out of and companies that operate through the Lloyd's, London insurance market at 1 Lime Street London, England subscribing to the insurance policies sold to Plaintiffs. Lloyd's "is a market in which independent insurance underwriters join together in syndicates to sell insurance, mainly through brokers, under the umbrella of the Lloyd's brand name." Her Majesty's Revenue & Customs internal manual, Lloyd's Manual (Sept. 25, 2019), <https://www.gov.uk/hmrc-internal-manuals/lloyds-manual/lm1010> (visited October 5, 2021).

16. Plaintiffs are informed and believe, and on that basis allege, that the lead syndicate on the Policies is Hiscox Syndicate 0033, which is managed by Hiscox Syndicates Limited ("Hiscox").<sup>1</sup> The lead syndicate sets the terms and conditions of insurance policies and provides claims servicing on behalf of all of the syndicates that subscribe to a particular policy.

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<sup>1</sup> The Policies identify the following syndicates as subscribing members: Policy NOJE46883019 (Hiscox Syndicates Limited for and on behalf of Syndicate 33; Brit Syndicates Limited for and on behalf of Syndicate 2987; Beazley Furlonge Ltd for and on behalf of Syndicate 2623; Beazley Furlonge Ltd for and on behalf of Syndicate 623; and Talbot Underwriting Ltd for and on behalf of Syndicate 1183); Policy NOJE46247019 (Hiscox Syndicates Limited for and on behalf of Syndicate 33; Beazley Furlonge Ltd for and on behalf of Syndicate 2623; Beazley Furlonge Ltd for and on behalf of Syndicate 623; Brit Syndicates Limited for and on behalf of Syndicate 2987; Talbot Underwriting Ltd for and on behalf of Syndicate 1183; and Atrium Underwriters Limited for and on behalf of Syndicate 609); Policy NOJE46249019 (Hiscox Syndicates Limited for and on behalf of Syndicate 33; Beazley Furlonge Ltd for and on behalf of Syndicate 2623; Beazley Furlonge Ltd for and on behalf of Syndicate 623; Brit Syndicates Limited for and on behalf of Syndicate 2987; Talbot Underwriting Ltd for and on behalf of Syndicate 1183; Tokio Marine

## THE POLICIES

17. FEI bought an event cancellation insurance program from FEI Defendants for the policy period April 1, 2019 to April 1, 2020 with a 90-day extension of the reporting period. The insurance program consisted of a primary policy and two excess policies (collectively, the "FEI Policies"):

- Policy No. B0595NOJE42647019 ("Primary Policy") has a \$5,000,000 limit per "each and every loss" and a \$10,000,000 aggregate limit.
- Policy No. B0595NOJE42649019 (the "First Excess Policy") has a \$5,000,000 ultimate net loss limit per "each and every loss" excess of \$5,000,000 and no aggregate limit.
- Policy No. B0595NOJE42648019 (the "Second Excess Policy") has a \$20,000,000 limit per "each and every loss" excess of \$10,000,000 and no aggregate limit.

18. Each of the excess policies follow form to the Primary Policy with respect to the policy wording. True and correct copies of the Primary Policy, First Excess Policy, and Second Excess Policy are, respectively, attached hereto as Exhibits A, B, and C.<sup>2</sup>

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Kiln for and on behalf of Syndicate 0510; Argenta Group for and on behalf of Syndicate 2121; and MS Amlin Underwriting Limited for and on behalf of Syndicate 2001); Policy NOJE46248019 (Hiscox Syndicates Limited for and on behalf of Syndicate 33; Beazley Furlonge Ltd for and on behalf of Syndicate 2623; Beazley Furlonge Ltd for and on behalf of Syndicate 623; Brit Syndicates Limited for and on behalf of Syndicate 2987; Talbot Underwriting Ltd for and on behalf of Syndicate 1183; and Argenta Group for and on behalf of Syndicate 2121).

<sup>2</sup> The Policies have been redacted to remove proprietary information including premium amounts and Plaintiffs' revenue projections for individual insured events. The Policies have been bates labeled for ease of reference as follows: Ex. A. (FELD000001-69); Ex. B. (FELD000070-97); Ex. C. (FELD000098-137); Ex. D (FELD000138-165).



19. FMS purchased a separate event cancellation insurance policy from the FMS Defendants, Policy No. B095NOJE46883019 (the “FMS Policy”), with a policy period of December 20, 2019 to April 5, 2020. The FMS Policy has a limit of \$22,922,549 in the aggregate with a \$50,000 deductible for “each and every loss.” A true and correct copy of the FMS Policy is attached as Exhibit D.

20. The Policies were designed to protect Plaintiffs against the possibility of an insured performance being “cancelled, abandoned, postponed, interrupted, curtailed, or relocated.” See Primary Policy, “Loss of Revenue” (Ex. A, FELD000004); FMS Policy, “Loss of Revenue” (Ex. D, FELD000152). The Policies provide broad “all-risk” coverage—that is, coverage against all causes of a loss except those conspicuously, plainly, clearly, and expressly excluded. See *id.* (coverage arises for cancellation “as a sole and direct result of a cause not otherwise excluded...”).

21. The insuring clause of the Policies states:

**If an insured event or an insured performance are necessarily and unavoidably cancelled, abandoned, postponed, interrupted, curtailed or relocated as a sole and direct result of a cause not otherwise excluded by this insurance, which occurs during the period of insurance, and is beyond the control of the insured and the participant therein the Underwriters shall pay the agreed sum insured for such insured event [or insured performance].**

*Id.* (emphasis in original) (bracketed language in the FEI Policies only).

22. The Policies further state:

**This insurance indemnifies the insured for proven additional costs or charges reasonably and necessarily paid by the insured to avoid or diminish a loss insured under this contract provided such additional costs or charges do not exceed the amount of loss thereby avoided or diminished subject always to the policy limits and the excess amounts described herein, subject to the Excess amounts described herein.**

*Id.*, Additional Costs and charges, Ex. A, FELD000004; Ex. D, FELD000152 (emphasis in original).

23. The Policies have a condition calling for Plaintiffs to mitigate, prevent, or otherwise avoid a covered loss: "The insured shall at all times do and concur in doing all things reasonably practical to avoid or diminish a loss under this Insurance." *Id.*, General Conditions § ii, Ex. A, FELD000007; Ex. D, FELD000154 (emphasis in original).

24. The Policies contain a choice of law provision which states that, "This insurance shall be governed by the laws of the State of Virginia." *Id.*, Choice of Law and Jurisdiction, Ex. A, FELD000015; Ex. D, FELD000160.

25. The communicable disease exclusion, upon which Defendants relied to deny coverage for Plaintiffs' losses, is found in the "What is Not Covered" section of the Policies.

This exclusion states:

This Insurance does not cover any loss directly or indirectly arising out of, contributed to by, or resulting from:

...

Any communicable disease which leads to:

- a) the imposition of quarantine or restriction in movement of people or animals by any national or international body or agency; and/or
- b) any travel advisory or warning being issued by a national or international body or agency and in respect of (a) or (b) any fear or threat thereof (whether actual or perceived).

If the Underwriters allege that by reason of this exclusion, any loss is not covered by this insurance the burden of proving the contrary shall be upon the insured.

*Id.*, What is Not Covered, § xii in the Motor Sports Policy and § xiv in the Primary Policy (the "2019 Communicable Disease Exclusion"), Ex. A, FELD000011; Ex. D, FELD000158 (emphasis in original).



26. The 2019 Communicable Disease Exclusion was written by Defendants.

Subsequently, Defendants unilaterally changed the language of their own exclusion to materially expand the scope of it in policies that they subsequently sold to FEI in October 2020, April 2021, and FMS in May 2021.

27. In October 2020, the FEI Defendants sold FEI an event cancellation insurance policy covering events around the globe from October 30, 2020 through April 5, 2021 (the "October 2020 FEI Policy").

28. The new communicable disease exclusion in the October 2020 FEI Policy (the "2020 Communicable Disease Exclusion") sought to exclude:

Any Communicable Disease or the fear or threat (whether actual or perceived) of a Communicable Disease. For the purpose of the exclusion, Communicable Disease means any disease capable of being **transmitted** directly or indirectly from any organism to another organism by means of any substance or agent.

29. The 2020 Communicable Disease Exclusion therefore removed the conditional language present in the 2019 Communicable Disease Exclusion, namely: (a) the imposition of ***quarantine or restriction in movement*** of people or animals ***by any national or international body or agency***; and/or (b) any ***travel advisory or warning*** being ***issued by a national or international body or agency*** and in respect of (a) or (b) any fear or threat thereof (whether actual or perceived).

30. The October 2020 FEI Policy also included a clawback provision for Defendants whereby Plaintiffs were required to reimburse Defendants in the event that Defendants' paid Plaintiffs' insured cancellation losses under the Policies (the "Clawback Provision"). The Clawback Provision states that:

If, during the period of this insurance, a payment as a result of a loss or aggregate of losses of more than USD1,500,000 is agreed under [the Policies...] then an additional premium of USD 530,00

will become due immediately on this insurance.

31. Because Plaintiffs had no claims for losses, other than those that are the subject of this lawsuit, the provision referenced in Paragraph 30 could only have been intended to apply to the losses in dispute here.

32. In April 2021, FEI Defendants sold FEI an event cancellation insurance policy covering events around the globe from May 1, 2021 through May 1, 2022 (the "2021 FEI Policy").

33. The 2021 FEI Policy contained yet another iteration of a communicable disease exclusion (the "2021 Communicable Disease Exclusion") which sought to exclude everything without limitation:

(a) Any **communicable disease** or the fear or threat (whether actual or perceived) of a **communicable disease**.

(b) Any action taken in controlling, preventing, suppressing, or remediating any **communicable disease** or the fear or threat (whether actual or perceived) of any **communicable disease**.<sup>3</sup>

34. The 2021 Communicable Disease Exclusion, like the 2020 Communicable Disease Exclusion before it, was changed to remove the qualifying conditional language on communicable disease that was present in the 2019 Communicable Disease Exclusion referenced in Paragraph 29 above. It then adds subsection (b), which is an express reference to "Any action taken in controlling, preventing, suppressing, or remediating any **communicable disease**."

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<sup>3</sup> Communicable Disease was not defined in the 2019 Communicable Disease Exclusion that is the subject of this lawsuit. It was, however, is defined in the 2021 FEI Policy to mean "any disease capable of being transmitted from any organism to another organism by means of any substance or agent."

35. The 2021 FEI Policy included the Clawback Provision, referenced in Paragraph 30 above, to provide Defendants with additional premium in the event that Defendants reimbursed Plaintiffs' event cancellation losses under the Policies.

36. In May 2021, FMS Defendants sold FMS an event cancellation insurance policy covering motor sports events in California from May 20, 2021 through March 13, 2022 (the "2021 FMS Policy").

37. The 2021 FMS Policy also contains the 2021 Communicable Disease Exclusion.

**DEFENDANTS' BREACHES OF CONTRACT AND THE DUTY OF  
GOOD FAITH AND FAIR DEALING**

**The Master Claim**

38. FEI timely provided notice to FEI Defendants of the over 110 engagement cancellations and included a list of all cancelled performances, locations, and scheduled dates. FEI Defendants, through Hiscox, responded with a reservation of rights letter. Despite reserving rights on the applicability of the 2019 Communicable Disease Exclusion, Hiscox asked FEI to provide an updated list of cancelled performances, and "detail regarding the basis of the determination, and dates on which such determinations were made."

39. FEI responded and provided pertinent governmental restrictions on gatherings as well as specific examples of shows that were cancelled following government restrictions on gatherings. FEI further explained that the gathering restrictions were the sole and direct cause of the event cancellations.

40. Specifically, FEI explained to Hiscox that the governmental restrictions on gatherings were the sole and direct cause of the cancellations by the very nature of the shows – the shows travel to the customers, not the reverse – and with reference to ticket sales data demonstrating that ticketholders tend to come from areas nearby to the venue hosting the event.

41. FEI Defendants responded through counsel to FEI to deny all coverage on the grounds that anything directly or indirectly related to COVID-19 was not covered.

42. Notwithstanding their steadfast blanket denial of coverage, the details provided by FEI regarding the cancelled events, and FEI Defendants' own lists of exhibits to their letters, FEI Defendants continue to claim that they do not have enough information regarding FEI's claims and that FEI should give them more. These requests are disingenuous where FEI Defendants have denied all coverage for each and every event under FEI's policies regardless of the detail provided, and thus serve no purpose other than to delay resolution of FEI's claims.

#### The Motor Sports Claim

43. FMS produces and promotes Monster Jam, a monster truck motorsports show. Monster Jam is one of the largest motor sports events touring North America.

44. FMS carries a separate event cancellation policy for its motor sports events held on the West Coast of the United States.

45. As part of a domestic stadium tour in 2020, FMS booked a Monster Jam event for Levi's Stadium in Santa Clara, California on April 4, 2020. This event was included on the list of insured events on the FMS Policy, with expected attendance of 39,000 ticketholders and anticipated revenues valued at \$1.6 million. Unfortunately, the event was cancelled.

46. On March 9, 2020, the County of Santa Clara issued an Order imposing a countywide moratorium on gatherings of 1,000 or more persons.<sup>4</sup> The term "mass gathering" specifically referenced any event or convening that brings together one thousand or more persons in a single space such as a stadium or arena.

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<sup>4</sup> <https://covid19.sccgov.org/sites/g/files/exjcpb766/files/03-09-20-Health-Officer-Order.pdf>

47. On March 10, 2020, Levi's Stadium, the venue for the Monster Jam event, issued the following statement:

The health and safety of Levi's Stadium patrons and employees is our top priority. We support Santa Clara County's order regarding events through May 3, 2020 and are continuing to monitor the COVID-19 situation in consultation with public health experts. Should there be additional changes to future Levi's Stadium events, we will communicate such changes to the public.

48. On March 11, 2020, FMS and the venue began communicating about the gathering restriction and its impact on the upcoming event.

49. On March 13, 2020, the County of Santa Clara issued another Order imposing a mandatory countywide moratorium on gatherings of more than 100 persons, and a conditional countywide moratorium on gatherings of between 35 and 100 persons, to mitigate the spread of COVID-19.<sup>5</sup> Both of these moratoriums were in effect through April 4, 2020, the scheduled date of the Monster Jam event at Levi's Stadium.

50. On March 13, 2020, it was determined that the event would have to be postponed and later cancelled.

51. FMS provided FMS Defendants with timely notice of its claim for coverage in connection with the cancellation of the Monster Jam event.

52. FMS Defendants, through Hiscox, responded and denied the claim based on the 2019 Communicable Disease Exclusion.

53. FMS responded, pointing out that the County of Santa Clara's actions were the sole and direct cause of the postponement of the Monster Jam event and requesting that Hiscox reconsider its denial of coverage.

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<sup>5</sup> <https://covid19.sccgov.org/sites/g/files/exjcpb766/files/03-13-20-Health-Officer-Order.pdf>

54. Hiscox responded and stood by its prior coverage position. Hiscox stated that “the COVID-19 pandemic is a communicable disease” and that the cancellation of the Monster Jam event was “indirectly contributed by” actions “taken by the CDC in response to the COVID-19 pandemic.”

55. FMS then, through counsel, responded to the denial, explaining why the 2019 Communicable Disease Exclusion did not clearly and unambiguously bar coverage for FMS’ claim. FMS pointed out that the CDC Order referenced by Hiscox involved the quarantine of U.S. citizens returning from China on January 29, 2020 but that Santa Clara’s order was six weeks after the CDC Order and that there was no connection between the two. FMS also pointed out that because the show travels to attendees, rather than the reverse, ticketholders are overwhelmingly local, and this was supported by ticket sales data showing that 86% of purchasers were local.

56. FMS’ letter also provided examples of other versions of Defendants’ “communicable disease exclusions,” which are broader than the version in the Policies and that Defendants did not choose to include in FMS’ policy. FMS also explained that “communicable disease” was not the primary cause of its losses (which, under Virginia law, is the principle that controls whether there is coverage in determining when excluded and covered causes of a loss may have contributed to the loss).

57. FMS Defendants responded through counsel to FMS by denying all coverage on the grounds that anything directly or indirectly related to COVID-19 was not covered.

58. Notwithstanding their steadfast blanket denial of coverage, the details provided by FMS regarding the cancelled event, and FMS Defendants’ own research regarding the same as reflected in correspondence, FMS Defendants continue to claim that they do not have enough



information regarding FMS' claims and that FMS should give them more. These requests are disingenuous where FMS Defendants have denied all coverage for the event under FMS' policy, regardless of the detail provided, and thus serve no purpose other than to delay resolution of FMS' claim.

### Defendants' Response

59. In Defendants' responses through counsel on both claims, they have insisted that the gathering restrictions were not the cause of Plaintiffs' losses, but rather the "pandemic" was the cause of the losses.

60. Defendants also stated that the 2019 Communicable Disease Exclusion applied to bar coverage. In taking this position, Defendants interpreted the 2019 Communicable Disease Exclusion in a much broader way than it was actually written in the Policies. Specifically, Defendants' counsel stated that the 2019 Communicable Disease Exclusion applies if the communicable disease has led to "there being a fear or threat (real or perceived) of a national or international body or agency imposing quarantine or restriction in movement" or "there being a fear or threat (real or perceived) of a national or international body or agency issuing a travel advisory or warning." Further, Defendants asserted that if a communicable disease resulted in any national or international order in any location throughout the world, then coverage was precluded regardless of whether the order affected Plaintiffs' insured events.

61. Defendants' letters attempted to broaden the 2019 Communicable Disease Exclusion to include language that does not appear in the Policies. It is only by ignoring the requirements contained in the 2019 Communicable Disease Exclusion (i.e., invoking language deletions that did not exist in the Policies and arose only in the revised exclusionary language

found in the subsequent 2020 and 2021 policies) and ignoring any causal linkage thereto that Defendants have concocted a way to deny coverage for Plaintiffs' losses.

62. Plaintiffs' losses were not caused by a communicable disease (COVID-19) generally because COVID-19 still exists, yet Plaintiffs have been able to resume producing and presenting events. This is not because COVID-19 has been eradicated. Rather, Plaintiffs have been able to do so because gathering restrictions have been lifted and venues have re-opened, despite new variants, surges of COVID-19, travel restrictions, and the fact that the world is still very much in the throes of a pandemic.

63. Defendants know that Plaintiffs have resumed producing events because Defendants have issued new policies (October 2020 FEI Policy, 2021 FEI Policy, 2021 FMS Policy) insuring those events. And as noted above in Paragraphs 30 and 35, Defendants even included the Clawback Provision in the 2020 and 2021 FEI policies whereby Plaintiffs would have to pay significant premiums to Defendants in the event that Defendants have to pay Plaintiffs' event cancellation losses under the Policies, thus effectively adding new premiums retroactively for the coverage that Plaintiffs already purchased.

64. Plaintiffs are informed and believe and, on that basis, allege that Defendants know that their interpretation and application of the 2019 Communicable Disease Exclusion and relevant facts is flawed, and that they have a real risk of being found wrong in a court of law, but yet continue to stand on their denial.

65. By taking the positions and acting as alleged above, Defendants have breached their contractual obligations and have not acted in accordance with the duty of good faith and fair dealing with respect to the Policies. Their wrongful conduct as alleged herein has caused, and will continue to cause, significant damage to Plaintiffs.

66. To the extent not waived or otherwise excused, Plaintiffs have complied with all terms and conditions precedent in the Policies. Therefore, Plaintiffs are entitled to all benefits of insurance provided by the Policies.

### **FIRST CAUSE OF ACTION**

#### ***FEI's Claim for Breach of Contract Against the Syndicates Subscribing to Policy Nos. B0595NOJE42647019, B0595NOJE42648019, and B0595NOJE42649019***

67. FEI realleges and incorporates by reference each allegation in paragraphs 1 through 66 above.

68. FEI performed all obligations required of it under Policy Nos. B0595NOJE42647019, B0595NOJE42648019, and B0595NOJE42649019, except as otherwise excused.

69. FEI Defendants breached their duties under Policy Nos. B0595NOJE42647019, B0595NOJE42648019, and B0595NOJE42649019 by, among other things:

- a. Failing and refusing to pay for losses FEI sustained as a result of the gathering restrictions;
- b. Refusing to pay for the amounts that FEI reasonably spent to reduce its losses, even though Policy Nos. B0595NOJE42647019, B0595NOJE42648019, and B0595NOJE42649019 require FEI to "mitigate" its losses and common law obligates FEI Defendants to pay for amounts reasonably incurred in an effort to mitigate loss; and
- c. Otherwise acting as alleged above.

70. As a direct and proximate result of FEI Defendants' contractual breaches, FEI has sustained, and continues to sustain, substantial damages for which FEI Defendants are liable, in amounts to be established at trial.

## SECOND CAUSE OF ACTION

### ***FEI's Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing Against Syndicates Subscribing to Policy Nos. B0595NOJE42647019, B0595NOJE42648019, and B0595NOJE42649019***

71. FEI realleges and incorporates by reference each allegation in paragraphs 1 through 70 above.

72. At all pertinent times, FEI Defendants had a duty to act in good faith and deal fairly with FEI as their insured, and FEI Defendants were and are forbidden from doing anything that would destroy or injure FEI's right to receive the full benefits of the contract. This duty extends to and informs all of FEI Defendants' obligations under Policy Nos. B0595NOJE42647019, B0595NOJE42648019, and B0595NOJE42649019.

73. Pursuant to their duty of good faith and fair dealing, FEI Defendants had the duty: (1) to promptly, fairly, and honestly investigate and evaluate each claim; (2) to reach valid coverage positions; and (3) to articulate the reasons for such positions.

74. Rather than comply with these duties, FEI Defendants breached their duties of good faith and fair dealing by, among other things:

- a. failing to conduct a full and thorough investigation of FEI's claims for insurance coverage and asserting grounds for denying coverage without conducting such investigation;
- b. wrongfully and unreasonably asserting grounds for denying coverage that it knew, or should have known, are not supported by, and in fact conflict with, Policy Nos. B0595NOJE42647019, B0595NOJE42648019, B0595NOJE42649019, the law, and the facts;
- c. failing to fully inquire into the bases that might support coverage for FEI's claims;

- d. failing to conduct an adequate investigation of the losses suffered by FEI, and asserting grounds for disputing coverage based on their inadequate investigation;
- e. unreasonably failing and refusing to honor their promises and representations in the policies they issued to FEI;
- f. retroactively adding premiums as a condition for FEI to be covered for its losses under the policies that FEI already purchased;
- g. giving greater consideration to their own interests than they gave to FEI's interests; and
- h. otherwise acting as alleged above.

75. FEI Defendants knew there was no reasonable basis, or recklessly disregarded the lack of reasonable basis, for the foregoing acts and/or omissions.

76. In breach of the implied covenant of good faith and fair dealing, FEI Defendants did the things and committed the acts alleged above for the purpose of consciously withholding from FEI the rights and benefits to which it is and was entitled under Policy Nos. B0595NOJE42647019, B0595NOJE42648019, and B0595NOJE42649019.

77. Such actions are inconsistent with the reasonable expectations of FEI, conflict with established industry custom and practice, conflict with legal requirements, conflict with the express terms of Policy Nos. B0595NOJE42647019, B0595NOJE42648019, and B0595NOJE42649019, and constitute bad faith.

78. As a direct and proximate result of these bad faith breaches, which are continuing as of the filing of this Complaint, FEI has sustained, and will continue to sustain, significant damages for which FEI Defendants are liable.

### **THIRD CAUSE OF ACTION**

#### ***FMS' Claim for Breach of Contract Against Syndicates Subscribing to Policy No. B095NOJE46883019***

79. FMS realleges and incorporates by reference each allegation in paragraphs 1 through 78 above.

80. FMS performed all obligations required of it under Policy No. B0595NOJE46883019, except as otherwise excused.

81. FMS Defendants breached their duties under Policy Nos. Policy No. B0595NOJE46883019 by, among other things:

- a. Failing and refusing to pay for losses FMS sustained as a result of the gathering restrictions;
- b. Refusing to pay for the amounts that FMS reasonably spent to reduce its losses, even though Policy No. B0595NOJE46883019 requires FMS to "mitigate" its losses and the common law obligates FMS Defendants to pay for amounts reasonably incurred in an effort to mitigate loss; and
- c. Otherwise acting as alleged above.

82. As a direct and proximate result of FMS Defendants' contractual breaches, FMS has sustained, and continues to sustain, substantial damages for which FMS Defendants are liable, in amounts to be established at trial.

### **FOURTH CAUSE OF ACTION**

#### ***FMS' Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing Against Syndicates Subscribing to Policy No. B095NOJE46883019***

83. FMS realleges and incorporates by reference each allegation in paragraphs 1 through 82 above.



84. At all pertinent times, FMS Defendants had a duty to act in good faith and deal fairly with FMS as their insured, and FMS Defendants were and are forbidden from doing anything that would destroy or injure FMS' right to receive the full benefits of the contract. This duty extends to and informs all of FMS Defendants' obligations under Policy No. B0595NOJE46883019.

85. Pursuant to their duty of good faith and fair dealing, FMS Defendants had the duty: (1) to promptly, fairly, and honestly investigate and evaluate each claim; (2) to reach valid coverage positions; and (3) to articulate the reasons for such positions.

86. Rather than comply with these duties, FMS Defendants breached their duties of good faith and fair dealing by, among other things:

- a. failing to conduct a full and thorough investigation of FMS' claims for insurance coverage and asserting grounds for denying coverage without conducting such investigation;
- b. wrongfully and unreasonably asserting grounds for denying coverage that it knew, or should have known, are not supported by, and in fact conflict with, Policy No. B0595NOJE46883019, the law, and the facts;
- c. failing to fully inquire into the bases that might support coverage for FMS' claims;
- d. failing to conduct an adequate investigation of the losses suffered by FMS, and asserting grounds for disputing coverage based on their inadequate investigation;
- e. unreasonably failing and refusing to honor their promises and representations in the policies they issued to FMS;

- f. giving greater consideration to their own interests than they gave to FMS' interests; and
- g. otherwise acting as alleged above.

87. FMS Defendants knew there was no reasonable basis, or recklessly disregarded the lack of reasonable basis, for the foregoing acts and/or omissions.

88. In breach of the implied covenant of good faith and fair dealing, FMS Defendants did the things and committed the acts alleged above for the purpose of consciously withholding from FMS the rights and benefits to which it is and was entitled under Policy No. B0595NOJE46883019.

89. Such actions are inconsistent with the reasonable expectations of FMS, conflict with established industry custom and practice, conflict with legal requirements, conflict with the express terms of Policy No. B0595NOJE46883019, and constitute bad faith.

90. As a direct and proximate result of these bad faith breaches, which are continuing as of the filing of this Complaint, FMS has sustained, and will continue to sustain, significant damages for which FMS Defendants are liable.

#### **FIFTH CAUSE OF ACTION**

##### ***Declaratory Judgment***

91. Plaintiffs reallege and incorporate by reference each allegation in paragraphs 1 through 90 above.

92. Plaintiffs contend that they are entitled to coverage under the Policies for their losses as described herein. Plaintiffs are informed and believe, and on that basis allege, that Defendants dispute that Plaintiffs are entitled to such coverage. Therefore, an actual and justiciable controversy exists between Plaintiffs and Defendants concerning the interpretation

and construction of the Policies, and the rights and obligations of the parties thereto, with respect to Plaintiffs' claims.

93. Pursuant to § 8.01-184, Plaintiffs seek a judicial declaration from this Court confirming that Plaintiffs' contentions that:

- a. No exclusion in the Policies bars or limits coverage, in whole or in part, for Plaintiffs' losses; and
- b. That the Policies cover Plaintiffs' losses.

94. A declaration is necessary at this time so that the parties' dispute may be resolved and that they may be aware of their prospective rights and duties.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray for relief as follows:

1. For damages in an amount to be determined at trial, plus interest;
2. For attorneys' fees and costs of suit, in an amount to be determined at trial;
3. For declarations in accord with Plaintiffs' contentions stated above; and
4. For such other, further, and/or different relief as may be deemed just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiffs hereby demand a trial by jury in this action.

DATED: October 8, 2021

Respectfully Submitted,

By: 

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