

DISTRICT COURT, COUNTY OF BOULDER,
STATE OF COLORADO

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Boulder, CO 80302
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Plaintiff:

THE REGENTS OF THE UNIVERSITY OF
COLORADO,

v.

Defendant:

FACTORY MUTUAL INSURANCE COMPANY.

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COMPLAINT AND JURY DEMAND

Plaintiff, The Regents of the University of Colorado (“Plaintiff” or the “Regents”) by and through its attorneys, for its Complaint for breach of contract and declaratory judgment pursuant to CO Rev Stat § 13-51-101, *et seq.*, alleges as follows against Defendant Factory Mutual Insurance Company (“Defendant” or “FM”):

NATURE OF THE ACTION

1. This is a civil action for declaratory relief, as well as damages for breach of contract and for violation of C.R.S. §§ 10-3-1115 and 1116 arising out of FM’s wrongful failure and refusal to provide the University of Colorado (“CU”) with coverage under a \$1,000,000,000 (one billion dollars) per occurrence “all risks” insurance policy. More specifically, CU suffered millions of dollars in losses and extra expenses due to “physical loss or damage” at the locations insured under the policy, all of which arose out of the novel coronavirus (“COVID-19”) pandemic and/or the unprecedented government orders that impaired, altered, and/or damaged the properties.

2. Colorado law requires that “[a] person engaged in the business of insurance shall not unreasonably delay or deny payment of a claim for benefits owed to or on behalf of any first-party claimant.” C.R.S. § 10-3-1115. On or around March 12, 2020, the Regents provided FM with notice of its claim. Yet, FM has failed for nearly a year to both honor its coverage obligations and to conduct a reasonable investigation of the claim. FM’s unreasonable delay and refusal is particularly egregious because the policy specifically covers “Communicable Disease Response” and “Interruption by Communicable Disease” as well as providing numerous additional triggered coverages. Faced with a one-year policy-driven deadline to file suit, the Regents asked FM to enter into a tolling agreement to allow for further investigation of the claim. FM refused, leaving the Regents with no choice but to file this action.

3. FM’s course of conduct with respect to the Regents is consistent with FM’s unreasonable litigation positions taken across the country with similarly situated policyholders whose policies contain nearly identical policy language. Due to FM’s improper approach, these policyholders were likewise forced to file lawsuits to compel FM to honor its contractual obligations under this policy form and similar forms.

4. The Regents believe that FM has adopted these untenable litigation positions out of corporate necessity, rather than out of a good faith reading of its own policy language. Indeed, FM has taken litigation positions in actions that pre-date the COVID-19 pandemic that *expressly contradict* its claimed present view that COVID-19 cannot cause “physical loss or damage.” By way of example, FM previously argued in court that a “loss of functionality and/or reliability” due to a mold infestation—a situation analogous to the presence of COVID-19—amounted to “physical loss or damage.”

PARTIES

5. Plaintiff, the Regents, is a body corporate organized under the Colorado Constitution to govern the CU system. The Regents’ office is in Denver, Colorado. Plaintiff is empowered by statute to bring suits on behalf of CU.

6. Defendant FM is a Rhode Island corporation with its principal place of business in Johnston, Rhode Island. FM is authorized to transact insurance business in Colorado.

JURISDICTION AND VENUE

7. This Court has personal jurisdiction over FM because FM is engaged in the business of selling insurance; is licensed to do business, and does business, in the State of Colorado, including Boulder County; and FM sold to the Regents an insurance policy providing commercial property coverage to property located within Boulder County in which FM consents to the jurisdiction of any court within the United States.

8. This Court has jurisdiction over this action as a court of general jurisdiction pursuant to Colo. Const. Art. VI § 9 and pursuant to C.R.C.P. 57, and the Colorado Uniform Declaratory Judgments Law, C.R.S. § 13-51-101, *et seq.*, under which Plaintiff is entitled to seek a declaration of FM's obligations under the contract of insurance it issued to Plaintiff.

9. Venue is appropriate in this Court pursuant to C.R.C.P. 98(c).

GENERAL ALLEGATIONS

The University of Colorado

10. CU is a public research university with multiple campuses serving Colorado, the nation, and the world through leadership in high-quality education and professional training, public service, advancing research and knowledge, and state-of-the-art health care.

11. CU is proud to be a pillar of the Colorado community, boasting about 490,000 living alumni, nearly 285,000 of whom live in Colorado.

12. During the academic year that began in the fall of 2019, CU enrolled more than 67,000 students across the CU system and ended the 2019-2020 academic year by awarding 17,099 degrees.

13. CU has approximately 37,000 employees.

14. The Regents' property holdings include CU's four campuses—Boulder, Colorado Springs, Denver, and the Anschutz Medical Campus—as well as dozens of associated facilities.

15. In total, CU contributes approximately \$12.5 billion to Colorado's economy.

The Policy

16. FM issued Mutual Corporation Non-Assessable Policy No. 1056439 to the Regents providing \$1,000,000,000 per **occurrence**¹ in “all risks” coverage for the policy period of October 1, 2019 to October 1, 2020, subject to various sublimits and time limits and, as relevant here, a \$500,000 deductible (“Policy”). A true and correct copy of the Policy is attached hereto as **Exhibit 1**.

17. The Regents timely paid all premiums due for the Policy and complied with all terms and conditions of the Policy.

18. The Regents, any subsidiary, and the Regents’ “interest in any partnership or joint venture in which [CU] has management control or ownership as now constituted or hereafter is acquired, as the respective interest of each may appear,” including any legal representatives, are an “Insured” under the Policy. Ex. 1 at 1.²

19. The Policy defines an “**occurrence**” in relevant part as “the sum total of all loss or damage of the type insured, including any insured TIME ELEMENT loss, arising out of or caused by one discrete event of physical loss or damage.” *Id.* at 78.

20. The Policy provides coverage for the Regents’ properties—called “**locations**” in the Policy—as specified in a Schedule of Locations identified in Appendix A of the Policy.

21. The Regents’ “**locations**” insured under the Policy are broad, and include but are not limited to CU’s campuses, administrative and other offices, centers of research and study, and related buildings (collectively, the “Properties”).

22. The Policy insures the Properties “against **ALL RISKS OF PHYSICAL LOSS OR DAMAGE**, except as hereinafter excluded, while located as described in the Policy.” *Id.* at 1 (emphasis added).

23. The Policy does not define “physical loss or damage.”

24. FM has stated in previous litigation that the term “physical loss or damage” when undefined in an “all risks” policy like this Policy is “[a]t best . . . susceptible of more than one reasonable interpretation and is therefore ambiguous and must be construed against the [issuing insurer].” See Dkt. 127, Plaintiff FM Motion *in Limine* No. 5 RE Physical Loss or Damage, at 3 n.1, *Factory Mut. Ins. Co. (as Assignee of Albany Molecular Rsch., Inc. and OSO Biopharmaceuticals Mfg., LLC) v. Fed. Ins. Co.*, No. 1:17-cv-00760-GJF-LF (D.N.M. Nov. 19, 2019), attached hereto as **Exhibit 2**.

¹ Terms that are bolded here when discussing the Policy’s language are defined terms in the Policy and have the same meaning as used therein.

² The page numbers used herein are those identified in the FM Policy’s form.

25. In that litigation, FM additionally asserted that “[n]umerous courts have concluded that loss of functionality or reliability . . . constitutes physical loss or damage” under all-risk policies like the FM Policy at issue here. *Id.* at 3.

26. The Policy provides broad “PROPERTY DAMAGE” coverage for physical loss or damage to real and personal property as described in the Policy, *see* Ex. 1 at 9-16.

27. The “PROPERTY DAMAGE” section includes numerous “OTHER ADDITIONAL COVERAGES” potentially implicated here, including without limitation:

- A. \$1 million **annual aggregate** combined with a “TIME ELEMENT” counterpart for “COMMUNICABLE DISEASE RESPONSE” coverage for “reasonable and necessary costs incurred by the [Regents]” at a **location** “with the actual not suspected presence of communicable disease for the: 1) cleanup, removal and disposal of the actual not suspected presence of communicable diseases from insured property; and 2) actual costs of fees payable to public relations services or actual costs of using the Insured’s employees for reputation management resulting from the actual not suspected presence of communicable diseases on insured property” where access to such **location** “is limited, restricted or prohibited” for more than 48 hours “by: 1) an order of an authorized governmental agency regulating the actual not suspected presence of communicable disease; or 2) a decision of an Officer of the Insured as a result of the actual not suspected presence of communicable disease,” *see id.* at 22-23;
- B. \$100 million per occurrence combined with “EXTRA EXPENSE” of “EXPEDITING COSTS” for the “the reasonable and necessary costs incurred: 1) for the temporary repair of insured physical damage to insured property; 2) for the temporary replacement of insured equipment suffering insured physical damage; and 3) to expedite the permanent repair or replacement of such damaged property,” *id.* at 24-25;
- C. “LAW AND ORDINANCE” coverage for “costs . . . resulting from the [Regents] obligation to comply with a law or ordinance . . . enforced as a direct result of insured physical loss or damage at an insured **location**” that was “in force at the time of such loss or damage,” and that “such **location** was not required to be in compliance with such law or ordinance prior to the happening of the insured physical loss or damage,” including costs to comply with a law or ordinance “that regulates the . . . use of building, structures, machinery, or equipment,” *id.* at 26-27;
- D. “PROTECTION AND PRESERVATION OF PROPERTY” coverage, which includes “reasonable and necessary costs incurred for actions to temporarily protect or preserve insured property; provided such actions are

necessary due to actual, or to prevent immediately impending, insured physical loss or damage to such insured property,” *id.* at 29; and

- E. \$25,000 plus 50% of the amount recoverable under this coverage in excess of \$25,000 of “CLAIMS PREPARATION COSTS”—*i.e.*, “the actual costs incurred by [the Regents]: 1) of reasonable fees payable to the Insured’s: accountants, architects, auditors, engineers, or other professionals; and 2) the cost of using the Insured’s employees, for producing and certifying any particulars or details contained in the [Regents] books or documents, or such other proofs, information or evidence required by [FM] resulting from insured loss payable under this Policy for which the [FM] has accepted liability,” *id.* at 21-22.

28. The “PROPERTY DAMAGE” coverage section contains certain exclusions that “apply unless otherwise stated,” including an exclusion for “loss of market or loss of use.” *Id.* at 11.

29. The “PROPERTY DAMAGE” coverage section also excludes “**contamination**, and any cost due to **contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy. If **contamination** due only to the actual not suspected presence of **contaminant(s)** directly results from other physical damage not excluded by this Policy, then only physical damage caused by such contamination may be insured” (the “Contamination Exclusion”). *Id.* at 14. The Contamination Exclusion does not apply if the “**contamination**” is “directly resulting from other physical damage not excluded by this Policy.” *Id.*

30. The Policy defines “**contaminant**” as “anything that causes **contamination.**” *Id.* at 75. The Policy, in turn, defines “**contamination**” as “any condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold or mildew.” *Id.*

31. Additionally, the Policy provides several “TIME ELEMENT” coverages implicated here, including but not limited to:

- A. coverage for lost “GROSS EARNINGS and EXTENDED PERIOD OF LIABILITY”³ or “GROSS PROFIT,”⁴ *id.* at 36-41;
- B. \$100 million per occurrence combined with “EXPEDITING COSTS” of “EXTRA EXPENSE” for “the reasonable and necessary extra costs

³ The Policy’s Limits of Liability identify the “EXTENDED PERIOD OF LIABILITY” as 90 days. *Id.* at 4.

⁴ The Policy’s Limits of Liability identify the period for “GROSS PROFIT” as “12 months, not to exceed 30 days for Ordinary Payroll.” *Id.*

incurred by the [Regents] . . . during the PERIOD OF LIABILITY” which includes “extra expenses to temporarily continue as nearly normal as practicable the conduct of the [Regents’] business . . . [and] extra costs of temporarily using property or facilities of the Insured or others . . . less any value remaining at the end of the PERIOD OF LIABILITY for property obtained in connection with the above,” *id.* at 41-42;

- C. “RENTAL INSURANCE” for “Actual Loss Sustained” by Regents “during the PERIOD OF LIABILITY” of any of the following: “1) the fair rental value of any portion of the property occupied by the [Regents]; 2) the income reasonably expected from rentals of unoccupied or unrented portions of such property; and 3) the rental income from the rented portions of such property according to bona fide leases, contracts or agreements in force at the time of loss, all not to include noncontinuing charges and expenses,” *id.* at 43; and
- D. broad coverage for “TUITION FEES” during the “PERIOD OF LIABILITY,” which includes without limitation “tuition fees which are prevented from being earned or received,” lost “other income” from “routine and special services” and/or research grant and research contract-related revenue losses, lost “Ordinary Payroll” for 30 days, and certain lost “donation and fund raising proceeds,” *id.* at 44-45.

32. The Policy also includes several implicated “TIME ELEMENT COVERAGE EXTENSIONS,” including:

- A. “CIVIL OR MILITARY AUTHORITY” coverage of 30 days of “the Actual Loss Sustained and EXTRA EXPENSE incurred by the [Regents] during the PERIOD OF LIABILITY if an order of civil or military authority limits, restricts or prohibits partial or total access to an insured location provided such order is the direct result of physical damage of the type insured at the insured location or within” five statute miles/eight kilometers of it, *id.* at 53;
- B. \$50 million, not to exceed \$25 million per **contingent time element location**⁵ in “CONTINGENT TIME ELEMENT EXTENDED”

⁵ A “**contingent time element location**” includes any location of: (1) “a direct customer, supplier, contract manufacturer or contract service provider” to the Regents; (2) “any company under a royalty, licensing fee or commission agreement with” the Regents; and (3) “any location of a company that is a direct or indirect customer, supplier, contract manufacturer or contract service provider to a location described in [(1)] above.” *Id.* at 75-76. A “**contingent time element location**” does not include “locations of any company directly or indirectly supplying to, or

coverage for “Actual Loss Sustained and EXTRA EXPENSE incurred by the [Regents] during the PERIOD OF LIABILITY directly resulting from physical loss or damage of the type insured to property of the type insured at **contingent time element locations** located within the TERRITORY of this Policy,” *id.* at 53-54;

- C. “INGRESS/EGRESS” coverage for 30 days of “Actual Loss Sustained and EXTRA EXPENSE incurred by the [Regents] during the PERIOD OF LIABILITY due to the necessary interruption of the [Regents’] business due to partial or total physical prevention of ingress to or egress from an insured location, whether or not the premises or property of the [Regents] is damaged, provided that such prevention is a direct result of physical damage of the type insured to property of the type insured,” *id.* at 54-55;
- D. “ATTRACTION PROPERTY” coverage for 30 days of “Actual Loss Sustained and EXTRA EXPENSE incurred by the [Regents] during the PERIOD OF LIABILITY directly resulting from physical loss or damage of the type insured to property of the type insured that attracts business to an insured location and is” within 1 statute mile/1.6 kilometers of any of the Properties, *id.* at 58;
- E. 90 days of “EXTENDED PERIOD OF LIABILITY” coverage expanding the loss of “GROSS EARNINGS” to include reduced sales “for such additional length of time as would be required with the exercise of due diligence and dispatch to restore the Insured’s business to the condition that would have existed had no loss happened; and . . . commencing with the date on which the liability of the Company for loss resulting from interruption of business would terminate if this Extension had not been included in this Policy,” *id.* at 59.
- F. 365 days, not to exceed \$1 million **annual aggregate** combined with its “PROPERTY DAMAGE” counterpart, for “INTERRUPTION BY COMMUNICABLE DISEASE,” *id.* at 60-61;
- G. \$100 million per occurrence of “PROTECTION AND PRESERVATION OF PROPERTY TIME ELEMENT” for “Actual Loss Sustained by the Insured for a period of time not to exceed 48 hours prior to and 48 hours after the Insured first taking reasonable

receiving from, [Regents], electricity, fuel, gas, water, steam, refrigeration, sewage, voice, data or video.” *Id.* at 76.

action for the temporary protection and preservation of property insured by this Policy provided such action is necessary to prevent immediately impending insured physical loss or damage to such insured property,” *id.* at 61-62; and

- H. “RESEARCH AND DEVELOPMENT” extension of the “TIME ELEMENT” coverage for “Actual Loss Sustained by the Insured of continuing fixed charges and Ordinary Payroll directly attributable to the interruption of research and development activities that in themselves would not have produced income during the PERIOD OF LIABILITY,” *id.* at 62.

33. The Policy contains a “Suit Against The Company” provision which states that “[n]o suit, action or proceeding for the recovery of any claim will be sustained in any court of law or equity unless: 1) the Insured has fully complied with all the provisions of this Policy; and 2) legal action is started within twelve months after inception of the loss. If under the insurance laws of the jurisdiction in which the property is located, such twelve months’ limitation is invalid, then any such legal action must be started within the shortest limit of time permitted by such laws.” *Id.* at 66.

The COVID-19 Outbreak: What is COVID-19?

34. COVID-19 is a communicable disease caused by the novel coronavirus known as SARS-CoV-2.

35. On January 30, 2020, the World Health Organization (“WHO”) declared COVID-19 a Public Health Emergency of International Concern. On March 11, 2020, the WHO upgraded its declaration to recognize COVID-19 as a global pandemic.

36. WHO reporting reflects that COVID-19 is highly transmissible and can be passed, among other ways, through:

- A. “direct, indirect, or close contact with infected people”;
- B. exposure to respiratory droplets from a person “in close contact (within 1 metre) with an infected person who has respiratory symptoms (e.g. coughing or sneezing) or who is talking or singing”;
- C. airborne or aerosol transmission where droplets remain in the air for extended periods of time and over long distances; and
- D. coming into contact with an infected surface as “viable SARS-CoV-2 virus and/or RNA . . . can be found on . . . surfaces for periods

ranging from hours to days, depending on the ambient environment (including temperature and humidity) and the type of surface.”⁶

37. The U.S. Centers for Disease Control and Prevention (“CDC”) has similarly concluded that COVID-19 “is spreading very easily and sustainably between people.”

38. On August 25, 2020, CU chemistry professor Jose-Luis Jimenez, an aerosols expert, published an article in TIME explaining that SARS-CoV-2 spreads three ways: (1) by “fomites,” or “objects that are contaminated with the virus (which could include someone else’s skin)”; (2) “droplets,” or “small bits of saliva or respiratory fluid that infected individuals expel when they cough, sneeze, or talk” that “fall to the ground after traveling 3-6 feet”; and (3) “aerosols,” or “bits of fluid” expelled by humans that “are so small that they can linger in the air for minutes to hours.”⁷

39. With respect to “aerosols,” Professor Jimenez explained that “the evidence overwhelmingly supports aerosol transmission [of SARS-CoV-2], and there are no strong arguments against it.”⁸ His article compares aerosol transmission to smoking, explaining:

Imagine sharing a home with a smoker: if you stood close to the smoker while talking, you would inhale a great deal of smoke. Replace the smoke with virus-containing aerosols, which behave very similarly, and the impact is similar: the closer you are to someone releasing virus-carrying aerosols, the more likely you are to breathe in larger amounts of virus. We know from detailed, rigorous studies that when individuals talk in close proximity, aerosols dominate transmission and droplets are nearly negligible.

If you are standing on the other side of the room, you would inhale significantly less smoke. But in a poorly ventilated room, the smoke will accumulate, and people in the room may end up inhaling a lot of smoke over time. Talking, and especially singing and shouting increase aerosol exhalation by factors of 10 and 50, respectively. Indeed, we are finding that outbreaks often occur when people gather in crowded, insufficiently ventilated indoor spaces, such as singing at karaoke parties, cheering at clubs, having conversations in bars, and exercising in gyms. Superspreading events, where one person infects many, occur almost exclusively in indoor locations and are driving the pandemic. These observations are easily explained by aerosols, and are very difficult or impossible to explain by droplets or fomites.

⁶ *Transmission of SARS-CoV-2: implications for infection prevention precautions*, World Health Org. (Jul. 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions>.

⁷ Jose-Luis Jimenez, *COVID-19 Is Transmitted Through Aerosols. We Have Enough Evidence, Now It Is Time to Act*, TIME (Aug. 25, 2020 7:00AM EDT), <https://time.com/5883081/covid-19-transmitted-aerosols/>

⁸ *Id.*

Aerosols . . . act like smoke: after being expelled, they don't fall to the ground, but rather disperse throughout the air, getting diluted by air currents, and being inhaled by others present in the same space. Contact tracing shows that, when it comes to COVID-19, being outdoors is 20 times safer than being indoors, which argues that aerosol transmission is much more important than droplets; outdoors, there's plenty of air in which aerosols can become diluted; not so indoors.⁹

40. With respect to surfaces, a March 2020 National Institutes of Health study published in the *New England Journal of Medicine* reported that SARS-CoV-2 “remained active on plastic and stainless steel surfaces for two to three days” and “remained infectious for up to 24 hours on cardboard and four hours on copper.” The same study found that SARS-CoV-2 “was detectable in aerosols for up to three hours.”

41. Each of the aforementioned types of surfaces are present in the Properties.

42. Other studies have found that SARS-CoV-2 may be found on various surfaces for even longer periods of time. For example, the CDC determined that SARS-CoV-2 RNA was identifiable on surfaces within the Diamond Princess cruise ship up to 17 days after the cabins had been vacated.

43. Another study published on October 7, 2020 in the *Virology Journal* determined that “SARS-CoV-2 can be recovered from non-porous surfaces for at least 28 days at ambient temperature and humidity (20 °C and 50% RH).”¹⁰

44. COVID-19 is particularly dangerous because it has an incubation period (the time between exposure and manifesting symptoms) of up to 14 days, during which time an individual who has been exposed to COVID-19 but is “pre-symptomatic” can unknowingly shed and/or transmit SARS-Cov-2 particles.

45. In addition, as many as 40 percent of individuals infected with COVID-19 never manifest symptoms. Scientific studies suggest that even asymptomatic individuals can shed and/or transmit SARS-Cov-2 particles at a level sufficient to infect others.

46. Based on this evidence, SARS-CoV-2 plainly can cause physical damage to property.

47. Additionally, and in the alternative, SARS-CoV-2 plainly can cause physical loss to property.

⁹ *Id.*

¹⁰ Riddell, S., Goldie, S., Hill, A. et al. *The effect of temperature on persistence of SARS-CoV-2 on common surfaces*, *Virology J* 17, 145 (2020), <https://doi.org/10.1186/s12985-020-01418-7>.

COVID-19's Impact on the CU System

48. COVID-19 was first reported in Wuhan City, China in or around December 2019. Available evidence “suggests that the start of the outbreak resulted from a single point introduction in the human population around the time that the virus was first reported in humans in Wuhan, China in December 2019.”¹¹

49. On or about January 21, 2020, the United States confirmed what was then believed to be the first known case of COVID-19 in the country, involving an individual who entered the United States in Seattle, Washington and resided in the State of Washington.

50. On January 31, 2020, Health and Human Services Secretary Alex M. Azar II declared a public health emergency to combat COVID-19.¹²

51. On March 11, 2020, the WHO declared COVID-19 to be a “pandemic.”

52. On that same day and thereafter, state and municipal government officials issued a series of executive orders, ordinances, and/or actions in response to the presence of COVID-19 at the Properties and within the surrounding community (“Government Orders”).

53. The Government Orders have the force of law and have led to the Regents to incur substantial costs and extra expenses to comply with the same, as well as caused a necessary suspension of CU’s operations in ways that remain on-going to this day.

54. Additionally, the Regents responded to such Government Orders and the presence of COVID-19 at and around its Properties by working by and through CU campus leadership to issue a series of orders (“University Orders”) that dramatically impacted CU’s operations, led to the incurring the substantial costs and extra expenses, and ultimately caused tens of millions of dollars in losses.

55. For example:

- A. On or about March 11, 2020, each of the campuses within the CU system, except the Anschutz Medical Campus, announced a transition to remote learning beginning March 16, 2020, effectively suspending in-person operations in its academic and research facilities. CU’s Boulder campus further announced a suspension of Education Abroad-sponsored programs,

¹¹ *Coronavirus disease 2019 (COVID-19) Situation Report - 94*, World Health Org. (Apr. 23, 2020), <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200423-sitrep-94-covid-19.pdf>

¹² *Secretary Azar Declares Public Health Emergency for United States for 2019 Novel Coronavirus*, U.S. Dep’t of Health and Human Serv. (Jan. 31, 2020), <https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html>.

a suspension of all university-sponsored domestic and international travel, and suspension of all university-sponsored gatherings of more than 150 attendees. CU's campuses additionally began the transition to remote work for certain employees.

- B. On or about March 11, 2020, the Governor of Colorado issued Executive Order D 2020 003 declaring a Disaster Emergency “due to the presence of coronavirus disease 2019 (COVID-19) in Colorado.” The Governor’s Executive Order recognized that “[l]ike many other states and countries around the world, Colorado identified numerous presumptive positive cases of COVID-19.”
- C. On or about March 12, 2020, the Regents confirmed the presence of COVID-19 within the CU system as a CU Boulder employee received a presumptive positive test result. The same day, CU Boulder announced the cancellation of the university’s Admitted Student Day, originally scheduled for April 4, 2020. Additionally, the PAC-12 Conference, of which CU Boulder is a member, announced the suspension of all spring athletic competitions until further notice. The suspensions of spring athletics for 2020 has ultimately become indefinite.
- D. On or about March 13, 2020, CU’s Anschutz Medical Campus joined the other campuses within the CU system by ordering a transition to remote learning wherever possible. On or about March 16, 2020, CU Boulder announced “intensifying measures” to protect the campus, including suspending all non-essential research activities.
- E. By on or about March 17, 2020, CU ordered the cancellation of spring in-person commencement ceremonies—major events that draw tens of thousands of people to CU’s Properties—in response to the presence of COVID-19.
- F. On or about March 19, 2020, the Colorado Department of Public Health & Environment (“CDPHE”) issued Public Health Order (“PHO”) 20-22, which declared that “the following places of public accommodation are closed to ingress, egress, use, and occupancy by members of the public . . . [r]estaurants, food courts, cafes, coffeehouses, and other similar places of public accommodation offering food or beverage for on-premises consumption . . . [b]ars, taverns, brew pubs, breweries, microbreweries, distillery pubs, wineries, tasting rooms, special licensees, clubs, and other places of public accommodation offering alcoholic beverages for on-premises consumption . . . [g]ymnasiums . . . [m]ovie and performance theaters, opera houses, concert halls, and music halls.” CU’s Properties contain many of the places of public accommodation impacted by PHO 20-22.

- G. On or about March 25, 2020, the Governor of Colorado issued Executive Order D 2020 017 “ordering Coloradans to stay at home whenever possible due to the presence of coronavirus disease 2019 (COVID-19) in the State.” This Executive Order further “direct[ed] all Coloradans to stay at home, subject to limited exceptions such as obtaining food and other household necessities, going to and from work at critical businesses, seeking medical care, caring for dependents or pets, or caring for a vulnerable person in another location.”
- H. On or about March 26, 2020, the CDPHE issued PHO 20-24 Implementing Stay at Home Requirements. This Order required, among other things, that “[a]ll public and private gatherings of any number of people occurring outside a Residence are prohibited, except for the limited purposes expressly permitted in this PHO which include Essential Activities.” The CDPHE PHO 20-24 identified postsecondary institutions like CU as “Critical Businesses,” but only “for the purpose of facilitating distance learning or performing essential functions, provided that Social Distancing Requirements are observed, such as security, medical and mental health services, housing, food services, and critical research.”
- I. By the end of March 2020, in response to the presence of COVID-19 at the Properties and Government Orders, the University Orders had transformed the CU system to operate in a remote learning, teaching, working, and researching environment to protect all non-essential personnel.
- J. On or about April 26, 2020, the CDPHE issued PHO 20-28, which authorized a very limited re-opening of postsecondary institutions “for the purpose of facilitating distance learning, providing in-person classroom or laboratory education for less than 10 students per classroom or lab in medical training fields only, or performing essential functions, provided that Social Distancing Requirements are observed, such as security, medical and mental health services, housing, food services, and critical research.”

56. Further, many other Government Orders issued by Colorado state and municipal officials in whose jurisdiction the Properties reside during March and April 2020 and thereafter recognized the ability for COVID-19 to spread through contact with contaminated surfaces—*i.e.*, the presence of COVID-19 damages and/or impairs property by creating a platform from which to spread a communicable disease. These Government Orders are omitted here for brevity and subject to judicial notice.

57. Into the summer months, the Regents worked with administrators to protect the health and safety of CU students, faculty, staff, and researchers by issuing further University Orders and continuing to closely monitor the spread of COVID-19 on CU’s Properties. These University Orders included without limitation orders cancelling events and maintaining a remote working and education posture.

58. Throughout the summer, in response to COVID-19 and the Government Orders, each CU campus developed and launched a plan to return students safely to CU's campuses for the fall 2021 semester. As part of these efforts, CU incurred substantial expenses to accommodate its Properties for social distancing, installed physical barriers, engaged in systematic cleaning and sanitizing efforts, and updated and assessed air filtration and HVAC systems in the Properties to maximize ventilation and minimize recirculated air.

59. CU's detection and prevention efforts continued into the fall semester. Nonetheless, COVID-19 remained a continuing presence at its Properties. For example, during the fall 2020 semester, at the Boulder campus alone, CU conducted 74,267 monitoring salivary COVID-19 tests, of which 1,409 returned positive results, leading to a referral for a diagnostic polymerase chain reaction ("PCR") test. In total, at the Boulder campus alone, CU conducted 16,067 diagnostic PCR tests during the fall 2020 semester, with 1,725 of such tests returning a positive result.

60. During the fall 2020 semester, at the Boulder campus alone, CU identified the presence of COVID-19 in a substantial number of Properties, including at least 25 residence halls, at least 24 academic and research buildings, at least two athletic facilities, and at least five administrative offices.

61. CU made such identifications through a systematic approach that included weekly monitoring testing, contact tracing of COVID-19 positive individuals, and wastewater monitoring of the residence halls.

62. To date, at all campuses except the Anschutz Medical Campus, CU has collectively conducted 127,550 salivary and PCR COVID-19 tests, of which 2,426 returned positive results.

63. The Regents state, on information and belief, that COVID-19 was ultimately present at all of the Properties starting on or about March 11, 2020 and has remained consistently at all relevant times thereafter due to a number of factors, including: (1) the volume of confirmed positive tests in fall 2020; (2) treatment efforts of COVID-19 patients at facilities on, near, or around the Properties; (3) prevalence of COVID-19 in and around the State of Colorado; (4) the fact that nearly all of the Properties are moderate-to-heavily trafficked public spaces; (5) the lack of available testing at high volumes until the summer and fall months of 2020, and (6) the lack of public knowledge during the initial outbreak of COVID-19 in March 2020 that COVID-19 may be spread by pre-symptomatic and asymptomatic individuals.

FM's Failure to Investigate and Refusal to Accept Coverage

64. On or about March 16, 2020, the Regents, by and through their agents, provided FM with notice of loss under the Policy ("Claim").

65. On or about March 20, 2020, FM sent the Regents correspondence acknowledging the Claim, a true and correct copy of which is attached as **Exhibit 3**. Rather than investigate coverage under the full Policy, as FM is obligated to do once it receives a notice of loss, FM instead

only adjusted the Claim under the Policy's Communicable Disease Response and Interruption by Communicable Disease coverage extensions.

66. To date, FM's sole "investigation" of the Regents' Claim has consisted of sending CU's University Risk Management department a set of limited questionnaires.

67. During the course of 2020 and into early 2021, the Regents heard nearly nothing from FM about the Claim.

68. Recognizing that the "Suit Against the Company" provision in the Policy may require the Regents to bring an action on its Claim within 12 months of incurring loss, the Regents in mid-February 2021 requested that FM enter into a tolling agreement concerning this Claim. Such an agreement would allow FM to finally conduct a proper investigation and allow the parties to potentially reach a resolution to this Claim without judicial intervention.

69. On February 26, 2021, FM unreasonably refused the Regents' tolling request, forcing the instant lawsuit.

70. To date, FM has unreasonably delayed in acknowledging coverage for the Claim. Its present coverage position, coupled with FM's refusal to enter into a tolling agreement, also amounts to an unreasonable denial of coverage for the Claim. Regents suspect that FM's unreasonably delay and/or denial of the Claim was knowingly wrongful and/or undertaken with a reckless disregard for its reasonableness.

71. Specifically, the Regents believe that FM has made a corporate decision not to acknowledge coverage for such claims and would not have adjusted the Claim under any coverages other than "Communicable Disease" coverages. This strategic corporate decision was motivated by FM's financial self-interest, rather than a fair reading of the Policy as applied to the Claim.

72. The Regents find support for this position in, among other things, an FM internal memo, entitled "Talking Points on the Novel 2019 Coronavirus," attached hereto as **Exhibit 4**. These Talking Points incorrectly seek to limit policyholders solely to the "Communicable Disease"-specific coverages in each policy, while advancing incorrect summary conclusions concerning the Policy's approach to the remaining coverages which are triggered here. Moreover, FM's positions in the Talking Points are contrary to the legal positions FM has previously taken. *See, e.g., Ex. 2.*

**The Regents' Claim for COVID-19-Related Losses Triggered The "All Risks"
FM Policy and Various Coverages Therein**

73. The actual presence of SARS-CoV-2, the virus, which causes the COVID-19 communicable disease, at the Properties first arose during the period of the Policy and caused physical loss and/or damage at the Properties.

*COVID-19 Has Triggered the “COMMUNICABLE DISEASE RESPONSE” and
“INTERRUPTION BY COMMUNICABLE DISEASE” Coverages*

74. As described herein, the Regents’ Properties have been subjected to the actual not suspected presence of a **communicable disease**, namely, COVID-19.

75. The Regents’ access to such Properties has been limited for more than 48 hours by both: (1) an order of an authorized governmental agency, including without limitation the Governor of the Colorado and the CDPHE, concerning the actual not suspected presence of COVID-19; and/or (2) a decision of an Officer of CU as a result of the actual not suspected presence of a communicable disease, including but not limited to CU’s decision to suspend in-person classroom operations, order remote working for non-essential employees, cancel on-campus events and gatherings, and, later, return students, faculty, and staff to campus under COVID-19 compliant protocols.

76. As a result, CU has incurred reasonable and necessary costs at its Properties to cleanup, remove, and/or dispose of SARS-CoV-2 particles. CU has also incurred reputation management costs by directing staff to address on-going communication with the CU community related to the pandemic and/or the government and university orders concerning the same.

77. Moreover, the Regents’ lack of access to such Properties as a result of orders by an authorized governmental agency and/or an Officer of CU has led the Regents to sustain and continue sustaining on-going actual costs, losses of business income, and extra expenses well in excess of the Policy’s sublimits in an amount and for a duration to be proven at trial.

*The Regents are Not Limited to the “COMMUNICABLE DISEASE RESPONSE” and
“INTERRUPTION BY COMMUNICABLE DISEASE” Sublimits*

78. FM has issued an “all risks” Policy that does not contain a broad-form communicable disease exclusion.

79. The actual presence of SARS-CoV-2, the virus which causes the COVID-19 communicable disease, at the Properties caused physical loss and/or physical damage to the Properties, triggering multiple coverages in the FM Policy.

80. Moreover, the presence of SARS-CoV-2, the virus which causes the COVID-19 communicable disease, at locations away from, but within 1 statute mile and/or 5 statute miles proximity to the Properties has triggered additional coverages within the FM Policy.

COVID-19 Triggered the Policy’s “PROPERTY DAMAGE” Coverage

81. The Regents have interests in substantial real and personal property (the Properties) covered under Policy.

82. COVID-19's presence at the Properties caused physical loss and/or physical damage to such Properties in an amount and for a duration to be proven at trial, requiring, among other things, closure of the Properties, restriction of access to the Properties, payment for, among other things, extra cleaning and sanitizing, improved ventilation, restructuring within the Properties to accommodate for social distancing requirements, and testing at the Properties.

COVID-19 Triggered the Policy's "EXPEDITING COSTS" Coverage

83. In response to the COVID-19 pandemic, including the confirmed presence of COVID-19 at the Properties, and/or the various government and university orders related to the same, the Regents have incurred reasonable and necessary costs to conduct temporary repairs and/or replacements at its Properties that include, among other things: introducing extra deep cleaning and sanitizing; adding hand sanitizing stations to buildings; making modifications to the ventilation and HVAC systems; installing portable air purifiers; making physical alterations within the Properties to accommodate for social distancing requirements; and creating testing, monitoring, and isolation spaces.

84. The Regents have engaged in such repair and/or replacement efforts to expedite the permanent repair and/or replacement of its Properties, *i.e.*, to ensure that all Properties have minimal COVID-19 exposure and, ultimately, no COVID-19 exposure.

85. Such costs are covered EXPEDITING COSTS under the Policy in an amount and for a duration to be proven at trial.

The Regents Incurred and Continue to Incur Covered "LAW AND ORDINANCE" Costs During the COVID-19 Pandemic

86. Since mid-March 2020, state and local officials in Colorado have issued Government Orders as a direct result of the presence of COVID-19 at the Properties and/or in the surrounding communities. A number of the key Government Orders have been outlined above. Other potentially applicable Government Orders are publicly, and thus equally, available to FM and are subject to judicial notice.

87. Each of these Government Orders was in force at the time COVID-19 was present at the Properties.

88. Certain of these Government Orders—including those orders limiting the size of gatherings and/or banning gatherings altogether and orders regulating the ability to hold in-person postsecondary education classes—have regulated the Regents' use of its buildings, structures, machinery, or equipment and forced the Regents to issue the University Orders and incur costs resulting from its obligations to comply with such Government Orders in an amount and for a duration to be proven at trial.

*COVID-19 Triggered the Policy's "PROTECTION AND PRESERVATION
OF PROPERTY" and "PROTECTION AND PRESERVATION
OF PROPERTY TIME ELEMENT" Coverages*

89. The Policy provides for "reasonable and necessary costs incurred for actions to temporarily protect or preserve insured property; provided such actions are necessary due to actual, or to prevent immediately impending, insured physical loss or damage to such insured property." Ex. 1 at 29. The "TIME ELEMENT" aspect provides for "Actual Loss Sustained by the Insured for a period of time not to exceed 48 hours prior to and 48 hours after the Insured first taking reasonable action for the temporary protection and preservation of property insured by this Policy provided such action is necessary to prevent immediately impending insured physical loss or damage to such insured property." *Id.* at 61-62.

90. COVID-19 has caused physical damage and/or physical loss to the Regents' Properties during the period of the Policy.

91. The risks posed by COVID-19's spread and the Government Orders led the Regents to take actions to temporarily protect or preserve its Properties, including without limitation issuing the University Orders, thereby triggering the aforementioned coverages in an amount and for a duration to be proven at trial.

*COVID-19 Triggered the Policy's "TIME ELEMENT" Coverage,
Including the 90 Day "EXTENDED PERIOD OF LIABILITY"*

92. Starting on or about March 11, 2020, COVID-19, the Government Orders, and the University Orders caused the Regents to incur tens of millions of dollars in "TIME ELEMENT" losses to its business that directly resulted from physical loss or damage to its Properties during the term of the Policy. Such losses remain on-going.

93. Such Properties were used by the Regents or were Properties for which the Regents had contracted for use.

94. Such physical loss or damage during the term of the Policy occurred to such Properties as described in the "INSURED PROVIDED" provision, or within 1,000 feet/3000 meters thereof.

95. Such physical loss or damage also led the Regents to incur reasonable and necessary expenses to reduce its "TIME ELEMENT" losses.

96. This loss triggers the "TIME ELEMENT" coverage in an amount and for a duration to be proven at trial.

97. The Regents' investigation into its losses is on-going and the Regents continue to incur losses. The Regents thus reserve the right to elect whether to seek the "GROSS EARNINGS

and EXTENDED PERIOD OF LIABILITY” or “GROSS PROFIT” calculation of loss under this coverage part.

98. Should the Regents elect to seek “GROSS EARNINGS and EXTENDED PERIOD OF LIABILITY” method, it is evident from the facts alleged above that it will take at least 90 days, if not more, to restore CU’s business to the condition that would have existed had no loss happened, even with reasonable diligence and dispatch from the Regents and their agents.

COVID-19 Triggered the Policy’s “EXTRA EXPENSE” Coverage

99. COVID-19, the Government Orders, and University Orders have caused loss or damage to the Properties and led the Regents to incur reasonable and necessary extra costs incurred by the during the PERIOD OF LIABILITY.

100. Such extra costs include, but may not be limited to, extra expenses to temporarily continue as nearly normal as practicable the conduct of the Regents’ business and extra costs of temporarily using Properties in other ways during the pandemic or temporarily using other property to conduct CU operations.

101. Such extra expenses include without limitation: incurring costs to promote social distancing in its Properties, clean up and disinfecting costs, property testing and monitoring costs, security costs, and capital expenditures on retrofitting heating, ventilation, and air conditioning systems.

102. These expenses trigger the Policy’s “EXTRA EXPENSE” coverage in an amount and for a duration to be proven at trial.

COVID-19 Triggered the Policy’s “RENTAL INSURANCE” Coverage

103. The Policy covers “Actual Loss Sustained” by the Regents “during the PERIOD OF LIABILITY” of any of the following: “1) the fair rental value of any portion of the property occupied by the [Regents]; 2) the income reasonably expected from rentals of unoccupied or unrented portions of such property; and 3) the rental income from the rented portions of such property according to bona fide leases, contracts or agreements in force at the time of loss, all not to include noncontinuing charges and expenses.” Ex. 1 at 43.

104. The Regents have dozens of facilities at the Properties that are subject to rental, including event and conference spaces, performance spaces, housing, hospitality spaces, and athletic facilities.

105. The presence of COVID-19 in or on its Properties, the Government Orders, and University Orders have caused loss and/or damage, leading to a reduction in “fair rental value” received at its Properties, a substantial loss of income reasonably expected from rentals of portions of the Properties that have gone unrented during the relevant time period, and reduced rental

income from rented portions of the Properties where such rental agreements were disrupted by the pandemic.

106. Such losses are covered under the Policy in an amount and for a duration to be proven at trial.

COVID-19 Triggered the Policy's TUITION FEES Coverage

107. The Policy contains broad coverage for loss of "TUITION FEES" during the "PERIOD OF LIABILITY." *See id.* at 44-45.

108. Among other things, the physical damage and/or loss caused by COVID-19, the Government Orders, and the University Orders have caused the Regents to incur a substantial loss of tuition fees which have been prevented from being earned or received.

109. The Regents have also lost, among other things: (1) other income from "routine and special services;" (2) research grants and/or research contract-related revenue; (3) "Ordinary Payroll" for 30 days; and (4) "donation and fund raising proceeds." *Id.* at 44-45.

110. Such losses trigger the "TUITION FEES" coverage in the Policy in an amount and for a duration to be proven at trial.

COVID-19 Triggered the Policy's "CIVIL OR MILITARY AUTHORITY" Coverage

111. Starting in mid-March 2020, Colorado state and municipal officials issued the Government Orders as a direct result of the loss and/or damage being caused by COVID-19 being present at the Properties and/or within five statute miles/eight kilometers of the Properties.

112. Such Government Orders restricted and/or prohibited partial or total access to certain of the Properties, leading the Regents to issue the University Orders addressing the same.

113. The Government Orders were additionally acting to prevent further community spread of COVID-19 by, among other things, prohibiting dine-in access to restaurants, bars, and coffee shops; banning gatherings and public events above a certain size, including in the operation of movie theaters; and ultimately ordering Colorado residents to stay in their homes except for essential travel.

114. As a result of such Government Orders, the Regents incurred an "Actual Loss Sustained" and "EXTRA EXPENSE" as those terms are defined in the Policy in an amount and for a duration to be proven at trial.

COVID-19 Triggered the Policy's "CONTINGENT TIME ELEMENT EXTENDED" Coverage

115. As a direct result of the physical loss or physical damage caused by COVID-19 and the Government Orders at a **contingent time element location**, the Regents have incurred "Actual Loss Sustained" and EXTRA EXPENSE in an amount and for a duration to be proven at trial.

116. By way of example, the CU system has hundreds of thousands of direct customers—purchasers of university-made products and/or services—including its students, alumni, athletic supporters, and community members who live at, eat at, shop at, or purchase products and services from the CU system every day. Each of these individuals was impacted by the loss or damage caused by COVID-19, and the Government Orders and University Orders issued in response to the pandemic.

117. The Regents additionally have contracts with suppliers, manufacturers, service providers as well as companies under royalty, licensing fee, and/or commission agreements, each of whom were impacted in some way by the presence of COVID-19 at their location and/or by the Government Orders or University Orders that has caused “Actual Loss Sustained” or “EXTRA EXPENSE.”

118. Such “Actual Loss Sustained” or “EXTRA EXPENSE” is covered under this extension in an amount and for a duration to be proven at trial.

COVID-19 Triggered the Policy’s “INGRESS/EGRESS” Coverage

119. Starting in mid-March 2020, Colorado state and municipal officials issued the Government Orders as a direct result of the loss and/or damage being caused by COVID-19 to the property of the type insured under this Policy.

120. By way of example and not limitation, PHO 20-22 expressly stated the specific places at the Properties, including restaurants, food courts, cafes, coffeehouses, gymnasiums, movie and performance theaters, concert halls, and other similar places of public gathering were “closed to ingress, egress, use, and occupancy by members of the public” for the duration of the order.

121. The Government Orders created a partial or total physical prevention of ingress to or egress from certain of the Properties, causing a necessary interruption of the Regents’ business and triggering the “INGRESS/EGRESS” coverage in the Policy in an amount and for a duration to be proven at trial.

COVID-19 Triggered the Policy’s “ATTRACTION PROPERTY” Coverage

122. In addition to being attractions themselves, the majority of the Properties are located in some of the most visited locations in the State of Colorado, including Denver, Boulder, and Colorado Springs.

123. The Regents have sustained an “Actual Loss” and incurred “EXTRA EXPENSE” during the PERIOD OF LIABILITY in an amount and for a duration to be proven at trial that directly resulted from physical loss or damage caused by COVID-19 and/or the Government Orders to properties located within 1 statute mile/1.6 kilometers of the Properties that help to attract students, parents, alumni, guests, corporate partners, and visitors to the Properties from all over the world.

COVID-19 Triggered the Policy's "RESEARCH AND DEVELOPMENT" Coverage

124. COVID-19 and the Government Orders and University Orders have caused the Regents to incur an "Actual Loss Sustained," including continuing fixed charges and Ordinary Payroll that is directly attributable to the interruption of research and development activities that in themselves would not have produced income during the PERIOD OF LIABILITY.

125. Among other things, and as noted above, physical loss and physical damage caused by COVID-19 at its Properties has forced the Regents to suspend non-essential research and development activities and/or to move such activities to a remote environment where possible.

126. Such "Actual Loss Sustained" is covered under the Policy's "RESEARCH AND DEVELOPMENT" coverage in an amount and for a duration to be proven at trial.

The Regents Have Incurred and May Incur Further
"CLAIMS PREPARATION COSTS" Covered Under the Policies

127. The Regents have begun incurring costs by, among other things, using CU employees to collect proofs, information, or evidence requested by FM's questionnaires in an amount and for a duration to be proven at trial. Such costs resulted from insured loss payable under this Policy. The Regents expect that FM will accept such losses as covered following the Court's resolution of this action, thus triggering coverage part.

128. During the course of this litigation, the Regents expect that they will need to hire outside accountants, architects, auditors, engineers, or other professionals and shall be entitled to pursue such costs under the "CLAIMS PREPARATION COSTS" section of the Policy in an amount to be established through proof.

No Exclusions Bar Coverage

129. No exclusions in the Policy apply to bar coverage for costs, "EXTRA EXPENSE," and losses caused by the actual presence of COVID-19 at the Properties or within applicable distance limitations set forth in the Policy, physical loss or physical damage caused by COVID-19, and/or the Government Orders or University Orders.

130. By way of example and not limitation, the Contamination Exclusion does not apply to the Regents' losses caused by the pandemic, for numerous reasons, including but not limited to the following:

- A. The Policy expressly provides that the presence of a "communicable disease" is a "physical loss or damage" to property of the type insured under the Policy. The Policy's definition of "**contamination**" does not include within it a "condition of property" due to the presence of "**communicable disease**" (defined as including "disease . . . transmissible from . . . [an] individual's discharges"), only due to the presence of "virus." The

Contamination Exclusion concerns a “condition of property” due to a “virus” and contains an exception providing that coverage is *available* if it is “*directly resulting from other physical damage not excluded by this Policy.*” Ex. 1 at 14 (emphasis added). Persons who contract the **communicable disease** of COVID-19 did so as a consequence of being exposed to others and/or to property that was adversely impacted by an “individual’s discharges” or respiratory droplets; and, as noted, the Policy does not exclude coverage for physical damage resulting from such “**communicable disease.**” Accordingly, to the extent that the Regents’ losses result from infected persons being on the Regents’ Properties and “discharging” a transmissible disease or, with respect to the CIVIL OR MILITARY AUTHORITY coverage within five statute miles of such Properties, or at pertinent properties with respect to other coverages as set forth herein, any resulting impact results from “other physical damage not excluded by this Policy” and therefore is not subject to the Contamination Exclusion.

- B. To the extent the SARS-CoV-2 virus is actually present or suspected of being present at pertinent locations, its presence would be the result of a natural process, as opposed to an act of pollution or contamination. So-called “contamination” exclusions, such as the form of Contamination Exclusion in the Policy, apply only to situations that reasonable policyholders would understand to constitute *polluting* activities, as opposed to natural catastrophes such as the COVID-19 pandemic.
- C. The narrow language of the so-called Contamination Exclusion is in contrast with broader exclusions within the Policy for other excluded property damage (for example, with respect to the exclusion for “loss or damage directly or indirectly caused by or resulting from [nuclear contamination] . . . contributing concurrently or in any other sequence to the loss”) as well as standard-form broader “virus exclusions” that are found in many other, less generous policy forms issued throughout the insurance industry. Indeed, as a means of collecting higher premiums from and attracting desired customers such as the Regents, FM eschewed many other broader standard-form virus exclusions that have been widely available since 2006, when the Insurance Services Office published and circulated an explicit virus exclusion (the “ISO Virus Exclusion”) stating “[w]e will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease” and specifically stating that this exclusion applies to “all coverage” under the policy. Rather than using an explicit and broad virus exclusion, FM instead opted for an exclusion that barred only virus-related damage that could fairly be described as resulting from an act of “contamination” or “pollution”; and even then, FM further limited the

scope of the Contamination Exclusion by also permitting coverage if the “contamination” is not actually at an insured location or suspected to be at an insured location, or if the contamination itself resulted from a covered instance of loss or damage to the Properties.

- D. The Contamination Exclusion excludes only “contamination, and any *cost* resulting from contamination,” *id.* (italics added), but makes no mention of “losses” and does not purport to exclude “loss or damage to property” resulting from Contamination. Thus, the Contamination Exclusion is expressly directed solely at any costs incurred to remove the contamination from covered property, but not to consequential economic losses such as, *e.g.*, the “TIME ELEMENT” losses, “EXTRA EXPENSE,” and other coverage extensions within the Policy.
- E. The Contamination Exclusion is directed solely at “conditions of property” and thus does not address, *e.g.*, “TIME ELEMENT” losses due to civil authority orders or impairment of ingress or egress occasioned by covered **communicable disease**.

131. Furthermore, by way of example and not limitation, applying the “loss of market or loss of use” exclusion to defeat the coverages explicitly provided by the Policy would render those coverages illusory. Numerous coverages in the Policy stem at least to some extent from loss of use, including for example, the CIVIL OR MILITARY AUTHORITY coverage extension that “. . . covers the Actual Loss Sustained and EXTRA EXPENSE incurred by [the Regents] during the PERIOD OF LIABILITY if an order of civil or military authority limits, restricts or prohibits partial or total access to an insured location . . .” and the INGRESS/EGRESS coverage extension, which is triggered by “partial or total physical prevention of ingress to or egress from an insured location, whether or not the premises or property of the Insured are damaged . . .” *Id.* at 53-55. As the exclusion states, it is not absolute but will “apply unless otherwise stated” and the coverages available under the Policy that arise from loss of use are thus not impacted by this exclusion because they are “otherwise stated.”

132. The “loss of use” exclusion was developed in the insurance industry to exclude consequential damages where a policy did not cover such consequential damages. For policies that do provide coverage for consequential damages, including this Policy under numerous coverages, the exclusion *does not* apply.

CAUSES OF ACTION

COUNT II **BREACH OF CONTRACT**

133. The Regents reallege and incorporate by reference the preceding paragraphs of this Complaint as if fully set forth herein.

134. The Regents entered into a legally binding written contract of insurance with FM when FM issued the Policy to the Regents.

135. In the Policy, FM agrees to cover “all risks,” including the specifically enumerated risk of a “communicable disease.”

136. The Regents made a timely Claim to FM under the Policy for, among other things, costs, EXTRA EXPENSE, lost income, lost tuition and other losses arising out of the COVID-19 pandemic and related Government Orders and University Orders that caused loss or damage at each of its Properties.

137. The Regents’ Claim seeks coverage under the Policy’s many provisions and coverages, which include but may not be limited to: (1) “PROPERTY DAMAGE” coverage; (2) the full aggregate limits for “COMMUNICABLE DISEASE RESPONSE” and “INTERRUPTION BY COMMUNICABLE DISEASE”; (3) “EXPEDITING COSTS”; (4) “LAW AND ORDINANCE” costs; (5) “PROTECTION AND PRESERVATION OF PROPERTY” costs and accompanying “PROTECTION AND PRESERVATION OF PROPERTY TIME ELEMENT” loss; (6) “CLAIMS PREPARATION COSTS”; (7) “TIME ELEMENT” coverage; (8) “EXTRA EXPENSE” coverage; (9) “RENTAL INSURANCE” coverage; (10) “TUITION FEES” coverage; (11) “CIVIL OR MILITARY AUTHORITY” coverage; (12) “CONTINGENT TIME ELEMENT EXTENDED” coverage; (13) “INGRESS/EGRESS” coverage; (14) loss arising out of “ATTRACTION PROPERTY”; and (15) “RESEARCH AND DEVELOPMENT” coverage.

138. The Regents’ Claim for each of these forms of coverage is covered under the Policy as outlined herein and not excluded.

139. By failing and refusing to provide coverage to the Regents under the Policy, FM has breached its Policy obligations to the Regents.

140. As a direct and proximate result of such breaches, the Regents have been deprived of the benefit of its bargained-for insurance coverage and has incurred millions of dollars of damages in an amount to be proven at trial.

COUNT II
DECLARATORY JUDGMENT PURSUANT TO C.R.S. § 13-51-101, et seq.

141. The Regents reallege and incorporate by reference the preceding paragraphs of this Complaint as if fully set forth herein.

142. The Regents provided FM with timely notice of its Claim under the Policy and sought coverage under the multiple forms of coverage described herein, including through submissions of information and via communications with FM.

143. FM has failed to acknowledge coverage for any aspect of the Claim under its Policy.

144. Thus, an actual and justiciable controversy exists as between the Regents and FM concerning the availability of coverage under the Policy for the Claim. Such controversy is ripe for judicial review.

145. Accordingly, and pursuant to C.R.S. § 13-51-101, *et seq.*, the Regents seek the Court's declaration of the parties' rights and duties under the Policy with respect to its Claim and respectfully request that the Court issue a declaration that: (1) each of the coverage provisions identified herein is triggered by the Regents' Claim; (2) the Regents' Claim is not subject to any exclusion or limitation in the Policy; and (3) FM is thus liable to cover the Claim.

COUNT III
STATUTORY RELIEF PURSUANT TO C.R.S. § 10-3-1115 AND § 10-3-1116

146. The Regents reallege and incorporate by reference the preceding paragraphs of this Complaint as if fully set forth herein.

147. FM is a person engaged in the business of insurance within the meaning of C.R.S. § 10-3-1115(1)(a).

148. The Regents are a first-party claimant within the meaning of C.R.S. § 10-3-1115 and have asserted an entitlement to insurance benefits owed directly to it under the Policy.

149. FM has denied and/or delayed payment of the Regents Claim for benefits under the Policy and lacked any reasonable basis for doing so.

150. The Regents' coverage under the Policy for the Claim, which may extend up to and including the Policy's \$1,000,000,000 per **occurrence** limits, is a "covered benefit" within the meaning of C.R.S. § 10-3-1116(1).

151. Accordingly, FM has violated C.R.S. §§ 10-3-1115 and 10-3-1116.

152. As a result of such violation, the Regents are entitled to damages from FM, including without limitation, damages equal to two times the "covered benefit," as well as reasonable attorneys' fees and court costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, The Regents of the University of Colorado, prays for the following relief:

- A. Enter a judgment in favor of the Regents and against FM, as requested herein, on each of the Counts in the Regents' Complaint;
- B. Award the Regents their actual and consequential damages sustained as a result of FM's breach of the Policy in an amount to be established through proof;

- C. Enter a declaration of the rights of the parties under the Policy with respect to the Regents' Claim that includes, but may not be limited to, declaring that: (1) each of the coverage provisions in the Policy identified herein is triggered by the Claim; (2) the Regents' Claim is not subject to any exclusion or limitation in the Policy; and (3) FM is thus liable to cover the Regents' Claim;
- D. Enter a judgment awarding the Regents all damages suffered or incurred as a result of or arising from FM's violations of C.R.S. §§ 10-3-1115 and 10-3-1116, including actual damages, plus statutory damages equal to two times the "covered benefit," as well as reasonable attorneys' fees and court costs;
- E. Enter a judgment awarding the Regents pre-judgment interest and post-judgment interest under applicable law; and
- F. Enter a judgment awarding the Regents such other and further relief to which it may justly be entitled.

JURY DEMAND

The Regents hereby demand a trial by jury on all matters so triable.

DATED this 10th day of March, 2021

Respectfully submitted,

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