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STATE OF RHODE ISLAND
PROVIDENCE, S.C.

SUPERIOR COURT

ADVANCE PUBLICATIONS, INC.,

Plaintiff,

v.

FACTORY MUTUAL INSURANCE COMPANY,

Defendant.

C.A. No. PC-2021 -

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff Advance Publications, Inc. ("Plaintiff" or "API") brings its complaint against Defendant Factory Mutual Insurance Company ("FM") for declaratory relief and breach of contract, and alleges and states as follows:

INTRODUCTION

1. API is one of America's leading media companies. In 2019, API purchased an "all-risk" commercial property insurance policy from FM (the "Policy") that provides $2 billion in per occurrence coverage for the period July 1, 2019 to July 1, 2020 (the "Policy Period"). API has incurred significant business interruption losses as a result of physical loss and/or damage to property caused by the SARS-CoV-2 virus (the "Coronavirus") and the disease it causes, Coronavirus Disease 2019 ("COVID-19"). The Coronavirus and COVID-19 caused physical loss or damage to API's properties and those of the many businesses that advertise in API's publications ("API's Advertisers"), which, as a direct result, dramatically reduced or ceased advertising in API publications.

2. The Policy specifically provides coverage for business interruption and other losses API sustained as a result of physical loss or damage to its own properties, as well losses API sustained as a result of physical loss or damage to the property of direct or indirect customers, such

as API's Advertisers.

3. FM, however, has refused to honor its promise to protect API against losses resulting from the physical loss and/or damage caused by the presence of the Coronavirus and COVID-19 at API's own properties and those of API's advertisers and other customers. Instead, FM has wrongly asserted that the Coronavirus and COVID-19 cannot trigger coverage under the Policy because they purportedly do not cause physical loss or damage to property. FM is wrong. The presence of the Coronavirus and COVID-19 in the air or on the surfaces of premises is no different than the presence of radon gas, asbestos, ammonia, fumes, a mold infestation or a salmonella outbreak in the air or on surfaces of premises. All render property uninhabitable, unsafe, and unfit for its normal and intended uses and cause physical loss or damage to property.

4. In fact, just two years ago, FM agreed with API and admitted in a court filing that "loss of functionality or reliability . . . constitutes physical loss or damage."[1] FM further stated that **"[a]t best . . . 'physical loss or damage,' which is undefined, is susceptible of more than one reasonable interpretation and is therefore ambiguous and must be construed against [the drafter of the policy]."** *Id.*

5. Faced with paying API's claim, however, FM now wrongly takes exactly the opposite position. Accordingly, because of FM's failure to honor the promises contained in its Policy, API seeks declaratory relief from this Court regarding FM's coverage obligations and damages for FM's breach of the Policy in failing to pay API's covered losses.

PARTIES

6. API is a corporation formed under the laws of New York with its principal

[1] *See* Plaintiff Factory Mutual Insurance Company's Motion *In Limine* No. 5 Re Physical Loss or Damage, *Factory Mutual Ins. Co., et al. v. Federal Ins. Co.*, Case No.: 1:17-cv-00760-GJF-LF (D. N.M. November 19, 2019), attached hereto as Exhibit 1.

executive offices in New York.

7. API is informed and believes, and based thereon alleges, that FM is a Rhode Island corporation with its principal place of business in Rhode Island.

VENUE

8. Venue is proper in Providence County pursuant to R.I. Gen. Laws §9-4-4 because FM is a corporation that "dwell[s]" and is "found" in Providence County.

9. API is informed and believes, and based thereon alleges, that FM maintains its headquarters and principal place of business in Providence County.

FACTUAL BACKGROUND

A. API

10. API is a privately held global media company, which owns, among other businesses: (1) Condé Nast; (2) American City Business Journals; and (3) Sports Business Journal. API is named after the Staten Island Advance, which the owners of API acquired almost 100 years ago. From those beginnings, API has grown to become one of the largest privately held companies, and one of the largest media companies, in the United States.

11. Condé Nast is a global media company founded in 1909 which publishes many of the leading print and digital publications in the world. Condé Nast is widely considered to be the originator of the type of magazine focused on particular social groups or interests, rather than targeting the largest possible readership. Today, Condé Nast's publications attract more than 72 million consumers in print, 394 million in digital and 45 million across social platforms. Condé Nast's print publications include: (1) Allure, (2) Architectural Digest, (3) Bon Appétit, (4) Condé Nast Traveler, (5) GQ, (6) The New Yorker, (7) Vanity Fair, (8) Vogue, and (9) Wired. Condé Nast's digital publications include: (1) Ars Technica, (2) Backchannel, (3) Epicurious, (4) Glamour, (5) Pitchfork, (6) Them, (7) Teen Vogue, (8) Self, (9) Love, and (10) La Cucina Italiana.

12. American City Business Journals ("ACBJ") is the premier print and digital publisher of local business and breaking news in the United States. ACBJ's 44 local business publications reach approximately 1.3 million readers in print weekly and draw 16.6 million monthly web visitors. ACBJ also publishes, among others, Hemmings Motor News, AmericanInno and Bizwomen.com.

13. Sports Business Journal ("SBJ") provides the news, the networking and the data to equip the most powerful executives in the sports business to make more informed decisions, deals and partnerships. SBJ's award-winning media content is delivered via multiple media platforms, with weekly and daily content providing original reporting and news aggregation, plus newsletters, podcasts and video.

14. API, through its subsidiaries Condé Nast, ACBJ and SBJ, derives a large portion of its revenue from advertising. As a result of the Coronavirus and COVID-19, API's Advertisers reduced advertising expenditures in the publications of Condé Nast, ACBJ and SBJ.

15. As a part of its prudent business practices and in recognition of its responsibilities to its employees and customers, API maintains insurance coverage.

16. API specifically maintains "all risk" commercial property coverage with FM, covering not only more commonly occurring risks like fire, but also entirely unanticipated and novel risks that may arise. As described below in greater detail, the Policy: (a) provides coverage for all "physical loss or damage" to API's property unless specifically excluded; and (b) provides coverage for API's actual losses directly resulting from "physical loss or damage of the type insured" by the Policy at property of customers of API such as API's Advertisers.

B. The Coronavirus and COVID-19

17. COVID-19 is a severe infectious disease caused by the Coronavirus. The

Coronavirus can cause serious systemic illness and death.[2] Due to pervasive spread and presence of the Coronavirus and COVID-19 across the planet, both are presumed to be present or imminently present everywhere.[3]

18. The existence and/or presence of the Coronavirus and COVID-19 is not simply reflected in reported cases or individuals' positive test results, as only a portion of the population has been tested. For example, the Centers for Disease Control and Prevention ("CDC") estimates that the number of people in the United States who have been infected with COVID-19 was ten times higher than the number of reported cases.[4] Additionally, at least 40% of people infected with COVID-19 are asymptomatic.[5] COVID-19 also includes a pre-symptomatic incubation period of up to 14 days, during which time infected people can transmit COVID-19 to people, and release infectious droplets and aerosols into the air and onto surfaces without having experienced symptoms and without realizing that they are contagious or infected.[6]

19. Studies have demonstrated that pre-symptomatic individuals have an even greater

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[2] Tianna Hicklin, *Immune cells for common cold may recognize SARS-COV-2*, NAT. INST. OF HEALTH (Aug. 18, 2020), https://www.nih.gov/news-events/nih-research-matters/immune-cells-common-cold-may-recognize-sars-cov-2 (last visited June 28, 2021).

[3] *See, e.g.*, Christopher Ingraham, *At the population level, the coronavirus is almost literally everywhere,* WASH. POST (Apr. 1, 2020), https://www.washingtonpost.com/business/2020/04/01/population-level-coronavirus-is-almost-literally-everywhere/ (last visited June 28, 2021).

[4] Lena H. Sun & Joel Achenbach, *CDC chief says coronavirus cases may be 10 times higher than reported,* WASH. POST (June 25, 2020), https://www.washingtonpost.com/health/2020/06/25/coronavirus-cases-10-times-larger/ (last visited June 28, 2021).

[5] Ellen Cranley, *40% of people infected with covid-19 are asymptomatic, a new CDC estimate says,* BUS. INSIDER (July 12, 2020), https://www.businessinsider.com/cdc-estimate-40-percent-infected-with-covid-19-asymptomatic-2020-7 (last visited June 28, 2021).

[6] *See Coronavirus disease 2019 (COVID-19) Situation Report – 73*, WHO (Apr. 2, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_2 (last visited June 28, 2021); Minghui Yang et al., *SARS-CoV-2 Detected on Environmental Fomites for Both Asymptomatic and Symptomatic Patients with COVID-19*, 203 AM. J. RESPIRATORY & CRITICAL CARE MED. 3 (Feb. 1, 2021), https://www.atsjournals.org/doi/10.1164/rccm.202006-2136LE (last visited June 28, 2021).

ability to transmit COVID-19 than other infected people because they carry high levels of "viral load" during a period when they have no symptoms and therefore are unaware they are infectious.[7] The National Academy of Sciences has concluded that "the majority of transmission is attributable to people who are not exhibiting symptoms, either because they are still in the pre-symptomatic stage or the infection is asymptomatic."[8]

20. As early as February 26, 2020, the CDC advised that COVID-19 was spreading freely without the ability to document the source of new infections, also known as community transmission or community spread.

21. COVID-19 is highly contagious, uniquely resilient, and potentially deadly. The degree to which an infectious disease is contagious is measured by R_0, a term that defines the average number of other people who are likely to become infected by one person with that disease. The R_0 is a measure of the transmissibility of a pathogen and is determined by estimating the susceptibility of individuals in the population to disease, the transmissibility of the pathogen and importantly, the likelihood and duration of contact between individuals in a population, a parameter that is directly determined by the physical properties of the environment in which contact occurs.[9] Studies have concluded that one person with COVID-19 could infect as many as 5.7 others ($R_0 \approx 5.7$), which is much higher than seasonal influenza for example, where on average,

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[7] *See, e.g.*, Xi He et al., *Temporal dynamics in viral shedding and transmissibility of COVID-19,* 26 NATURE MED. 672, 674 (Apr. 15, 2020), https://www.nature.com/articles/s41591-020-0869-5 (last visited June 28, 2021); Lirong Zou, *et al., SARS-CoV-2 Viral Load in Upper Respiratory Specimens of Infected Patients,* 382 NEW ENG. J. MED. 1177-79 (Mar. 19, 2020), https://www.nejm.org/doi/full/10.1056/NEJMc2001737 (last visited June 28, 2021).

[8] Seyed M. Moghadas et al., *The implications of silent transmission for the control of COVID-19 outbreaks*, 117 PNAS 30, 17513-15 (July 28, 2020), https://www.pnas.org/content/117/30/17513 (last visited June 28, 2021).

[9] Anthony R. Ives & Claudio Bozzuto, *Estimating and explaining the spread of COVID-19 at the county level in the USA*, 4 COMMC'NS BIOLOGY 60 (updated Jan. 20, 2021), https://www.nature.com/articles/s42003-020-01609-6 (last visited June 28, 2021).

one person will infect only 1.3 others ($R_0 \approx 1.3$).[10]

22. The Coronavirus can remain infectious for "much longer time periods than generally considered possible."[11] In the Journal of Virology, researchers demonstrated that the Coronavirus can survive up to 28 days at room temperature (68ºF) on a variety of surfaces including glass, steel, vinyl, plastic, and paper.[12] A CDC report from March 27, 2020, stated that the Coronavirus was identified on surfaces of the cabins on the Diamond Princess cruise ship 17 days after the cabins were vacated but before they were disinfected.[13]

23. Numerous other scientific studies and articles have identified the persistence of the Coronavirus on doorknobs, toilets, faucets and other high-touch points, as well as on commonly overlooked surfaces such as floors.[14]

24. While the detection of viral RNA on surfaces or in the air does not necessarily mean that the Coronavirus is currently present and infectious, it demonstrates that the Coronavirus was in fact present. Studies have demonstrated the transmission of laboratory-confirmed Coronavirus infection via surfaces.[15]

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[10] M. Cevik, C.C.G. Bamford, & A. Ho, *COVID-19 pandemic-a focused review for clinicians*, 26 CLINICAL MICROBIOLOGY & INFECTION 7, 842-47 (July 1, 2020), https://www.clinicalmicrobiologyandinfection.com/article/S1198-743X(20)30231-7/fulltext (last visited June 28, 2021).

[11] Shane Riddell et al., *The effect of temperature on persistence of SARS-CoV-2 on common surfaces*, 17 VIROLOGY J. 145 (Oct. 7, 2020), https://virologyj.biomedcentral.com/articles/10.1186/s12985-020-01418-7 (last visited June 28, 2021).

[12] *Id.*

[13] Leah F. Moriarty et al., *Public Health Responses to COVID-19 Outbreaks on Cruise Ships — Worldwide, February–March 2020*, 69 MMWR 12, 347-52 (Mar. 27, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.htm (last visited June 28, 2021).

[14] Zhen-Dong Guo et al., *Aerosol and Surface Distribution of Severe Acute Respiratory Syndrome Coronavirus 2 in Hospital Wards, Wuhan, China, 2020,* 26 EMERGING INFECTIOUS DISEASES 7, 1583-91 (July 2020), https://pubmed.ncbi.nlm.nih.gov/32275497/ (last visited June 28, 2021).

[15] Nancy HL Leung, *Transmissibility and transmission of respiratory viruses*, NATURE REVS. MICROBIOLOGY 1-18 (Mar. 22, 2021), https://pubmed.ncbi.nlm.nih.gov/33753932/ (last visited

25. The World Health Organization ("WHO") states that "[t]he disease spreads primarily from person to person through small droplets from the nose or mouth, which are expelled when a person with COVID-19 coughs, sneezes, or speaks . . . . People can catch COVID-19 if they breathe in these droplets from a person infected with the virus . . . . These droplets can land on objects and surfaces around the person such as tables, doorknobs and handrails. People can become infected by touching these objects or surfaces, then touching their eyes, nose or mouth."[16]

26. People infected with the Coronavirus spread the virus not only from small droplets but also from aerosols expelled from their nose and mouth when they cough, sneeze or speak. People become infected with the Coronavirus and resultant COVID-19 disease if they breathe in these droplets or aerosols from an infected person. Droplets and aerosols can be expelled in close proximity (1-2 meters) or can be carried on air currents tens of meters.[17]

C. The Coronavirus and COVID-19 Cause Physical Loss or Damage to Property

27. The omnipresence of the Coronavirus and COVID-19 is enabled by multiple modes of viral transmission, including respiratory droplet, airborne/aerosolized and fomite transmission (i.e., transmission from surfaces and objects).[18] These transmission methods demonstrate that the Coronavirus and/or COVID-19 cause direct physical loss or damage to property.

June 28, 2021); G. Kampf et al., *Persistence of coronaviruses on inanimate surfaces and their inactivation with biocidal agents*, 104 J. HOSP. INFECTIONS 3, 246-51 (Mar. 2020), https://pubmed.ncbi.nlm.nih.gov/32035997/ (last visited June 28, 2021).

[16] *Q&A on coronaviruses (COVID-19)*, WHO (updated Apr. 17, 2020), https://web.archive.org/web/20200506094904/https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses (last visited June 28, 2021).

[17] Lidia Morawska & Donald K. Milton, *It Is Time to Address Airborne Transmission of Coronavirus Disease 2019 (COVID-19)*, 71 CLINICAL INFECTIOUS DISEASES 9, 2311-13 (Dec. 3, 2020), https://pubmed.ncbi.nlm.nih.gov/32628269/ (last visited June 28, 2021).

[18] *See, e.g.*, *Scientific Brief: Transmission of SARS-CoV-2: implications for infection prevention precautions*, WHO (July 9, 2020), https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions (last visited June 28, 2021).

28. Respiratory transmission of COVID-19 occurs through exposure to an infected person's respiratory particles, such as from saliva or mucus.[19] Respiratory transmission of the Coronavirus is commonly divided into droplets (larger particles that have a transmission range of about six feet) and airborne (smaller particles that can remain suspended in the air for prolonged periods of time) modes of transmission. Though convenient, this binary division is an oversimplification that underscores transmission risk.[20] Humans produce a wide range of particle sizes when coughing, sneezing, talking, singing, or otherwise dispersing droplets, with virions predominating in the smallest particles.[21] Respiratory particles produced by the average person can travel almost 20 feet by sneezing.[22] An M.I.T. researcher has found that virus-laden "clouds" containing clusters of droplets can travel 23 to 27 feet.[23] A recent review article on viral, host and environmental factors reported on the "abundant evidence" that proximity is a determinant to the Coronavirus transmission risks.[24]

29. Airborne transmission involves the spread of the infectious agent caused by the dissemination of droplet nuclei (aerosols) from, for example, exhaled breath, that remain infectious when suspended in the air over long distances and time.[25] These tiny particles can remain

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[19] *Id.*

[20] Kevin P. Fennelly, *Particle sizes of infectious aerosols: implications for infection control*, 8 LANCET RESPIRATORY MED. 9, P914-24 (Sept. 1, 2020), https://www.thelancet.com/journals/lanres/article/PIIS2213-2600(20)30323-4/fulltext (last visited June 28, 2021).

[21] *Id.*

[22] *Id.*

[23] Lydia Bourouiba, *Turbulent Gas Clouds and Respiratory Pathogen Emissions, Potential Implications for Reducing Transmission of COVID-19*, 323 JAMA 18, 1837-38 (Mar. 26, 2020), https://jamanetwork.com/journals/jama/fullarticle/2763852 (last visited June 28, 2021).

[24] Eric A. Meyerowitz et al., *Transmission of SARS-CoV-2: A Review of Viral, Host, and Environmental Factors*, ANNALS INTERNAL MED. (Jan. 2021), https://www.acpjournals.org/doi/10.7326/M20-5008 (last visited June 28, 2021).

[25] Lydia Bourouiba, *Turbulent Gas Clouds and Respiratory Pathogen Emissions, Potential Implications for Reducing Transmission of COVID-19*, 323 JAMA 18, 1837-38 (Mar. 26, 2020),

suspended "for indefinite periods unless removed by air currents or dilution ventilation."[26] As a result, the risk of disease transmission increases substantially in enclosed environments, compared to outdoor settings.[27]

30. The WHO and the scientific community have studied the spread of the Coronavirus through aerosols in indoor settings via air circulation systems. For example, the CDC published a research letter concluding that a restaurant's air conditioning system triggered the transmission of the Coronavirus, spreading it to people who sat at separate tables downstream of the restaurant's airflow.[28] Moreover, a study detected the Coronavirus inside HVAC systems transmitted over 180 feet from its source.[29]

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https://jamanetwork.com/journals/jama/fullarticle/2763852 (last visited June 28, 2021); *see also* Jose-Luis Jimenez, *COVID-19 Is Transmitted Through Aerosols. We Have Enough Evidence, Now It Is Time to Act*, TIME (Aug. 25, 2020), https://time.com/5883081/covid-19-transmitted-aerosols/ (last visited June 28, 2021); Ramon Padilla & Javier Zarracina, *WHO agrees with more than 200 medical experts that COVID-19 may spread via the air*, USA TODAY (updated Sept. 21, 2020), www.usatoday.com/in-depth/news/2020/04/03/coronavirusprotection-how-masks-might-stop-spread-throughcoughs/5086553002/ (last visited June 28, 2021); Wenzhao Chen et al., *Short-range airborne route dominates exposure of respiratory infection during close contact*, 176 BLDG. & ENV'T (June 2020) https://www.sciencedirect.com/science/article/pii/S0360132320302183 (last visited June 28, 2021).

[26] Kevin P. Fennelly, *Particle sizes of infectious aerosols: implications for infection control*, 8 LANCET RESPIRATORY MED. 9, P914-24 (Sept. 1, 2020), https://www.thelancet.com/journals/lanres/article/PIIS2213-2600(20)30323-4/fulltext (last visited June 28, 2021).

[27] Muge Cevik, Julia L Marcus, Caroline Buckee, & Tara C Smith, *Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) Transmission Dynamics Should Inform Policy*, CLINICAL INFECTIOUS DISEASES (Sept. 23, 2020), https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1442/5910315 (last visited June 28, 2021).

[28] Jianyun Lu et al., *COVID-19 outbreak associated with air conditioning in restaurant, Guangzhou, China, 2020,* 26 EMERGING INFECTIOUS DISEASES 7 (July 2020), https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article (last visited June 28, 2021); *see also* Keun-Sang Kwon, Jung-Im Park, Young Joon Park, Don-Myung Jung, Ki-Wahn Ryu, and Ju-Hyung Lee, *Evidence of Long-Distance Droplet Transmission of SARS-CoV-2 by Direct Air Flow in a Restaurant in Korea*, 35 J. KOREAN MED. SCI. 46 (Nov. 30, 2020), https://jkms.org/DOIx.php?id=10.3346/jkms.2020.35.e415 (last visited June 28, 2021).

[29] Karolina Nissen et al., *Long-distance airborne dispersal of SARS-CoV-2 in COVID-19 wards*, SCI REP 10, 19589 (Nov. 11, 2020), https://www.nature.com/articles/s41598-020-76442-2 (last visited June 28, 2021).

31. A recently published (February 2021) systematic review of airborne transmission of the Coronavirus corroborated the CDC's concerns and recommended procedures to improve ventilation of indoor air environments to decrease bioaerosol concentration and reduce the Coronavirus' spread.[30]

32. Additionally, on May 7, 2021 the CDC issued a scientific brief warning of the risks of airborne indoor transmission of the Coronavirus from aerosols at distances greater than six feet from the source, which stated that "transmission of SARS-CoV-2 from inhalation of virus in the air farther than six feet from an infectious source can occur" and that:

> With increasing distance from the source, the role of inhalation likewise increases. Although infections through inhalation at distances greater than six feet from an infectious source are less likely than at closer distances, the phenomenon has been repeatedly documented under certain preventable circumstances. These transmission events have involved the presence of an infectious person exhaling virus indoors for an extended time (more than 15 minutes and in some cases hours) leading to virus concentrations in the air space sufficient to transmit infections to people more than 6 feet away, and in some cases to people who have passed through that space soon after the infectious person left. Per published reports, factors that increase the risk of SARS-CoV-2 infection under these circumstances include:
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> - **Enclosed spaces with inadequate ventilation or air handling** within which the concentration of exhaled respiratory fluids, especially very fine droplets and aerosol particles, can build-up in the air space.
> - **Increased exhalation** of respiratory fluids if the infectious person is engaged in physical exertion or raises their voice (e.g., exercising, shouting, singing).
> - **Prolonged exposure** to these conditions, typically more than 15 minutes.[31] (Emphasis in original).

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[30] Zahra Noorimotlagh et al., *A systematic review of possible airborne transmission of the COVID-19 virus (SARS-CoV-2) in the indoor air environment*, 193 ENV'T RSCH. 110612, 1-6 (Feb. 2021), https://www.sciencedirect.com/science/article/pii/S0013935120315097?dgcid=rss_sd_all (last visited June 28, 2021).

[31] *Scientific Brief: SARS-CoV-2 Transmission*, CDC (updated May 7, 2021), https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fscience%2Fscience-briefs%2Fscientific-brief-sars-cov-2.html (last visited June 28, 2021).

33. The CDC has recommended "ventilation interventions" to help reduce exposures to the airborne Coronavirus in indoor spaces, including increasing airflow and air filtration (such as with high-efficiency particulate air ("HEPA") fan/filtration systems).[32] These and other remedial measures must be implemented, at high cost and extra expense, to reduce the amount of the Coronavirus present in the space and to make property safe for its intended use. These extreme measures demonstrate that the Coronavirus and COVID-19 cause physical loss or damage to interior spaces. Even then, those interventions, cannot be guaranteed to eliminate the aerosolized Coronavirus in an indoor space. Nor do they eliminate it immediately.

34. COVID-19 may also be transmitted to people from physical objects, materials or surfaces. "Fomites" are physical objects or materials that carry, and are capable of transmitting infectious agents, altering these objects to become vectors of disease.[33] Fomite transmission has been demonstrated as highly efficient for viruses, both from object-to-hand and from hand-to-mouth.[34]

35. In addition, while fomite transmission may not be the primary route of transmission for COVID-19, fomite transmission is important and has been estimated to be responsible for up to 25% of all deaths due to COVID-19 since lockdowns were imposed.[35]

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[32] *Ventilation in Buildings*, CDC (updated June 2, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html#:~:text=HEPA%20filters%20are%20even%20more,with%20SARS%2DCoV%2D2 (last visited June 28, 2021).

[33] *Fomite*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/fomite (last visited June 28, 2021).

[34] Jing Cai et al., *Indirect Virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China, 2020*, 26 EMERGING INFECTIONS DISEASES 6 (June 2020), https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article (last visited June 28, 2021).

[35] A. Meiksin, *Dynamics of COVID-19 transmission including indirect transmission mechanisms: a mathematical analysis*, 148 EPIDEMIOLOGY & INFECTION e257, 1-7 (Oct. 23, 2020), https://www.cambridge.org/core/journals/epidemiology-and-infection/article/dynamics-of-covid19-transmission-including-indirect-transmission-mechanisms-a-mathematical-analysis/A134C5182FD44BEC9E2BA6581EF805D3 (last visited June 28, 2021).

36. The WHO has described fomite transmission as follows:

> Respiratory secretions or droplets expelled by infected individuals can contaminate surfaces and objects, creating fomites (contaminated surfaces). **Viable SARS-CoV-2 virus and/or RNA detected by RT-PCR can be found on those surfaces for periods ranging from hours to days**, depending on the ambient environment (including temperature and humidity) and the type of surface, in particular at high concentration in health care facilities where COVID-19 patients were being treated. Therefore, transmission may also occur indirectly through touching surfaces in the immediate environment or objects contaminated with virus from an infected person . . . .[36] (Emphasis added).

37. In addition to studies cited by the WHO,[37] numerous other studies and scientific articles have discussed fomite transmission as a mode of virus transmission, including, but not limited to:

a. A study of a COVID-19 outbreak published by the CDC identifying elevator buttons and restroom taps as possible causes of the "rapid spread of SARS-CoV-2" in a shopping mall in China.[38]

b. A National Institutes of Health study published in the New England Journal of Medicine finding that the Coronavirus survives up to four hours on copper, up to 24 hours on cardboard, and up to three days on plastic and stainless steel, and suggesting that people may acquire the virus through the air and after touching contaminated objects.[39]

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[36] *See, e.g.*, *Scientific Brief: Transmission of SARS-CoV-2: implications for infection prevention precautions*, WHO (July 9, 2020), https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions (last visited June 28, 2021).

[37] *Id.*

[38] Jing Cai et al., *Indirect Virus Transmission in Cluster of COVID-19 Cases*, Wenzhou, China, 2020, 26 EMERGING INFECTIONS DISEASES 6 (June 2020), https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article (last visited June 28, 2021).

[39] *New coronavirus stable for hours on surfaces*, NAT'L INSTS. HEALTH (Mar. 17, 2020), https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces (last visited June 28, 2021).

c. An American Society for Microbiology article discussing fomite infection as involving both porous and non-porous surfaces, and occurring through a fomite's contact with bodily secretions, hands, aerosolized virus from talking, sneezing, coughing, etc., or other airborne viral particles that settle after a disturbance of a fomite (*e.g.*, shaking a contaminated textile such as clothing merchandise).[40] According to the researchers, "[o]nce a fomite is contaminated, the transfer of infectious virus may readily occur between inanimate and animate objects, or vice versa, and between two separate fomites (if brought together)."[41] Generally, frequently touched surfaces can become highly transmissive fomites.[42]

d. A CDC research letter reporting that the Coronavirus can remain viable on polystyrene plastic, aluminum, and glass for 96 hours in indoor living spaces.[43]

e. A *Journal of Hospital Infection* article citing studies revealing that human coronaviruses can persist on inanimate surfaces like metal, glass, or plastic for up to nine days.[44]

38. Importantly, the Coronavirus has been detected on environmental objects and

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[40] Stephanie A. Bone and Charles P. Gerba, *Significance of Fomites in the Spread of Respiratory and Enteric Viral Disease*, 73 APPLIED & ENV'T MICROBIOLOGY 6, 1687-96 (Mar. 15, 2007) https://aem.asm.org/content/73/6/1687 (last visited May 11, 2021).

[41] *Id.*

[42] *Id.*

[43] Boris Pastorino et al., *Prolonged Infectivity of SARS-CoV-2 in Fomites*, 26 EMERGING INFECTIOUS DISEASES 9 (Sept. 2020), https://wwwnc.cdc.gov/eid/article/26/9/20-1788_article (last visited June 28, 2021).

[44] G. Kampf et al., *Persistence of coronaviruses on inanimate surfaces and their inactivation with biocidal agents*, J. HOSP. INFECTION 104, 246-51 (Feb. 6, 2020), https://www.journalofhospitalinfection.com/action/showPdf?pii=S0195-6701%2820%2930046-3 (last visited June 28, 2021).

surfaces from symptomatic, pre-symptomatic and asymptomatic individuals.[45] Fomites physically transform the surface of property into a potentially deadly Coronavirus transmission device.

39. Accordingly, the presence of the Coronavirus in and on property, including in indoor air, on surfaces, and on objects, causes physical loss or damage to property by causing physical harm to and altering property and otherwise making it incapable of being used for its intended purpose.

40. Among other things, the presence of the Coronavirus transforms everyday surfaces and objects into fomites, causing a tangible change of the property into a transmission vehicle for disease from one host to another. The WHO's description of fomite transmission of COVID-19 expressly recognizes this physical alteration of property, describing viral droplets as "**creating** fomites (contaminated surfaces)"[46] (Emphasis added). "Creating" involves making or bringing into existence something new[47] – such as something that is in an altered state from what it was before the Coronavirus was present on, in and around the property.

41. The Coronavirus adheres to surfaces and objects, harming and physically changing and physically altering those objects by becoming a part of their surface and making physical contact with them unsafe for their ordinary and customary use. Once the Coronavirus is in, on, or near property, it is easily spread by the air, people and objects, from one area to another, causing

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[45] *See Coronavirus disease 2019 (COVID-19) Situation Report – 73*, WHO (Apr. 2, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_2 (last visited June 28, 2021); Minghui Yang et al., *SARS-CoV-2 Detected on Environmental Fomites for Both Asymptomatic and Symptomatic Patients with COVID-19*, 203 AM. J. RESPIRATORY & CRITICAL CARE MED. 3 (Feb. 1, 2021), https://www.atsjournals.org/doi/10.1164/rccm.202006-2136LE (last visited June 28, 2021).

[46] *See, e.g.*, *Scientific Brief: Transmission of SARS-CoV-2: implications for infection prevention precautions*, WHO (July 9, 2020), https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions (last visited June 28, 2021).

[47] *See, e.g., Create*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/create (last visited June 28, 2021).

additional physical loss or damage.

42. Additionally, the presence of the dangerous and potentially fatal Coronavirus in and on property, including in indoor air, on surfaces, and on objects, renders the property lost, unsafe and unfit for its normal usage. Respiratory particles (including droplets and airborne aerosols) and fomites are physical substances that alter the physical properties of the interiors of buildings to make them unsafe, untenantable and uninhabitable.

43. The presence of an unsafe agent on the surfaces of a property or in the air within a property causes physical loss or damage to that property. Just as air within a property that is laden with asbestos fibers constitutes physical damage to that property, so too does the presence of Coronavirus on the surfaces or in the air within a property.

44. Well-established law holds that drinking water or a water table that contain virus or any other impurity that is an agent of illness or death are considered damaged because the virus/impurities make the water unsafe for drinking. The presence of the Coronavirus in or on property is no different. Coronavirus in the air of a building damages the building because the virus invades and physically transforms the air and makes it unsafe for breathing.

45. Contrary to the arguments advanced by the insurance industry, the presence of the Coronavirus is not the same as – and could not be more different from – the presence of dust at a property. The presence of dust, which is an everyday occurrence, does not require the closure and/or restriction of property to make that property habitable/fit for normal use and/or to make it safe and prevent mass illness and death; the presence of the Coronavirus does.

46. By contrast, the presence of the Coronavirus in the air within properties and on property surfaces is neither expected nor ordinary. Unlike dust, the Coronavirus cannot be removed by routine cleaning from surfaces. Attempting to remove the Coronavirus from surfaces

requires specific protocols. These specific protocols require harsh and abrasive chemicals that are not routinely used and that themselves cause additional physical loss or damage to API and API's Advertisers' property. Even assuming surface cleaning was 100% effective – which it is not – surface cleaning does not eliminate the number one transmission vector: Coronavirus in the air within properties.

D. The Government Orders Recognized that the Coronavirus Causes Physical Loss or Damage to Property and Required Measures to Stop Aerosol and Fomite Transmission

47. Across the United States and the World, the governmental orders arising from the Coronavirus and COVID-19 required measures to protect against aerosol and fomite transmission and expressly addressed the Coronavirus' impacts upon property in numerous ways.

48. State and local governments across the nation and governments around the world recognized the unprecedented and mushrooming outbreaks of COVID-19 across the nation and the Coronavirus's catastrophic impact through the physical loss or damage to property and lives. As a consequence, many states issued "State of Emergency" Declarations in early March 2020. Within a short time, virtually every state and countries across the World issued orders suspending or severely limiting business operations where people could potentially contract COVID-19 from others or from the property itself. This included API's own insured properties, as well as properties essential to the normal business operations of API's Advertisers, such as the retail stores that many of API's Advertisers rely on to sell their products.

49. Many governmental orders specified detailed restrictions on the use of property and disinfection protocols such as New Jersey's July 2, 2020 Order.[48] This Order permitted the limited

[48] N.J. Exec. Order No. 157, OFF. GOVERNOR (July 2, 2020) https://www.nj.gov/infobank/eo/056murphy/pdf/EO-157.pdf (last visited June 28, 2021).

reopening of retail establishments subject to restrictions such as a capacity limit of "50% of the stated maximum store capacity" and other workplace safeguards. These limitations were expressly issued, among other reasons, to protect against fomite transmission of the Coronavirus, and explicitly addressed the Coronavirus' impacts upon property in numerous ways, including but not limited to requiring businesses to:

a) Conduct "frequent sanitization of high-touch areas";

b) "Clean and disinfect equipment that is rented in accordance with CDC and DOH guidelines" – that is, more arduous, extensive and stringent cleaning and disinfecting standards than those in the ordinary course of those activities;

c) "Clean and disinfect the worksite in accordance with CDC guidelines when a worker at the site has been diagnosed with COVID-19 illness"; and

d) "Routinely clean and disinfect all high-touch areas" including "common surfaces, safety equipment, and other frequently touched surfaces."

50. Many of these and other government orders arising from the Coronavirus and COVID-19 expressly recognized that the Coronavirus damages property, not just people. The orders issued in Washington, home to numerous retail locations of API's Advertisers, are prime examples. On March 16, 2020, Governor Inslee issued an order closing fitness centers, theaters and indoor dining (and certain other business), in Washington.[49] Among other things, the March 16, 2020 order expressly stated, among its justifications, that the pervasiveness of COVID-19 was a "public disaster affecting . . . property;" that state government agencies were working with local health officials "in alleviating the impacts to . . . property;" and that among

[49] Wash. Proclamation No. 20-13, Proclamation by the Governor Amending Proclamation 20-05, OFF. GOVERNOR (Mar. 16, 2020), https://www.governor.wa.gov/sites/default/files/proclamations/20-13%20Coronavirus%20Restaurants-Bars%20%28tmp%29.pdf (last visited June 28, 2021).

its objectives was to "help preserve and maintain . . . property[.]"[50]

51. Many government orders to which API and API's Advertisers were subject also explicitly cited the need to protect and preserve property as a motivation for such order. For example, almost every one of New York City's multiple orders imposing COVID-19 related restrictions specifically cited the need to mitigate ongoing property damage. Consistent with this, a March 16, 2020 NYC Order stated that it was issued "because of the propensity of the virus to spread person to person and also because **the virus physically is causing property loss and damage**." (Emphasis added).[51]

E. The Coronavirus Cannot be Removed or Eliminated by Routine Cleaning

52. The proposition advanced by the insurance industry that an indoor space containing the infectious Coronavirus can be made safe and fit for its functional and intended use because the Coronavirus can be removed by routine surface cleaning is false.

53. In fact, the CDC has recently released guidance stating that there is little evidence to suggest that routine use of disinfectants can prevent the transmission of the Coronavirus from fomites in community settings.[52] Indeed, the CDC concluded that according to a more quantitative microbial risk assessment study, "surface disinfection once- or twice-per-day had little impact on reducing estimated risks" of Coronavirus transmission.[53]

54. A number of studies have demonstrated that the Coronavirus is "much more

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[50] *Id.*

[51] N.Y.C. Emergency Exec. Order No. 100, OFF. MAYOR (Mar. 16, 2020), https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-100.pdf (last visited June 28, 2021).

[52] *Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, CDC (updated Apr. 5, 2021), https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html (last visited June 28, 2021).

[53] *Id.* (citing A. K. Pitol & T. R. Julian, *Community transmission of SARS-CoV-2 by fomites: Risks and risk reduction strategies*, ENV'T SCI. & TECH. LETTERS (2020)).

resilient to cleaning than other respiratory viruses so tested."[54] The measures that must be taken to attempt to remove and disinfect the Coronavirus from property are significant and depend on the concentration of the Coronavirus, myriad surface characteristics (e.g., type of surface, temperature, porosity) and extend far beyond ordinary or routine cleaning.

55. Efficacy of decontaminating agents for viruses is based on a number of factors, including the initial amount of virus present, surface porosity, contact time with the decontaminating agent, dilution, temperature, and pH, among many others. No reported studies have investigated the efficacy of surface cleaning (with soap or detergent not containing a registered disinfectant) for reducing concentration of the Coronavirus on non-porous surfaces.[55] However, in one study, detergent surfactants were not recommended as single agents, but rather in conjunction with complex disinfectant solutions.[56]

56. Additionally, unlike cleaning a visible substance such as dust, with respect to the invisible (to the naked eye) Coronavirus, it can be challenging to accurately determine the efficacy of decontaminating agents and how "clean is clean" or if surface disinfection was even effective. Moreover, the toxicity of an agent may inhibit the growth of cells used to determine the presence of virus, making it difficult to determine if lower levels of infectious virus are actually still present on treated surfaces.[57]

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[54] Nevio Cimolai, *Environmental and decontamination issues for human coronaviruses and their potential surrogates*, 92 J. MED. VIROLOGY 11, 2498-510 (June 12, 2020), https://onlinelibrary.wiley.com/doi/10.1002/jmv.26170 (last visited June 28, 2021).

[55] *Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, CDC (updated Apr. 5, 2021), https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html (last visited June 28, 2021).

[56] Nevio Cimolai, *Environmental and decontamination issues for human coronaviruses and their potential surrogates*, 92 J. MED. VIROLOGY 11, 2498-510 (June 12, 2020), https://onlinelibrary.wiley.com/doi/10.1002/jmv.26170 (last visited June 28, 2021).

[57] *Id.*

57. In order to be effective, cleaning and decontamination procedures require strict adherence to protocols not necessarily tested under "real life" conditions in the midst of a widespread wave of pervasive Coronavirus spread, where treated surfaces or objects may not undergo even exposure or adequate contact time.[58] Studies of coronaviruses have demonstrated viral RNA persistence on objects despite cleaning with 70% alcohol.[59]

58. When considering disinfection and decontamination, the safety of products and procedures must be considered as well, due to the risks of harmful chemical accumulation, breakdown of treated materials, flammability, and potential for allergen exposure.[60]

59. With respect to textiles, studies have demonstrated that virus can survive on fabrics and be transferred to skin and other surfaces, "suggesting it is biologically plausible that . . . infectious diseases can be transmitted directly through contact with contaminated textiles."[61] Given the inadequacy of conventional cleaning procedures, disinfection and decontamination measures include, but are not limited to, the use of harsh chemicals to perform deep disinfection, the removal and disposal of porous materials like clothing, cloth and other fabrics, and making changes to air filtration systems, and redesigning interior spaces, all performed at great cost and expense to API, its direct and indirect customers and suppliers, and other property owners. These measures, among others, demonstrate that the Coronavirus and COVID-19 cause physical loss or

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[58] *Id.*

[59] Joon Young Song et al., *Viral Shedding* and *Environmental Cleaning in Middle East Respiratory Syndrome Coronavirus Infection*, 47 INFECTION & CHEMOTHERAPY 4, 252-5 (Dec. 2015), https://www.icjournal.org/DOIx.php?id=10.3947/ic.2015.47.4.252 (last visited June 28, 2021).

[60] *Id.*

[61] Lucy Owen & Katie Laird, *The role of textiles as fomites in the healthcare environment: a review of the infection control risk*, 8 PEER J. LIFE & ENV'T e9790, 1-35 (Aug. 25, 2020), https://peerj.com/articles/9790/ (last visited June 28, 2021).

damage to property.

60. Many of the surfaces and materials discussed in the studies and articles cited above are used throughout API's businesses as part of their operations, including plastics, glass, metals, and cloth and fabrics. Similarly, these surfaces and materials are used in virtually all office buildings, stores, shopping centers, restaurants, movie theaters, and other businesses and amenities throughout the United States and the across the globe, including at properties of API's Advertisers.

61. The aerosolized Coronavirus presents an inhalation exposure risk for people becoming exposed and infected with the Coronavirus and developing COVID-19. Indeed, the CDC, on April 5, 2021, concluded that:

- "[t]he principal mode by which people are infected with [the Coronavirus] … is through exposure to respiratory droplets carrying infectious virus"; and
- "when a person with suspected or confirmed COVID-19 has been indoors, virus can remain suspended in the air for minutes to hours."[62]

62. Aerosolized Coronavirus particles and virions cannot be eliminated by routine surface cleaning and in some cases cleaning contaminated surfaces (i.e., floors) could reasonably result in re-aerosolization of the Coronavirus. Cleaning Coronavirus contaminated surfaces in an indoor space will not remove aerosolized Coronavirus particles from the air that people can inhale and from which they can become infected with the Coronavirus and develop COVID-19 – no more than cleaning friable asbestos particles that have landed on a surface will remove the friable asbestos particles suspended in the air that people can inhale and from which develop asbestos-related diseases. In each case, people can inhale and become infected with the Coronavirus or

[62] *Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, CDC (updated Apr. 5, 2021), https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html (last visited June 28, 2021).

develop asbestos-related diseases.

63. Moreover, given the ubiquity, pervasiveness and increasing transmission of the Coronavirus strain variants, no amount of cleaning or ventilation intervention will prevent a person infected and contagious with the Coronavirus from entering an indoor space and exhaling millions of additional Coronavirus droplets and infectious aerosols into the air, further: (a) filling the air within the property with the aerosolized Coronavirus that can be inhaled; and (b) depositing infectious Coronavirus droplets on the surfaces, physically altering and transforming those surfaces into disease-transmitting fomites.

F. The Presence of the Coronavirus at API's Properties and the Properties of API's Advertisers

64. The incidence and prevalence (ratio of new vs. existing COVID-19 disease cases) in the United States and other countries where API and its Advertisers have their properties is unprecedented. In less than 4 months, COVID-19 spread worldwide and by June 2020, 10 million infections were reported, causing or contributing to the mortality of a million people.[63]

65. Indeed, occupancy of indoor spaces is reported to be a major risk factor for transmission of the Coronavirus. Investigation of over 7,000 COVID-19 cases found that all outbreaks involving three or more people occurred indoors.[64] The airborne Coronavirus viral RNA has been detected inside indoor spaces at distances over 50 meters from its source and in outdoor air in crowded areas outside of buildings.[65]

66. The prevalence and incidence of COVID-19 disease worldwide and its presence

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[63] Hua Qian et al., *Indoor transmission of SARS-CoV-2*, 31 INDOOR AIR 3, 639-45 (May 2021), https://pubmed.ncbi.nlm.nih.gov/33131151/ (last visited June 28, 2021).

[64] *Id.*

[65] Yuan Liu et al., *Aerodynamic analysis of SARS-CoV-2 in two Wuhan hospitals*, 582 NATURE 7813, 557-60 (June 2020), https://pubmed.ncbi.nlm.nih.gov/32340022/ (last visited June 28, 2021)

within the air inside property demonstrates that it is certain or virtually certain that the Coronavirus was in the air and on myriad surfaces at the properties of API and API's Advertisers. This can be confirmed with certainty or near-certainty by statistical modeling based on the known incidences of infection despite the lack of commercially available tests for air or surface presence of the Coronavirus, and despite the shortage of either rapid or laboratory COVID-19 tests and testing sites that could have otherwise been administered to every individual who was on-site at the relevant times.[66]

67. Early in the course of the Coronavirus and COVID-19, testing was limited, and thus potentially thousands more people were infected than were reported.[67] Concerning the testing that was available at the time of the first wave of COVID-19, national and local incidence and prevalence rates clearly demonstrated the high magnitude of COVID-19 infections (and deaths) and the pervasiveness of the Coronavirus throughout the United States. Moreover, deaths recorded throughout the United States point to a much higher prevalence of infectious cases and allow statistical estimates to quantify the certainty or high probability that the Coronavirus was present at the properties of API and API's Advertisers.

68. Indeed, employees and others with COVID-19 are known to have been physically present in API's offices. Given the high percentage of asymptomatic cases of COVID-19, it is certain that the actual number of API employees who have contracted COVID-19 is substantially greater than those known to have contracted COVID-19, and that infected employees were present

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[66] *See, e.g.,* Aroon Chande et al., *Real-time, interactive website for US-county-level COVID-19 event risk assessment*, 4 NATURE HUM. BEHAV., 1313-19 (Nov. 9, 2020), https://www.nature.com/articles/s41562-020-01000-9 (last visited June 28, 2021).

[67] *See, e.g.,* Benedict Carey & James Glanz, *Hidden Outbreaks Spread Through U.S. Cities Far Earlier Than Americans Knew, Estimates Say*, N.Y. TIMES (updated July 6, 2020), https://nytimes.com/2020/04/23/us/coronavirus-early-outbreaks-cities.html (last visited June 28, 2021).

at API's properties. The above is direct proof of the actual, certain presence of the Coronavirus at API's insured locations (i.e., its offices, printing, distribution and other facilities) in and around the properties.

69. Moreover, epidemiologists have explained that "the percent positive is a critical measure because it gives us an indication of how widespread infection is in the area where the testing is occurring[.]"[68] The percent positive is a crucial indicator to determine whether a business can safely remain open. As a threshold for the percent positive being "too high," the WHO stated that the percent positive should remain below 5% for at least two weeks before re-opening.[69]

70. API and many of API's largest advertisers operate throughout the United States and the World, including in many states and regions where the positivity rate was dramatically above 5%. For example, one advertiser, which operates in dozens of states and cities where positivity rates ranged from 6% to 50% at various points, has claimed that based on the positivity rates (as well as the large number of diagnosed employees), statistical modelling demonstrates the presence of the Coronavirus at its stores. Another API advertiser has stated that over 1,000 employees in its stores have tested positive for COVID-19 demonstrating both the certain or virtually certain presence of COVID-19 and/or the Coronavirus at the stores, in the air or on surfaces (whether in droplet nuclei, aerosols, droplets or otherwise).

71. Additionally, given how highly contagious the Coronavirus is, the global pervasive status of COVID-19 and the heavily-trafficked common areas inherent in their businesses, it is statistically certain, or near-certain, that many other individuals employed by, at, and in the vicinity

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[68] David Dowdy & Gypsyamber D'Souza, *COVID-19 Testing: Understanding the "Percent Positive"*, JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH (Aug. 10, 2020), https://www.jhsph.edu/covid-19/articles/covid-19-testing-understanding-the-percent-positive.html (last visited June 28, 2021).

[69] *Id.*

of the properties of API's Advertisers contracted and carried the Coronavirus.

72. Nor could the Coronavirus or the risk of Coronavirus transmission be completely removed with routine surface cleaning and no amount of surface cleaning could remove the aerosolized Coronavirus suspended in the air in the properties, further rendering the properties unfit for their intended uses.

73. The high prevalence of infectious COVID-19 cases makes it statistically certain or near-certain that the Coronavirus was dispersed continuously into the air and on property in, on and around API's Properties and the properties of API's Advertisers – rendering the already ineffective routine cleaning even less effective at removing the Coronavirus from surfaces of such properties and completely ineffective at removing aerosolized Coronavirus particles and virions from the air inside such properties. This was also the case at a myriad of office buildings, stores, shopping centers, restaurants, movie theaters, and other businesses and amenities throughout the United States and the across the globe, including at the properties of API's Advertisers, which are contingent time element locations under the Policy**.**

G. The Coronavirus and COVID-19 Caused Physical Loss Or Damage at API's Properties and the Properties of API's Advertisers

74. The presence of the Coronavirus and COVID-19 in, on and near property caused and continues to cause physical loss or damage to API's property and that of API's Advertisers, resulting in business income loss and contingent business income loss covered under the Policy.

75. API experienced physical loss or damage to property in at least four ways:

(1) individuals at API's properties testing positive for COVID-19 and, thus, through the certain or virtually certain presence of COVID-19 and/or the Coronavirus at API's properties in the air or on surfaces (whether in droplet nuclei, aerosols, droplets or otherwise);

(2) through state, local and agency governmental orders, that at various points shutdown or drastically limited the operations of API's properties causing API to lose the normal use and function of their property (in either total or in part);

(3) through the need to modify physical behaviors through the use of social distancing, avoiding confined indoor spaces, and avoiding congregating in the same physical area as others, in order to reduce or minimize the potential for viral transmission; and

(4) through the need to mitigate the threat or actual physical presence of the Coronavirus on door handles, clothing, desks, computers, miscellaneous surfaces, in heating and air conditioning systems and in or on any other of the multitude of places that the Coronavirus has been or could be found.

76. Similarly, API's Advertisers and other API customers suffered physical loss or damage to their property in the same four ways:

(1) on information and belief, API's Advertisers have had individuals present at API's Advertisers' properties test positive for COVID-19 and, thus, through the certain or virtually certain presence of COVID-19 and/or the Coronavirus at API's Advertisers' properties in the air or on surfaces (whether in droplet nuclei, aerosols, droplets or otherwise);

(2) through state, local and agency governmental orders, that at various points shutdown or drastically limited the operations of API's Advertisers' properties causing API's Advertisers to lose the normal use and function of their property (in either total or in part);

(3) through the need to modify physical behaviors through the use of social

distancing, avoiding confined indoor spaces, and avoiding congregating in the same physical area as others, in order to reduce or minimize the potential for viral transmission; and

(4) through the need to mitigate the threat or actual physical presence of the Coronavirus on door handles, clothing, desks, computers, miscellaneous surfaces, in heating and air conditioning systems and in or on any other of the multitude of places that the Coronavirus has been or could be found.

H. The Business Interruption and Other Losses Resulting From The Physical Loss Or Damage Caused By the Coronavirus and COVID-19

77. The advertising industry has been severely impacted by the physical loss or damage to property from the Coronavirus and COVID-19. Advertising was sharply down in 2020 and continuing into 2021 in the United States and Worldwide, as many media buyers paused or adjusted spending. For example, one survey found that nearly a quarter of responding business paused all advertising in the first or second quarter of 2020, and nearly 74% of respondents expected a greater decline in advertising than during the 2008 financial crisis.[70] In April 2020, Statista predicted that the advertising industry in the United States would experience losses of 26 billion dollars in revenue, a drop of 10.6%, as a result of COVID-19.[71] Simply put, the "deeper and deeper we get into the economic and societal impacts of the Covid-19 pandemic, the more clear it is that the advertising industry, and the many different types of companies that advertise, are being hit hard."[72]

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[70] Natalie Jarvey, *Coronavirus Ad Impact to Exceed 2008 Financial Crisis: Study*, HOLLYWOOD REP. (Mar. 27, 2020), https://www.hollywoodreporter.com/news/coronavirus-ad-impact-exceed-2008-financial-crisis-study-1286968 (last visited June 28, 2021).

[71] *Losses to advertising industry in the United States caused by the COVID-19 outbreak as of early March 2020*, STATISTA (Mar. 2020), https://www.statista.com/statistics/1104047/impact-covid19-ad-spend-usa/#statisticContainer (last visited June 28, 2021).

[72] Mike Vorhaus, *Advertising Revenues Projected to Decline in 2020 Worldwide*, FORBES (July

78. The widespread physical loss or damage to property throughout the United States and the World caused by the Coronavirus and COVID-19 has had a negative effect on API's business, including on the sale of advertising, one of its principal sources of revenue. Advertising is a product that businesses with a dramatically impaired ability to manufacture or sell their products and services either do not need, do not need to same degree or no longer have the revenue available to fund to the same degree. Simply put, companies do not advertise what they cannot sell.

79. As a result, purchasers of advertising have had to close or operate at limited capacity. Simply put, the physical loss or damage to API's Advertisers' and other customers property directly resulted in losses to API.

80. API's Advertisers themselves suffered physical loss or damage to property resulting in massive losses. Indeed at least two of API's major customers have stated that as a result of the Coronavirus and COVID-19 and the loss or damage to property they cause, as well as the government orders issued as a result, their stores were forced to close in whole or in part, and their ability to sell their products was thereby reduced, resulting in substantial losses.

81. This illustrates the basic truth that companies reliant on "brick-and-mortar" stores to sell their products sustained massive losses when those stores were forced to close and/or sharply limit their operations. Many of API's largest advertisers in the fashion, beauty and luxury products areas similarly rely heavily on physical stores to sell their products, and accordingly suffered massive losses when physical loss or damage to those stores prevented or limited them from filling this role. Such businesses accordingly found themselves with a diminished ability to

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27, 2020), https://www.forbes.com/sites/mikevorhaus/2020/07/27/advertising-revenues-projected-to-decline-in-2020-worldwide/?sh=6f3e382d2fcf (last visited June 28, 2021).

sell their products – and hence, a diminished need and/or revenue available to advertise.

82. Other examples abound, as a diverse cross-section of the United States and world economy was sharply impacted by the pervasive physical loss or damage to property caused by the Coronavirus and COVID-19, and numerous types of businesses that advertise in API's publications suffered dramatically as a result. For example, auto manufacturers remain heavily reliant on physical dealerships to display, show and facilitate the test driving of vehicles, and when those dealerships were forced to close or sharpy limit their operations as a result of the physical loss or damage to such property caused by the Coronavirus and COVID-19, fewer vehicles were sold, and auto manufacturers accordingly reduced their spending on advertising, including with API. Similarly, the travel industry was affected both by travel restrictions, and by the closure of travel-related properties such as hotels and local attractions due to the physical loss or damage caused by the presence of the Coronavirus and COVID-19, and as a result, travel business reduced their advertising with API.

83. API has also incurred substantial costs and losses as properties were closed or restricted by the Coronavirus and COVID-19, and subject to costly health and safety precautions, and restrictions on operations.

84. API has also sustained substantial losses from diminished advertising revenue as a direct result of COVID-19. In early 2020, prior to the impact of COVID-19, API was on track to meet or exceed 2019's advertising revenue. After the impact of COVID-19, API suffered substantial sharp declines in advertising revenue across most advertising categories.

85. Major API advertisers have stated that as a result of government orders, their stores were closed or severely restricted in their operations, greatly diminishing their ability to sell their products and leading to massive losses. For example, a major API cosmetics advertiser noted that

its sales for the first half of 2020 were significantly down, and explained that its business was "heavily impacted by lockdown measures, and by the closure of hair salons, department stores and perfumeries in almost all countries." As a result, the company "established very rigorous measures for operational budget discipline" including "a reduction in noncrucial expenditure[.]" In 2020, the company substantially reduced its advertising spending with API from 2019 levels.

86. Another API advertiser which is a leading designer, manufacturer, and retailer of luxury goods, reported a significant loss in revenue in the first half of 2020 due to "the closure of the Group's stores and manufacturing sites in most countries over a period of several months." As a result, the company made further efforts at "controlling costs[.]" In 2020, this company also substantially reduced its advertising spending with API from 2019 levels.

87. One luxury brand retailer and API advertiser explained its significant decline in revenue from 2019 by noting the "heavy toll" taken by "lockdown measures" and "store closures" on its brands. In 2020, this company substantially reduced its advertising spending with API from 2019 levels.

88. Several API clients have specifically mentioned reductions in advertising expenditures as one action taken in response to diminished sales due to store closures. For example, an Italian manufacturer and retailer of high-end leather goods and footwear, noted that "to mitigate the impact of store closures, [company] put [ ] in place a comprehensive program of cost cutting" including "cancelling or postponing marketing initiatives[.]" Similarly, a beauty products company noted that most "brick-and-mortar retail stores globally that sell the Company's products . . . were closed for some period of time" and that in "response" the company implemented "strong cost control actions to effectively manage the changing business environment" including reductions in "advertising and promotion activities[.]" In 2020, both companies substantially

reduced their advertising spending with API from 2019 levels.

I. The 2019/2020 FM Global Advantage® Time Element Select ™ "All Risk" Commercial Property Policy

89. In exchange for a substantial premium, FM sold API policy number 1053917, effective from July 1, 2019 to July 1, 2020 (the "Policy").

90. API fully paid the premium for the Policy.

91. The Policy was drafted and issued by FM on a FM Global Advantage® Time Element Select ™ form.

92. When introduced in 2016, the FM Global Advantage® coverage form was marketed as offering Business Interruption coverage "wherever you operate, or however indirect your connection to the loss."[73] FM also described its Business Interruption coverage as offering "unmatched coverage flexibility."[74]

93. The Policy insures API against "ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded," and provides coverage for property damage losses, business interruption losses ("Time Element" per the policy language), and other losses.

94. The Policy Limit is $2,000,000,000 per **occurrence**.[75] The Policy Deductible is $100,000 "per **occurrence**, for all coverages involved" and contains other deductibles applicable in specified circumstances.

95. The phrase "physical loss or damage" is not defined or limited in the Policy. In

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[73] *The FM Global Advantage® All-Risk Policy: Our Advantage is YOUR Advantage*, FM GLOBAL, https://www.fmglobal.com/products-and-services/products/the-fm-global-advantage-all-risk-policy (last visited June 28, 2021).

[74] *Business Interruption Coverage: Flexible Coverage When It Matters Most*, FM GLOBAL, https://www.fmglobal.com/products-and-services/products/business-interruption-coverage (last visited June 28, 2021)

[75] Unless otherwise noted, capitalized and/or bolded terms herein are capitalized and bolded in the Policy.

plain English, "physical loss or damage" to property denotes at least the following meanings: (1) physical damage to that property; (2) the structural alteration of that property; (3) the interaction of an external physical substance or force with that property, including its attachment to the surface or presence in the air of that property, rendering the property unfit, unsafe or uninhabitable for normal use or otherwise negatively affecting the property's usability; or (4) the loss of use or the loss of functional use, whether in whole or in part, of that property.

96. Despite FM's denial of API's claim on the basis that the Coronavirus and COVID-19 do not cause "physical loss or damage," less than two years ago FM told a federal court in New Mexico that "physical loss or damage" means exactly what API contends in this suit.[76]

97. In a filing in the New Mexico action, FM stated that a mold infestation that "destroyed the aseptic environment" of a room rendered it "unfit for its intended use" and therefore constituted "physical loss or property damage" as that phrase is interpreted "broadly" in property insurance policies and "[n]umerous courts have concluded that loss of functionality or reliability under similar circumstances constitutes physical loss or damage."[77]

98. FM stated in its public court filing in the New Mexico Action:

> It is undisputed that the mold infestation destroyed the aseptic environment and rendered Room 152 unfit for its intended use –manufacturing injectable pharmaceutical products. Numerous courts have concluded that loss of functionality or reliability under similar circumstances constitutes physical loss or damage. *See, e.g., Western Fire Insurance Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (church building sustained physical loss or damage when it was rendered uninhabitable and dangerous due to gasoline under the building); *Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America*, Civ. No. 2:12-cv-04418 2014 U.S. Dist. LEXIS 165232, 2014 WL 6675934 (D. N.J. 2014) (unsafe levels of ammonia in the air inflicted "direct physical loss of or damage to" the juice packing facility "because the ammonia physically rendered the facility unusable for a period of time."); *Port Authority of N.Y. and N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (asbestos

[76] *See* Ex. 1 (Plaintiff Factory Mutual Insurance Company's Motion *In Limine* No. 5 Re Physical Loss or Damage, *Factory Mutual Ins. Co., et al. v. Federal Ins. Co.*, Case No.: 1:17-cv-00760-GJF-LF (D. N.M. November 19, 2019)).

[77] *Id.*

fibers); *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (unpleasant odor in home); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 709 (E.D. Va. 2010), aff'd, 504 F. App'x. 251 (4th Cir. 2013) ("toxic gases" released by defective drywall).

Loss of functionality and/or reliability is especially significant where, as here, the property covered involves a product to be consumed by humans. Courts have concluded that the product is damaged where its "function and value have been seriously impaired, such that the product cannot be sold." *Pepsico, Inc. v. Winterthur International America Insurance Co*., 806 N.Y.S.2d 709, 744 (App. Div. 2005), *citing General Mills, Inc. v. Gold Medal Insurance Co*., 622 N.W.2d 147 (Minn. Ct. App. 2001); *Pillsbury Co. v. Underwriters at Lloyd's, London*, 705 F Supp 1396 (D. Minn. 1989); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Terra Indus*., 216 F Supp 2d 899 (N.D. Iowa 2002), aff'd 346 F3d 1160 (8th Cir. 2003), *cert denied* 541 US 939 (2004); *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg.*, Inc., 93 Cal Rptr. 2d 364 (Cal. App. 2000); *Zurich Am. Ins. Co. v. Cutrale Citrus Juices USA, Inc.*, 2002 WL 1433728, 2002 US Dist LEXIS 26829 (M.D. Fla. 2002). These courts' rationale regarding food products applies equally, if not more so, to the injectable pharmaceuticals OSO manufactured which were exposed to mold and no longer met industry safety standard. *See, General Mills v. Gold Medal Insurance*, 622 N.W.2d at 152 (food product which no longer met FDA safety standard sustained property damage.); *Motorists Mutual Ins. Co. v. Hardinger*, 131 F. Appx. 823 (3d Cir. 2005) (E coli in water well was physical loss or damage to insured's home.).

99. FM also stated that the "period of time as well as the costs required to bring [the Insured's property] to the level of cleanliness following the mold infestation required by [the Insured's] customers is also physical loss or damage" as the failure to meet the required level of cleanliness itself constituted damage, and rendered the property "unusable as the result of a covered loss." *Id.*

100. Additionally, FM admitted that **"[a]t best for [the opposing insurer] 'physical loss or damage,' which is undefined, is susceptible of more than one reasonable interpretation and is therefore ambiguous and must be construed against [the opposing insurer].**" *Id.* (Emphasis added).

101. Despite having previously admitted that the key "trigger language" in its own policy applies when an organism destroys an aseptic (*i.e*. sterile) environment and thereby renders property unfit for its intended purpose, and that such language is "at best" ambiguous and must be construed against a drafting insurer, FM's denial of API's claims took exactly the opposite

position, contending that the actual presence of the Coronavirus and COVID-19 at the property of API and API's Advertisers or other customers does not constitute "physical loss or damage."

102. FM's admissions in the New Mexico Action were legally correct: (a) the actual presence of the Coronavirus and COVID-19 at the property of API and API's Advertisers or other customers constitutes "physical loss or damage" within the meaning of the Policy; and (b) alternatively, "at best" "physical loss or damage" is ambiguous and must be construed against the drafter – FM.

103. The Policy's full terms and conditions are set forth therein, but as relevant here, the Policy provides as follows:

Time Element and Time Element Coverages

104. The Policy covers business interruption losses, "as provided in the TIME ELEMENT COVERAGES, directly resulting from physical loss or damage of the type insured."

105. As set forth above, the Coronavirus and COVID-19 caused physical loss or damage to property at API's insured **locations**.

106. The Coronavirus and COVID-19 also rendered such property unfit and unsafe for its normal usages, depriving API of its property.

107. Among the Policy's Time Element Coverages applicable to Non-Newspaper Locations is GROSS EARNINGS, covering "the Actual Loss Sustained by the Insured… during the PERIOD OF LIABILITY."

108. The Policy includes an EXTENDED PERIOD OF LIABILITY that extends the GROSS EARNINGS coverage up to 365 days to cover "the reduction in sales resulting from: 1) the interruption of business as covered by GROSS EARNINGS; 2) 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 3) 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."

109. Also among the Policy's Time Element Coverages applicable to Non-Newspaper Locations is GROSS PROFIT, covering "the Actual Loss Sustained by the Insured of the following due to the necessary interruption of business during the PERIOD OF LIABILITY: a) Reduction in Sales and b) Increase in Cost of Doing Business."

110. The Policy defines Gross Profit as "The amount produced by adding to the Net Profit the amount of the Insured Fixed Charges, or if there be no Net Profit the amount of the Insured Fixed Charges less that proportion of any loss from business operations as the amount of the Insured Fixed Charges bears to all fixed charges."

111. The Policy defines Net Profit as "The net operating profit (exclusive of all capital receipts and accruals and all outlay properly chargeable to capital) resulting from the business of the Insured at the insured **locations** after due provision has been made for all fixed charges and other expenses including depreciation but before the deduction of any taxes on profits."

112. The Policy defines Insured Fixed Charges as "All fixed charges unless specifically excluded herein."

113. API derives a large proportion of its revenue from the publications drafted at its Non-Newspaper Locations, both in the United States and in France. Many of these **locations** were either closed or partially closed during the Policy Period. To the extent any of the **locations** were reopened, this was often at reduced capacity, reduced hours and reduced levels of service. As such, API has sustained and is sustaining a substantial Time Element loss of its Gross Earnings and Gross Profit as insured under the Policy.

114. The Policy provides EXTRA EXPENSE coverage, covering "the reasonable and necessary extra costs incurred by the Insured of the following during the PERIOD OF LIABILITY: 1) extra expenses to temporarily continue as nearly normal as practicable the conduct of the Insured's business; 2) extra costs of temporarily using property or facilities of the Insured or other[.]

115. API incurred Extra Expenses to resume and continue as nearly as practicable its normal business activities that would otherwise be suspended due to physical loss or damage caused by the Coronavirus and COVID-19, costs associated with altering its property to protect it from physical loss or damage, as well as the safety of its occupants, such as erecting barriers, altering air circulation, reconfiguring indoor spaces, disinfecting surfaces and materials, and providing PPE to employees.

116. The Policy provides coverage for LEASEHOLD INTEREST loss as a result of "physical loss or damage of the type insured" to cover rent payable by API "[i]f the lease agreement requires continuation of rent; and if the property is wholly untenantable or unusable," or "if the property is partially untenantable or unusable."

117. API incurred continuing rental payments on insured property that was wholly and/or partially untenantable or unusable because of physical loss or damage caused by the Coronavirus and COVID-19.

118. The Policy also provides RENTAL INSURANCE coverage if insured property is not tenantable by reason of "an insured loss" and API incurred "Actual Loss" in the form of "the income reasonably expected from rentals of unoccupied or unrented portions of such property" and "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." API sustained rental income losses because

of Coronavirus and COVID-19 (an "insured loss" under the Policy) which rendered insured property untenantable.

Additional Coverages and Time Element Extensions

119. The Policy includes numerous Additional Coverages and Time Element Extensions that apply or are relevant to coverage for API's losses from the Coronavirus and COVID-19. These include the following, among others:

120. The Policy provides COMMUNICABLE DISEASE RESPONSE and INTERRUPTION BY COMMUNICABLE DISEASE coverages (collectively "On-Site Communicable Disease Coverages"). The COMMUNICABLE DISEASE RESPONSE coverage is for "the reasonable and necessary costs incurred by the Insured… for the: 1) cleanup, removal and disposal of the actual not suspected presence of **communicable diseases** from insured property[.]" The coverage applies when "a **location** owned, leased or rented by the Insured has the actual not suspected presence of **communicable disease** and access to such **location** is limited, restricted or prohibited 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**."

121. The INTERRUPTION BY COMMUNICABLE DISEASE coverage is for "the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY at such **location** with the actual not suspected presence of **communicable disease**." This coverage applies when "a **location** owned, leased or rented by the Insured has the actual not suspected presence of **communicable disease** and access to such **location** is limited, restricted or prohibited 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."**

122. The Policy defines **communicable disease** as "disease which is: transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges[.]" COVID-19 is a **communicable disease** under the Policy.

123. The Policy provides CIVIL OR MILITARY AUTHORITY coverage for "the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured 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."

124. The Coronavirus and COVID-19 caused physical loss or damage throughout the cities, states, and countries where API's **locations** are located, and caused the deprivation of use of such property, including property within 5 miles of the API **locations**, giving rise to the actions of civil authority in those cities, states, and countries, as set forth herein. These orders limited, restricted or prohibited partial or total access to the API **locations**. The damage giving rise to the civil authority orders is "of the type insured" by the Policy because the Policy provides coverage for **communicable disease**.

125. The Policy provides CONTINGENT TIME ELEMENT EXTENDED coverage for "the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured 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**."

126. The Policy defines **contingent time element locations** as including: "A. any **location**: 1) of a direct customer, supplier, contract manufacturer or contract service provider to

the Insured;" and "B. any **location** of a company that is a direct or indirect customer, supplier, contract manufacturer or contract service provider to a **location** described in A1 above."

127. The CONTINGENT TIME ELEMENT EXTENDED coverage also states: "Time Element loss recoverable under this Extension is extended to include the following TIME ELEMENT COVERAGE EXTENSIONS:

CIVIL OR MILITARY AUTHORITY

CONTINGENT TIME ELEMENT EXTENDED

DATA SERVICE PROVIDER TIME ELEMENT

DELAY IN STARTUP

EXTENDED PERIOD OF LIABILITY

INGRESS/EGRESS

ON PREMISES SERVICES

SERVICE INTERRUPTION TIME ELEMENT"

128. In plain English, the Policy provides coverage for API's losses if the properties of API's direct and indirect customers or suppliers suffer physical loss or damage "of the type insured" by the Policy, or if such direct and indirect customers or suppliers experience loss of the type covered under the listed TIME ELEMENT EXTENSIONS. Here, both are true: communicable disease is physical loss or damage "of the type insured" by the Policy, and API's direct and indirect customers and service providers, including API's Advertisers, suffered physical loss or damage, "directly resulting" in losses to API.

129. Among other things, as set forth herein, the Coronavirus and COVID-19 caused physical loss or damage at **locations** of direct and indirect customers and service providers to API. Those direct and indirect customers and service providers also suffered loss of the type covered

by CIVIL OR MILITARY AUTHORITY, CONTINGENT TIME ELEMENT, INGRESS/EGRESS, EXTENDED PERIOD OF LIABILITY, and other TIME ELEMENT EXTENSIONS due to the Coronavirus and COVID-19.

130. Additionally, as set forth herein, the Coronavirus and COVID-19 rendered such properties unfit and unsafe for their normal usages, resulting in the deprivation of use of such properties. As a result, API's direct and indirect customers were unable to sell their products in whole or in part, and accordingly reduced their advertising on such products, directly resulting in losses to API.

131. The Policy provides DECONTAMINATION COSTS coverage, which states in relevant part: "If insured property is contaminated as a direct result of insured physical damage and there is in force at the time of the loss any law or ordinance regulating contamination due to the actual not suspected presence of contaminant(s), then this Policy covers, as a direct result of enforcement of such law or ordinance, the increased cost of decontamination and/or removal of such contaminated insured property in a manner to satisfy such law or ordinance."

132. The Policy provides INGRESS/EGRESS coverage for "the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY due to the necessary interruption of the Insured's 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 Insured is damaged, provided that such prevention is a direct result of physical damage of the type insured to property of the type insured."

133. The Coronavirus and COVID-19 caused physical loss or damage to property throughout the cities, states and countries where API's **locations** are located, and caused the deprivation of use of such property. The areas surrounding the API **locations**, like the rest of the

cities where the API **locations** are located, were non-viable destinations in general, thus preventing total or partial access to some API **locations**.

134. The Policy provides PROTECTION AND PRESERVATION OF PROPERTY and PROTECTION AND PRESERVATION OF PROPERTY TIME ELEMENT coverages, 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" and the 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."

135. API undertook costly measures necessary to protect the API **locations** from further loss or damage and to mitigate its damages. This included, among other things, altering its property to protect it from physical loss or damage, and taking measures to protect the safety of its employees and customers, including erecting barriers, altering air circulation, reconfiguring indoor spaces, disinfecting surfaces and materials, and providing PPE to employees. Additionally, during times of low or no occupancy at or operation of the API **locations**, to mitigate its losses and to protect its property, API incurred costs associated with security, fire monitoring, elevator maintenance, pest control, utilities and maintenance.

136. API also expects that when the calculation of its full losses is fully known, additional coverages under the Policy may be applicable and additional provisions may become relevant. The foregoing is not a comprehensive discussion of all potentially applicable Policy coverages, terms, and conditions, which are fully set forth in the Policy.

The Policy's Contamination Exclusion Does Not Apply

137. As detailed above, the Policy provides several coverages applicable to API's losses. Significantly, these coverages do not refer to "physical loss or damage" or "physical damage" in the abstract, but instead qualify this trigger language by adding the phrase "of the type insured" – meaning that the Policy's general coverage grants are expressly to be interpreted in a manner which provides coverage for types of risk that other Policy provisions indicate are insured.

138. The On-Site Communicable Disease Coverages provide coverage for "cleanup, removal and disposal" of a **communicable disease** and for business interruption caused by the "actual not suspected presence of a **communicable disease**" and therefore the presence of **communicable disease** in or on insured property constitutes property damage "of the type insured" by the Policy.

139. COVID-19 is a **communicable disease** transmissible from human to human.

140. COVID-19 therefore meets the definition of **communicable disease** under the Policy, and property damage attributable to COVID-19 is property damage "of the type insured" by the Policy.

141. The Policy contains an exclusion that purports to preclude coverage for **contamination** (the "Contamination Exclusion").

142. The Policy defines **contamination** as, among other things, a "virus."

143. The Contamination Exclusion only excludes "direct" "costs" associated with **contamination** and does not preclude coverage for "losses" such as time element (business interruption) losses or indirect "costs" such as extra expenses.

144. In addition, even assuming the Contamination Exclusion did apply to coverage for

"losses" and was not limited to "direct" "costs", the Policy cannot simultaneously provide coverage for **communicable disease**, yet purport to simultaneously exclude coverage for "contamination" arising from a virus.

145. Conflicting provisions within the Policy cannot be read to negate certain coverages or in ways that render some coverage provisions mere surplusage. The words of the Policy must be read in a manner that gives meaning to all language, and leaves no provision without force and effect. Consistent with these rules of construction and interpretation, the Contamination Exclusion cannot apply to the Coronavirus or COVID-19 because it would negate and leave without force and effect the coverage for **communicable diseases**.

146. The On-Site Communicable Disease Coverages are not limited by, and are not an "exception to" the Policy's Contamination Exclusion. Rather, the Policy affords explicit coverage for loss and damage caused by **communicable disease**.

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

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

149. However, FM, a sophisticated insurer, decided not to include any such exclusions in the Policy it drafted. To the contrary, the Policy contains two express grants of coverage in the On-Site Communicable Disease Coverages, such that losses from **communicable disease** are affirmatively covered and are of the type insured under the Policy. Additionally, an insured

would reasonably understand a "contamination" exclusion as applying to traditional notions of environmental contamination.

150. Therefore, the Policy's Contamination Exclusion does not exclude coverage for API's claim.

151. In the alternative, the Policy's Contamination Exclusion is ambiguous and, as such, must be construed against the drafter, FM.

The Policy's Communicable Disease Sublimit Does Not Cap API's Losses

152. The On-Site Communicable Disease Coverages afford coverage to API for the actual presence of **communicable disease** at an API Location. This **communicable disease** coverage is found under two sections of the Policy titled "Communicable Disease Response" and "Interruption by Communicable Disease."

153. The Communicable Disease Response provision expressly provides that it is an "Additional Coverage."

154. The Interruption by Communicable Disease Response provision expressly provides that it is a coverage "Extension."

155. The On-Site Communicable Disease Coverages were added to the Policy as "enhancements" to what the base policy form already covered as **communicable disease**.

156. **Communicable disease** is a risk of physical loss or damage not excluded under the Policy.

157. Physical loss or damage caused by **communicable disease** is physical loss or damage of the type insured under the Policy.

158. The Policy contains no provision or wording that designates the On-Site Communicable Disease Coverages as the exclusive coverages applicable to physical loss or

damage caused by **communicable disease.**

159. The On-Site Communicable Disease Coverages do not operate to limit any other coverage under the Policy that may also apply to loss or damage resulting from or caused by **communicable disease**, including physical loss or damage resulting from or caused by **communicable disease** at or away from API Locations such as physical loss or damage at the locations of API's Advertisers or customers.

160. Likewise, any sublimit applicable to the On-Site Communicable Disease Coverages does not apply to limit any of the other coverages under the Policy that may also apply to loss or damage resulting from or caused by **communicable disease**, including physical loss or damage resulting from or caused by **communicable disease** at or away from API Locations, such as physical loss or damage at the locations of API's Advertisers or customers.

161. Rather, coverage for physical loss and damage, and/or resulting business interruption loss, from or caused by **communicable disease**, including physical loss or damage resulting from or caused by **communicable disease** at or away from API Locations, is subject to the Policy limits associated with the coverage or coverages implicated.

J. FM's Bad Faith Conduct

162. Aware that its Global Advantage® Time Element Select ™ policy form (the "Global Advantage Form") affords coverage for COVID-19 losses beyond the sublimited On-Site Communicable Disease Coverages, FM nevertheless specifically trained its claims adjusters to limit its insureds to only these limited coverage grants.

163. FM's systematic practice is outlined in a set of "Talking Points on the 2019 Novel Coronavirus (2019-nCoV)" (the "Talking Points") prepared for FM claims adjusters to use to ensure that they reach the incorrect conclusion that there is no coverage for COVID-19 related

claims beyond the Communicable Disease Coverages.[78]

164. FM drafted the Talking Points.

165. FM provided the Talking Points to its personnel for use when adjusting claims based on COVID-19.

166. The Talking Points outline only a few of the many different coverages contained in its Global Advantage Form – *i.e.*, the policy form on which the Policy issued to API is based.

167. The Talking Points outline certain specific "triggers" of coverage that the adjuster should look for when investigating any COVID-19 claim.

168. Notably, the only "triggers" identified in the Talking Points are those applicable to the Communicable Disease Coverages and the Talking Points entirely fail to mention all of the different "triggers" of coverage that may be implicated by COVID-19 claims.

169. By directing its adjusters away from the over coverages in Global Advantage Form that may (and here do) cover COVID-19 related losses, FM sought to ensure that such coverages would not be considered, that a proper investigation would not be conducted, and that the wrong coverage determination would be reached.

170. Ironically, however, although improperly designed to steer its adjusters to only those coverages with significant sublimits, the Talking Points concede that the actual presence of COVID-19 on insured property constitutes property "damage" as used in the Policy.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment)

171. API incorporates the above Paragraphs by reference.

172. This is a claim for relief for declaratory judgment pursuant to R.I. Gen. Laws §9-30-1, *et seq*. and R.I. Super. Ct. R. Civ. P. 57. An actual and justiciable controversy exists

[78] A copy of FM's "Talking Points" is annexed hereto as Exhibit 2.

between API and FM concerning their respective rights and obligations under the Policy.

173. FM disputes API's positions set forth herein and disputes that the Policy covers API's losses.

174. The issuance of declaratory relief will terminate the controversy between API and FM regarding this issue.

175. API therefore seeks a declaratory judgment declaring that the Policy covers the losses it has suffered, and that FM is responsible for fully and timely paying API's losses under the Policy.

SECOND CLAIM FOR RELIEF
(Breach of Contract)

176. API incorporates the above Paragraphs by reference.

177. The Policy is a valid and enforceable contract.

178. API paid substantial premium for the Policy and the promises of coverage contained therein, and otherwise performed all of its obligations owed under the Policy or was excused from performance.

179. FM has denied API's Claims and has refused to pay or otherwise honor its promises. In denying coverage for API's Claims as alleged above, FM breached its contract (that is, the Policy). As a result, API has suffered and continues to suffer damage in an amount to be proven at trial, but currently estimated to exceed millions of dollars in damages.

180. By failing to investigate API's Claims, FM breached its duty of good faith and fair dealing to its insureds. As a result, API is entitled to consequential damages for FM's breach of the Policy.

181. Consequential damages for breach of the Policy were reasonably contemplated by the parties when FM issued the Policy.

PRAYER FOR RELIEF

Wherefore, API respectfully requests that the Court enter Judgment in its favor against FM as follows:

1. As to Count I, a declaratory judgment that the Policy covers the losses API has suffered, and that FM is responsible for fully and timely paying API's losses under the Policy.
2. As to Count II, for an award of damages in favor of API in an amount to be proven at trial, plus pre- and post-judgment interest at the maximum legal rate, attorneys' fees, costs and disbursements for this action; and
3. Such other equitable and further relief as this Court deems just and proper.

PLAINTIFF DEMANDS TRIAL BY JURY ON ALL COUNTS SO TRIABLE.

Plaintiff
Advance Publications, Inc.
By its Attorneys,

Date: June 29, 2021

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