IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
LAW DIVISION

iFLY HOLDINGS, LLC,	)	
	)	
Plaintiff,	)	
	)	**CASE No.:** 2021L009320
v.	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY,	)	
	)	**JURY DEMANDED**
	)	
Defendant.	)	

COMPLAINT AT LAW

NOW COMES Plaintiff iFLY Holdings, LLC, by and through the undersigned attorneys, and for its Complaint against Defendant ZURICH AMERICAN INSURANCE COMPANY ("Zurich" or "Defendant") alleges and states as follows:

NATURE OF THE CAUSE OF ACTION

1. This lawsuit arises from Zurich's refusal to accept coverage and pay for the direct physical loss of or damage to Plaintiff's properties caused by the presence of COVID-19 on or about the insured locations, and the losses, damages, and expenses caused by state, county, and local government orders prohibiting access to the insured locations, the CDC's travel recommendations, former President Trump's travel orders, and/or other states' stay-at-home orders. Plaintiff's substantial business income losses are covered by its Policy with Zurich under the Policy's provisions for Time Element: Business Interruption, Business Interruption Loss of Profits, Denial of Access by Civil Authority, Loss of Ingress or Egress, Extra Expense, Ordinance or Law, Goodwill and Public Relations, Loss of Attraction, and other related provisions.

2. Plaintiff seeks enforcement of Zurich's contractual promises to insure Plaintiff against its significant and ongoing losses resulting from COVID-19 outbreaks in 19 states, the United States, and around the world.

3. Plaintiff is suing Defendant for breach of contract and breach of the duty of good faith and fair dealing and is seeking money damages.

PARTIES

4. Plaintiff iFLY Holdings, LLC ("Plaintiff" or "iFLY") is a Delaware corporation with its principal place of business in Austin, Texas. iFLY developed, owns, and/or operates indoor skydiving facilities. The company creates recreational facilities using its proprietary technology to create a stable, wall-to-wall cushion of air in a flight chamber ("wind tunnels"). iFLY operates 33 wind tunnels in the United States, spread across 19 states and 32 counties.

5. Defendant Zurich American Insurance Company ("Zurich") is organized under the laws of Illinois, with its principal place of business in Schaumburg, Illinois.

JURISDICTION AND VENUE

6. This Court has personal jurisdiction over Zurich, because it is domiciled in Illinois, does business in Illinois as it relates to the issues in this case, and generally conduct business in Illinois.

7. This Court has subject matter jurisdiction under Article VI, Section 9 of the Illinois Constitution. In addition, the Illinois Supreme Court does not have original, exclusive jurisdiction over this case.

8. Venue in this county is proper under 735 ILCS 5/2-101, because Cook County is Defendant's county of residence, the county in which the transaction or some part of the transaction occurred out of which this case arose, the county from which Defendant issued the insurance policy

at issue herein, and the county in which Zurich expects and receives payments under that policy. Moreover, Zurich denied, either expressly or as a matter of law, Plaintiff's claim for insurance coverage from its business locations in Cook County. Lastly, two of Plaintiff's insured locations that incurred covered losses subject to this lawsuit are located in Cook County.

GENERAL ALLEGATIONS

A. CORONAVIRUS AND COVID-19

9. COVID-19 is a severe infectious disease caused by SARS-CoV-2 (or the Coronavirus). SARS-CoV-2 causes serious systemic illness and death.[1] To date, there have been over 204 million confirmed cases of COVID-19 and over 4.3 million deaths worldwide.[2] In the United States, COVID-19 has infected over 36 million people and caused over 616,000 deaths.[3]

10. As of the filing of this lawsuit, the 19 states where iFLY's insured properties are located have in excess of 24,490,000 cases and 424,000 deaths combined.[4] The thirty-two counties where iFLY's insured properties are located have in excess of 5,988,000 cases and 90,000 deaths.[5] The State of Illinois alone has over 1.4 million confirmed cases and 26,000 deaths as a result of COVID-19.[6]

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[1] 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 22, 2021).

[2] *WHO Coronavirus (COVID-19) Dashboard*, WHO (last updated June 21, 2021), https://covid19.who.int/ (last visited August 12, 2021).

[3] *See* U.S. Centers for Disease Control and Prevention, *United States COVID-19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction*, https://covid.cdc.gov/covid-data-tracker/#cases_totalcases (last visited June 18, 2021).

[4] *See id.*; Exhibit A – Case and Death Counts by State with iFLY Locations (sources last visited August 12, 2021).

[5] *See* Exhibit B – Case and Death Counts by County with iFLY Locations (sources last visited August 12, 2021).

[6] *See* Illinois Department of Public Health, *Coronavirus Disease 2019 (COVID-19)* https://www.dph.illinois.gov/covid19 (last visited June 22, 2021).

11. Due to pervasive spread and presence of SARS-CoV-2 and COVID-19 across the planet, both are presumed to be present or imminently present everywhere.[7] The existence and/or presence of the Coronavirus and COVID-19 is not simply reflected in reported cases or individuals' positive test results. The Centers for Disease Control and Prevention ("CDC") estimates that the number of people in the U.S. who have been infected with COVID-19 is likely to be 10 times higher than the number of reported cases.[8] Additionally, at least 40% of people infected with COVID-19 are asymptomatic.[9] COVID-19 also includes a pre-symptomatic incubation period of up to 14 days, during which time infected people can transmit COVID-19 to other people, into the air, and onto surfaces, without having experienced symptoms and without realizing that they are infected.[10]

12. Studies prove that pre-symptomatic individuals have an even greater ability to transmit COVID-19 than other infected people because they carry the greatest "viral load."[11] The National Academy of Sciences has concluded that "the majority of transmission is attributable to

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[7] *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 22, 2021).

[8] Lena H. Sun and 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 22, 2021).

[9] 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 22, 2021).

[10] *See* WHO, *Coronavirus disease 2019 (COVID-19) Situation Report - 73* (Apr. 2, 2020), https://apps.who.int/iris/bitstream/handle/10665/331686/nCoVsitrep02Apr2020-eng.pdf?sequence=1&isAllowed=y (last visited June 22, 2021); Minghui Yang, Liang Li, Ting Huang, Shaxi Li, Mingxia Zhang, Yang, Yujin Jiang, Xiaohe Li, Jing Yuan, and Yingxia Liu, *SARS-CoV-2 Detected on Environmental Fomites for Both Asymptomatic and Symptomatic Patients with COVID-19,* https://doi.org/10.1164/rccm.202006-2136LE (last visited June 22, 2021).

[11] *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 22, 2021); Lirong Zou, M.Sc., *et al., SARS-CoV-2 Viral Load in Upper Respiratory Specimens of Infected Patients,* NEW ENG. J. OF MED. (Mar. 19, 2020).

people who are not exhibiting symptoms, either because they are still in the pre-symptomatic stage or the infection is asymptomatic."[12]

13. As early as February 26, 2020, the CDC advised that COVID-19 was spreading freely without the ability to trace the origin of new infections, also known as community transmission or community spread. 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 how many other people will become infected by one person with that disease. Studies have concluded that one person with the Coronavirus will infect up to 5.7 others ($R^0 \approx 5.7$), which is much higher than seasonal influenza, for example, where one person can infect on average only 1.3 others ($R^0 \approx 1.3$).[13] Newer variants of the Coronavirus are even more contagious and deadly.[14]

14. The Coronavirus can remain infectious for "much longer time periods than generally considered possible."[15] In the Journal of Virology, researchers demonstrated that the Coronavirus can survive up to 28 days at room temperature (68°F) on a variety of surfaces including glass, steel, vinyl, plastic, and paper.[16] 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

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[12] Meagan C. Fitzpatrick, Alison P. Galvani, Seyed M. Moghadas, Abhishek Pandey, Pratha Sah, Affan Shoukat, and Burton H. Singer, *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 22, 2021).

[13] M. Cevik, C.C.G. Bamford, A. Ho, *COVID-19 pandemic-a focused review for clinicians*, 26 CLIN MICROBIOL INFECT. 7, 842-47 (July 2020), https://www.clinicalmicrobiologyandinfection.com/article/S1198-743X(20)30231-7/fulltext (last visited June 22, 2021).

[14] *See* CDC, *About Variants of the Virus that Causes COVID-19* (last updated June 15, 2021) (last visited June 22, 2021).

[15] Shane Riddell, Sarah Goldie, Andrew Hill, Debbie Eagles & Trevor W. Drew, *The effect of temperature on persistence of SARS-CoV-2 on common surfaces*, 17 VIROLOGY J. 145 (2020), https://doi.org/10.1186/s12985-020-01418-7 (last visited June 22, 2021).

[16] *Id.*

days after the cabins were vacated but before they were disinfected.[17] 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.[18]

15. 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."[19]

1. The Coronavirus and COVID-19 Cause Direct Physical Loss of or Damage to Property

16. The omnipresence of the Coronavirus and COVID-19 is enabled by multiple modes of viral transmission, including respiratory droplets, airborne, and fomite transmission (i.e., transmission from surfaces and objects).[20] These transmission methods demonstrate that the Coronavirus and/or COVID-19 cause direct physical loss of or damage to property.

17. Respiratory transmission of COVID-19 occurs through exposure to an infected person's respiratory particles, such as from saliva or mucus.[21] Respiratory transmission of the

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[17] Leah F. Moriarty, Mateusz M. Plucinski, Barbara J. Marston, et al., *Public Health Responses to COVID-19 Outbreaks on Cruise Ships — Worldwide, February–March 2020*, 69 MMWR 12, 347-352, March 27, 2020, https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.htm (last visited June 22, 2021).

[18] Zhen-Dong Guo, Zhong-Yi Wang, Shou-Feng Zhang, Xiao Li, Lin Li, Chao Li, Yan Cui, Rui-Bin Fu, Yun-Zhu Dong, Xiang-Yang Chi, Meng-Yao Zhang, Kun Liu, Cheng Cao, Bin Liu, Ke Zhang, Yu-Wei Gao, Bing Lu, Wei Chen, *Aerosol and Surface Distribution of Severe Acute Respiratory Syndrome Coronavirus 2 in Hospital Wards, Wuhan, China, 2020,* 26 EMERG. INFECT. DIS. 7, 1583-91 (July 2020), https://pubmed.ncbi.nlm.nih.gov/32275497/ (last visited June 22, 2021).

[19] *Q&A on coronaviruses (COVID-19)*, World Health Organization, 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 22, 2021).

[20] *See, e.g.*, WHO, *Transmission of SARS-CoV-2: implications for infection prevention precautions* (Jul. 9, 2020), https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions (last visited June 22, 2021).

[21] *Id.*

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.[22] Humans produce a wide range of particle sizes when coughing, sneezing, talking, singing, or otherwise dispersing droplets, with pathogens predominating in the smallest particles.[23] Respiratory particles produced by the average person can travel almost 20 feet by sneezing.[24] An M.I.T. researcher has found that virus-laden "clouds" containing clusters of droplets can travel 23 to 27 feet.[25]

18. Airborne transmission involves the spread of the infectious agent caused by the dissemination of droplet nuclei (aerosols) from exhaled breath, for example, that remain infectious when suspended in the air over long distances and time.[26] These tiny particles can remain suspended "for indefinite periods unless removed by air currents or dilution ventilation."[27] As a result, the risk of disease transmission increases substantially in enclosed environments, compared to outdoor settings.[28]

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[22] 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 22, 2021).

[23] *Id.*

[24] *Id.*

[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, https://jamanetwork.com/journals/jama/fullarticle/2763852 (last visited June 22, 2021).

[26] *Id; 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 22, 2021); Ramon Padilla & Javier Zarracina, *WHO agrees with more than 200 medical experts that COVID-19 may spread via the air*, (last updated Sept. 21, 2020), www.usatoday.com/in-depth/news/2020/04/03/—coronavirusprotection-how-masks-might-stop-spread-throughcoughs/5086553002/ (last visited June 22, 2021); Nan Zhang, Jianjian Wei, Hui-Ling Yen, and Yuguo Li, *Short-range airborne route dominates exposure of respiratory infection during close contact*, 176 BLDG. AND ENV'T (June 2020).

[27] 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 22, 2021).

[28] 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 (2020), https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1442/5910315 (last visited June 22, 2021).

19. 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.[29] Moreover, a study detected Coronavirus inside the HVAC system connected to hospital rooms of patients sick with COVID-19. The study found the Coronavirus in ceiling vent openings, vent exhaust filters, and ducts located as much as 56 meters (over 183 feet) from the rooms of the sick COVID-19 patients.[30]

20. Additionally, the CDC stated that "there is evidence that under certain conditions, people with COVID-19 seem to have infected others who were more than 6 feet away" and infected people who entered the space shortly after the person with COVID-19 had left.[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's spread.[32]

21. The CDC recommended "ventilation interventions" to help reduce exposure to the airborne Coronavirus in indoor spaces, including increasing airflow and air filtration (such as with

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[29] Jianyun Lu, Jieni Gu, Kuibiao Li, Conghui Xu, Wenzhe Su, Zhisheng Lai, Deqian Zhou, Chao Yu, Bin Xu, and Zhicong Yang, *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 22, 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. 2020), https://pubmed.ncbi.nlm.nih.gov/33258335/ (last visited June 22, 2021).

[30] Karolina Nissen, Janina Krambrich, Dario Akaberi, Tobe Hoffman, Jiaxin Ling, Ake Lundkvist, Lennart Svensson & Erik Salaneck, *Long-distance airborne dispersal of SARS-CoV-2 in COVID-19 wards*, SCI REP 10, 19589 (Nov. 11, 2020), https://doi.org/10.1038/s41598-020-76442-2 (last visited June 22, 2021).

[31] CDC, *How COVID-19 Spreads* (last updated Oct. 28, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (last visited June 22, 2021).

[32] Zahra Noorimotlagh, Neemat Jaafarzadeh, Susana Silva Martínez, & Seyyed Abbas Mirzaee, *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 22, 2021).

high-efficiency particulate air ("HEPA") fan/filtration systems).[33] 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 direct physical loss of, damage, or destruction to interior spaces. Even so, such interventions, at most, reduce but do not eliminate the aerosolized Coronavirus in an indoor space.

22. 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.[34] Fomite transmission has been demonstrated as highly efficient for viruses, both from object-to-hand and from hand-to-mouth.[35]

23. The WHO 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).

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[33] CDC, *Ventilation in Buildings* (last updated Feb. 9, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html#:~:text=HEPA%20filters%20are%20even%20more,with%20SARS%2DCoV%2D2 (last visited June 22, 2021).

[34] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/fomite (last visited June 22, 2021).

[35] CDC, Jing Cai, Wenjie Sun, Jianping Huang, Michelle Gamber, Jing Wu, Guiqing He, *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 22, 2021).

[36] *See, e.g.*, WHO, *Transmission of SARS-CoV-2: implications for infection prevention precautions* (Jul. 9, 2020), https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions (last visited June 22, 2021).

24. Importantly, the Coronavirus has been detected on environmental objects and surfaces from symptomatic, pre-symptomatic, and asymptomatic individuals.[37] Fomites transform the surface of property into a potentially deadly Coronavirus transmission device. A study published in the Journal of Epidemiology and Infection demonstrated that, after lockdown in the United Kingdom, Coronavirus transmission via fomites may have contributed to as many as 25% of deaths in that region.[38]

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

26. 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)"[39] (emphasis added). "Creating" involves making or bringing into existence something new[40] – such as something that is in an altered state from what it was before the Coronavirus was present on, in, and around the property.

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[37] *See* WHO, *Coronavirus disease 2019 (COVID-19) Situation Report - 73* (Apr. 2, 2020), https://apps.who.int/iris/bitstream/handle/10665/331686/nCoVsitrep02Apr2020-eng.pdf?sequence=1&isAllowed=y (last visited June 22, 2021); Minghui Yang , Liang Li , Ting Huang, Shaxi Li, Mingxia Zhang, Yang, Yujin Jiang, Xiaohe Li, Jing Yuan, and Yingxia Liu, *SARS-CoV-2 Detected on Environmental Fomites for Both Asymptomatic and Symptomatic Patients with COVID-19*, https://doi.org/10.1164/rccm.202006-2136LE (last visited June 22, 2021).

[38] A. Meiksin, *Dynamics of COVID-19 transmission including indirect transmission mechanisms: a mathematical analysis*, 148 EPIDEMIOLOGY & INFECTION e257, 1-7 (Oct. 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7642914/ (last visited June 22, 2021).

[39] *See, e.g.*, WHO, *Transmission of SARS-CoV-2: implications for infection prevention precautions* (Jul. 9, 2020), https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions (last visited June 22, 2021).

[40] *See, e.g.*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/create (last visited June 22, 2021).

27. The Coronavirus adheres to surfaces and objects, thereby harming and physically changing or 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 air, people, and objects, from one area to another, causing additional direct physical loss or damage.

28. 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.

2. <u>The Coronavirus Cannot be Removed or Eliminated by Routine Cleaning</u>

29. Several studies proved that the Coronavirus is "much more resilient to cleaning than other respiratory viruses so tested."[41] The measures that must be taken to remove the Coronavirus from property are significant and far beyond ordinary or routine cleaning.

30. Efficacy of decontaminating agents for viruses is based on a number of factors, including the initial amount of virus present, contact time with the decontaminating agent, dilution, temperature, and pH, among many others. Detergent surfactants are not recommended as single agents, but rather in conjunction with complex disinfectant solutions.[42]

31. Additionally, it can be challenging to accurately determine the efficacy of decontaminating agents. The toxicity of an agent may inhibit the growth of cells used to determine

[41] Nevio Cimolai, *Environmental and decontamination issues for human coronaviruses and their potential surrogates*, 92 J. OF MED. VIROLOGY 11, 2498-510 (June 2020), https://doi.org/10.1002/jmv.26170 (last visited Mar. 20, 2021).
[42] *Id.*

the presence of virus, making it difficult to determine if lower levels of infectious virus are actually still present on treated surfaces.[43]

32. In order to be effective, cleaning and decontamination procedures require strict adherence to protocols not necessarily tested under "real life" or practical conditions, where treated surfaces or objects may not undergo exposure or adequate contact time.[44] Studies of coronaviruses have demonstrated viral RNA persistence on objects despite cleaning with 70% alcohol.[45]

33. 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.[46]

34. With respect to clothing or uniforms, studies have demonstrated that the 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."[47] Given the inadequacy of conventional cleaning procedures, disinfection and decontamination measures must 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, making changes to air filtration systems, and redesigning interior spaces, all performed at great cost and expense to Plaintiff and other property owners. These measures, among

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[43] *Id.*

[44] *Id.*

[45] Joon Young Song, Hee Jin Cheong, Min Joo Choi, Ji Ho Jeon, Seong Hee Kang, Eun Ju Jeong, Jin Gu Yoon, Saem Na Lee, Sung Ran Kim, Ji Yun Noh, & Woo Joo Kim, *Viral Shedding* and *Environmental Cleaning in Middle East Respiratory Syndrome Coronavirus Infection*, 47 INFECTION & CHEMOTHERAPY 4, 252-5 (2015), https://pubmed.ncbi.nlm.nih.gov/26788409/ (last visited June 22, 2021).

[46] *Id.*

[47] Lucy Owen and Katie Laird, *The role of textiles as fomites in the healthcare environment: a review of the infection control risk*, 8 PEER J. LIFE AND ENV'T e9790, 1-35 (2020), https://peerj.com/articles/9790/ (last visited June 22, 2021).

others, demonstrate that the Coronavirus and COVID-19 cause physical loss of or damage to property.

35. The types of surfaces and materials discussed in the scientific literature cited are used by Plaintiff on its insured premises as part of its operations, including plastics, glass, metals, and of course cloth. These surfaces and materials are used in the buildings and wind tunnels and by iFLY employees that interact and have physical contact with customers on a daily basis.

36. Moreover, the aerosolized Coronavirus particles and virions cannot be eliminated by routine cleaning. Cleaning surfaces in an indoor space will not remove the aerosolized Coronavirus particles that people can inhale from the air – no more than cleaning friable asbestos particles that landed on a surface from that surface will remove the friable asbestos particles suspended in the air that people can inhale and develop asbestos-related diseases.

37. Moreover, given the ubiquity and pervasiveness of the Coronavirus, no amount of cleaning or ventilation intervention will prevent a contagious person infected with the Coronavirus from entering an indoor space and exhaling millions of additional Coronavirus particles and virions into the air, further: (a) filling the air with the aerosolized Coronavirus that can be inhaled, sometimes with deadly consequences; and (b) depositing Coronavirus particles and virions on the surfaces, physically altering and transforming those surfaces into disease-transmitting fomites.

38. It is also statistically certain, or near-certain, that the Coronavirus was dispersed continuously into the air and on property in, on, and around Plaintiff's premises – rendering the already ineffective routine cleaning even less effective at removing the Coronavirus from surfaces at Plaintiff's premises and completely ineffective at removing aerosolized Coronavirus particles and virions from the air inside the insured premises.

39. Therefore, the presence of the Coronavirus and COVID-19 in, on, and near the insured property caused and continues to cause direct physical loss of or damage to Plaintiff's property, resulting in business income losses covered under the Policy.

40. The presence of the Coronavirus at Plaintiff's insured premises, as well as the many nearby locations that attract business customers, was certain or virtually certain. 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 fomite or the aerosolized Coronavirus, and despite the shortage of COVID-19 tests that could have otherwise been administered to every individual who was on-site at the relevant times.[48]

41. Early during the Coronavirus and COVID-19 pandemic, testing was limited, and thus potentially thousands more people were infected than were reported.[49] Concerning the testing that was available at that time, local positivity rates clearly demonstrated the pervasiveness of the Coronavirus throughout the counties and cities where Plaintiff's premises are located.

42. 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[.]"[50] It is a crucial indicator of 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.[51]

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[48] *See, e.g.,* Aroon Chande, Seolha Lee, Mallory Harris, Quan Nguyen, Stephen J. Beckett, Troy Hilley, Clio Andris, & Joshua S. Weitz, *Real-time, interactive website for US-county-level COVID-19 event risk assessment*, 4 NAT. HUMAN BEHAVIOR, 1313-19 (Nov. 9, 2020), https://doi.org/10.1038/s41562-020-01000-9 (last visited June 22, 2021).
[49] *See, e.g.,* Benedict Carey and James Glanz, *Hidden Outbreaks Spread Through U.S. Cities Far Earlier Than Americans Knew, Estimates Say*, N.Y. TIMES (Apr. 23, 2020), (updated July 6, 2020), https://nytimes.com/2020/04/23/us/coronavirus-early-outbreaks-cities.html (last visited June 22, 2021).
[50] David Dowdy and Gypsyamber D'Souza, *COVID-19 Testing: Understanding the "Percent Positive"*, Johns Hopkins Bloomberg School of Public Health Expert Insights (Aug. 10, 2020), https://www.jhsph.edu/covid-19/articles/covid-19-testing-understanding-the-percent-positive.html (last visited June 22, 2021).
[51] *Id.*

43. The Coronavirus has and continues to physically alter and transform these surfaces into virus-spreading fomites, which serve as a key transmission vector of yet more spread of the Coronavirus. The presence of the Coronavirus has caused physical loss of or damage to property and made Plaintiff's premises unsafe, uninhabitable and unfit for their intended uses, just as if asbestos or toxic substances were in the air or on surfaces of the premises.

44. Plaintiff experienced direct physical loss of or damage to its property in at least four ways: (1) at least one guest or employee at Plaintiff's 33 locations must have tested positive for COVID-19 and thus ensured the presence of COVID-19 and/or the Coronavirus at Plaintiff's insured locations, in the air, or on surfaces (whether in droplet nuclei, aerosols, droplets or otherwise); (2) state, county, and local governmental orders drastically limited Plaintiff's use of its properties and, at various times, reduced the capacity of Plaintiff's facilities, causing it to lose the normal use and function of its properties (either in full or in part); (3) the required modification of 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) the necessity to mitigate the threat or actual physical presence of the Coronavirus on door handles, counters, 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.

45. The presence of the Coronavirus in the air and on surfaces at Plaintiff's properties and the inability to eliminate the virus through routine cleaning made Plaintiff's insured premises uninhabitable, unsafe, and unfit for their normal and intended uses, resulting in substantial losses covered under the Policy issued by Zurich.

B. STATE AND FEDERAL GOVERNMENT ORDERS

46. On January 20, 2020, the Center for Disease Control confirmed the first SARS-CoV-2 virus case in the United States. *First Case of 2019 Novel Coronavirus in the United State*, NEJM.org, January 31, 2020.

47. On or about January 31, 2020, President Trump signed the Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus. This Proclamation states: "The entry into the United States, as immigrants or nonimmigrants, of all aliens who were physically present within the People's Republic of China, excluding the Special Administrative Regions of Hong Kong and Macau, during the 14-day period preceding their entry or attempted entry into the United States is hereby suspended and limited subject to section 2 of this proclamation."

48. On March 11, 2020, the World Health Organization declared the COVID-19 outbreak a pandemic. That same day, former President Trump imposed a travel ban barring travel from the Schengen zone of Europe to the U.S. in order to slow the spread of the SARS-CoV-2 virus and COVID-19. On March 13, 2020, a national emergency was declared in the United States due to the spread of COVID-19.

49. Since then, all 19 states where iFLY properties are located have declared a State of Emergency or Disaster, certifying that COVID-19 poses an imminent threat to the lives of their citizens. Most counties and local authorities followed suit. All relevant states and/or counties issued further orders closing public access to non-essential businesses, like iFLY's, prohibiting gathering in groups, and/or requiring non-essential businesses to conduct operations through remote work.

50. Although some states attempted to resume operations of non-essential business at some point in 2020, many were forced to rescind premature reopening orders due to drastic increases in COVID-19 infection rates. The stay-at-home orders prohibiting public access to iFLY's facilities forced iFLY to shutter operations in all locations for extended periods of time.

51. Relevant state, county, and local orders are attached hereto as ***Exhibit C.***

52. By way of example, the State of Texas (home to iFLY's principal place of business) and the State of Illinois (home to this Court and Defendant Zurich) issued several orders prohibiting or limiting access to businesses like iFLY.

State of Texas

53. On March 13, 2020, the Texas Governor, Gregg Abbott, issued a Declaration of State of Disaster because of COVID-19. This Order certified that COVID-19 poses an imminent threat of disaster for all counties in the State of Texas. This Order, together with other relevant Executive Orders, amendments, and extensions issued by Governor Abbott, are attached hereto as ***Exhibit C-TX*** and incorporated herein by reference.

54. On March 19, 2020, Governor Abbott issued Executive Order GA 08 "Relating to COVID-19 preparedness and mitigation" in "accordance with the Guidelines from the President and the CDC" which stated:

> ...every person in Texas shall avoid social gatherings in groups of more than 10 people...
>
> ...people shall avoid eating or drinking at bars, restaurants, and food courts, or visiting gyms or massage parlors; provided, however, that the use of drive-thru, pickup, or delivery options is allowed and highly encouraged throughout the limited duration of this executive order...
>
> ...people shall not visit nursing homes or retirement or long-term care facilities unless to provide critical assistance...

...schools shall temporarily close.

Exhibit C-TX, Relevant Texas Orders of Civil Authorities.

55. In the following months, the State of Texas (like cities, counties, and states across the nation) issued a series of orders (collectively the "Texas Government Orders"). The Texas Government Orders included (but are not limited to) the following:

- Texas COVID-19 Disaster Proclamation (March 13, 2020)
  - certified that COVID-19 poses an imminent threat of disaster in the state and declaring a state of disaster for all counties in Texas.

- Texas State Executive Order GA 08 (March 19, 2020)
  - prohibited gatherings in groups of more than 10 people
  - prohibited eating or drinking at bars, restaurants, and food courts, or visiting gyms or massage parlors, encouraged use of drive-thru, pickup, or delivery options
  - temporarily closed schools.

- Texas State Executive Order GA 11 (March 26, 2020)
  - required every person who entered Texas as the final destination via airports from New York, New Jersey, Connecticut, or the City of New Orleans to self-quarantine for 14 days, only leaving to seek medical care or depart from Texas.

- Texas State Executive Order GA 12 (March 29, 2020)
  - required every person who entered Texas as the final destination via roadways from Louisiana to self-quarantine for 14 days, only leaving to seek medical care or depart from Texas.

- Texas State Executive Order GA 14 (March 31, 2020)
  - established shelter-in-place order requiring every person to minimize social gatherings and minimize in-person contact with people who are not in the same household, unless such activity is necessary to provide or obtain essential services
  - required all services to be provided through remote telework form home unless they are essential services that cannot be provided through remote telework
  - extended closure of eating or drinking at bars, restaurants, and food courts, or visiting gyms or massage establishments; adding tattoo studios, piercing studios, and cosmetology salons
  - extended closure of schools.

- Texas State Executive Order GA 16 (April 17, 2020)
  - established "Open Texas" order to Phase 1

- non-essential retail services allowed to open and operate via pickup, delivery by mail, or delivery to customer's doorstep starting April 24, 2020 but remain working from home unless not possible
- extended closure of eating or drinking at bars, restaurants, and food courts for in-person dining, as well as closure of gyms, massage establishments, tattoo studios, piercing studios, or cosmetology salons
- extended closure of schools for remainder of the 2019-2020 school year.

- Texas State Executive Order GA 18 (April 27, 2020)
  - expanded "Open Texas" order
  - required people to stay home except where necessary to provide or obtain essential or reopened services
  - extended minimization of social gatherings or in-person contact of people not within same household
  - strongly encouraged people over age of 65 to stay home
  - reopened in-store retail services, dine-in restaurant services, movie theatres, shopping malls, museums, and libraries at 25% capacity starting on May 1, 2020; only restaurants with less than 51% of their gross receipts from sale of alcohol.

- Texas State Executive Order GA 20 (April 27, 2020)
  - rescinded self-quarantine requirement for State of Louisiana but expanded to include States of California and Washington; and Cities of Atlanta, Georgia; Detroit, Michigan; Chicago, Illinois; and Miami, Florida.

- Texas State Executive Order GA 21 (May 5, 2020)
  - expanded "Open Texas" order
  - directed previous occupancy requirement for restaurants to not apply to customers in outdoor areas of the restaurant
  - reopened wedding venues and reception facilities at 25% capacity but did not apply this requirement to outdoor areas
  - reopened cosmetology salons, hair salons, barber shops, nail salons/shops, and tanning salons starting May 8, 2020, provided they adhere to social distancing requirements
  - reopened office spaces, manufacturing services/facilities, and gym/exercise facilities at 25% occupancy starting May 18, 2020.
  - allowed previously opened non-essential services to operate at 50% occupancy in counties with five or fewer cases of COVID-19.

- Texas State Executive Order GA 23 (May 18, 2020)
  - expanded "Open Texas" order to Phase 2
  - starting May 22, 2020 directed all Texas counties except, Deaf Smith, El Paso, Moore, Potter, and Randall counties to allow:
    - dine-in restaurant services to operate at 50% capacity
    - reopening of bars and similar establishments at 25% capacity
    - aquariums, natural caverns, and similar facilities (excluding zoos) to operate at 25% capacity

- bowling alleys, bingo halls, simulcast racing, and skating rinks to operate at 25% capacity
- starting May 29, 2020, Deaf Smith, El Paso, Moore, Potter, and Randall counties will be allowed to restore services similar to other Texas counties
- reopened professional sporting events starting May 31, 2020.

- Texas State Executive Order GA 24 (May 21, 2020)
  - rescinded travel restrictions and self-quarantine requirements.

- Texas State Proclamation Amending GA 23 (May 26, 2020)
  - permitted food-court dining areas within shopping malls to open
  - allowed water parks to open at 25% capacity.

- Texas State Executive Order GA 26 (June 3, 2020)
  - allowed every business establishment in Texas to operate at 50% capacity with certain exceptions; cosmetology salons, hair salons, barber shops, nail salons, massage establishments, tattoo parlors, tanning salons, and other personal-care and beauty services must abide by six feet of social distance requirement
  - allowed restaurants to operate at 75% capacity provided less than 51% of their gross receipts are from the sale of alcoholic beverages.

- Texas State Executive Order GA 28 (June 26, 2020)
  - allowed cosmetology salons, hair salons, barber shops, nail salons, massage establishments, tattoo parlors, tanning salons, and other personal-care and beauty services to no longer abide by 50% occupancy limit as long as able to maintain six feet of social distancing between work stations.

- Texas State Executive Order GA 29 (July 2, 2020)
  - due to substantial increases in COVID-19 cases and hospitalizations" in June 2020, established a statewide mask mandate.

- Texas State Executive Order GA 30 (September 17, 2020)
  - extended requirement that every business establishment in Texas operates at no more than 50% of total occupancy with certain exceptions; religious services, government operations, schools, etc.
  - allowed in-store, non-CISA retail establishments, dine-in restaurants, museums, libraries, and gyms to operate at 75% total capacity provided they are not located in an area with high hospitalizations.

- Texas State Executive Order GA 32 (October 7, 2020)
  - allowed every business establishment to operate at no more than 75% total capacity except for areas with high hospitalizations that must abide by 50% requirement.

See, e.g., ***Exhibit C-TX***, Relevant Texas Orders of Civil Authorities.

State of Illinois

56. On March 9, 2020, Illinois Governor, JB Pritzker, issued a Gubernatorial Disaster Proclamation in response to COVID-19 and thereafter, issued Executive Order 2020-04, "Executive Order in Response to COVID-19." This Order, together with other relevant Executive Orders, amendments, and extensions issued by Illinois Governor, JB Pritzker, are attached hereto as ***Exhibit C-IL*** and incorporated herein by reference.

57. On March 13, 2020, Governor Pritzker issued Executive Order 2020-04, that cancelled all private and public gatherings in the State of Illinois of 1,000 people or more, and Executive Order 2020-05, that required all public and private K-12 schools to close for educational purposes.

58. On March 16, 2020, Governor Pritzker issued Executive Order 2020-07, that ordered the closure of all businesses in the State of Illinois offering "food or beverage for on-premises consumption" but were allowed to serve food and beverages for consumption off-premises through means such as deliver, drive-through, curbside pick-up, or carry-out. The Order also prohibited all private and public gatherings of 50 or more people, including fitness centers, private clubs, and theatres.

59. On March 20, 2020, Governor Pritzker issued Executive Order 2020-10. This Order required that all individuals stay home, with exceptions for essential activities, essential government functions, and essential businesses and operations. This Order also ceased all non-essential businesses and operations, aside from "Minimum Business Operations" and allowed non-essential business employees to work from home. The Order also prohibited all private and public gatherings of 10 or more people.

60. In the following months, the State of Illinois (like cities, counties, and states across the nation) issued a series of orders (collectively the "Illinois Government Orders"). The Illinois Government Orders included (but are not limited to) the following:

- Illinois Gubernatorial Disaster Proclamation (March 9, 2020)
  - Disaster Proclamation due to COVID-19.
- Illinois Executive Order 2020-04 (March 13, 2020)
  - prohibited gatherings of 1,000 or more people.
- Illinois Executive Order 2020-05 (March 13, 2020)
  - directed all public and private schools to close.
- Illinois Executive Order 2020-07 (March 16, 2020)
  - directed all businesses offering on-premises food and beverage services to close except for delivery, drive-through, carry-out, and pick-up services
  - prohibited gatherings of 50 or more people, including fitness centers, private clubs, and theatres.
- Illinois Executive Order 2020-10 (March 20, 2020)
  - established a statewide "Stay at Home" order
  - ceased all non-essential business operations
  - prohibited gatherings of 10 or more people.
- Illinois Executive Order 2020-15 (March 27, 2020)
  - established remote learning for private and public K-12 schools.
- Illinois Executive Order 2020-18 (April 1, 2020)
  - extended Stay at Home order and school closures, except for remote learning.
- Illinois Executive Order 2020-30 (April 23, 2020)
  - ceased all non-residential and residential evictions.
- Illinois Executive Order 2020-32 (April 30, 2020)
  - established new Stay at Home order
  - allowed Illinoisans to leave their homes for essential activities, outdoor activity, for certain types of work, to take care of others, and to engage in the free exercise of religion
  - required individuals to wear a face covering in public places when unable to maintain a six-foot social distance, such as in stores
  - allowed non-essential retail stores to fulfill online and telephonic orders through pick-up outside the store or delivery.

- Illinois Executive Order 2020-38 (May 29, 2020)
  - established "Phase Three Reopening"
  - established public health requirements for individuals, businesses, retail stores, manufacturers, office buildings, restaurants and bars, gyms, personal service facilities, youth sports, and public amusements to resume activities previously paused due to COVID-19.

- Illinois Executive Order 2020-39 (May 29, 2020)
  - reissued Executive Orders 2020-03 through 2020-37, extending most provisions through June 27, 2020.

- Illinois Executive Order 2020-40 (June 4, 2020)
  - allowed K-12 public and nonpublic schools in Illinois to open for limited in-person education purposes, such as summer school.

- Illinois Executive Order 2020-43 (June 26, 2020)
  - established "Phase Four Reopening"
  - required individuals to maintain social distancing and wear masks in public or when working
  - gatherings of 50 people or more remain prohibited
  - required retail stores to cap occupancy at 50% capacity.

- Illinois Executive Order 2020-44 (June 26, 2020)
  - reissued most executive orders, extending most provisions through July 26, 2020 and amended 2020-07 to allow public meetings to resume meetings with one member present and others allowed to attend telephonically or electronically.

- Illinois Executive Order 2020-48 (July 24, 2020)
  - reissued most executive orders, extending a majority of provisions through August 22, 2020, including Executive Order 2020-30, which prohibited evictions, but rescinded enforcement orders of eviction for non-residential premises.

- Illinois Executive Order 2020-52 (August 21, 2020)
  - reissued most executive orders, extending a majority of the provisions through September 19, 2020.

- Illinois Executive Order 2020-55 (September 18, 2020)
  - reissued most executive orders, extending a majority of the provisions through October 17, 2020.

- Illinois Executive Order 2020-59 (October 16, 2020)
  - reissued most executive orders, extending a majority of the provisions through November 14, 2020.

- Illinois Executive Order 2020-64 (October 29, 2020)
  - reinstated restrictions and mitigation measures for City of Chicago due to rising COVID-19 rates
  - required all restaurants and bars to close at 11:00 p.m. and to suspend indoor on-premises consumption; customers required to eat or drink at outdoor tables
  - required meetings and social events to limit capacity to 25 people or 25% of room capacity
  - all business and establishments must reinstitute remote work for high risk individuals, and shall evaluate whether additional workers can engage in telework.

See ***Exhibit C-IL***, Relevant Illinois Orders of Civil Authorities.

61. The CDC still recommends that people who are not vaccinated stay at home because travel "increases your chance of getting and spreading COVID-19". The CDC's admonitions on travel can be found at the following link: https://www.cdc.gov/coronavirus/2019-ncov/travelers/when-to-delay-travel.html.

62. The stay-at-home and reduced-capacity orders prohibiting full access to iFLY's facilities forced iFLY to shutter and later limit operations in all locations for extended periods of time.

C. THE HISTORY OF VIRUS COVERAGE IN INSURANCE POLICIES

63. Historically, the risk of loss due to pandemic is a covered cause of loss under all-risk policies. Payment of business interruption losses due to a pandemic were most recently issued in 2003 during the Severe Acute Respiratory Syndrome (SARS) pandemic caused by a coronavirus, SARS-CoV.[52]

64. After SARS, the insurance industry, including Zurich, knew that the language in all-risk policies provided coverage for business interruption losses associated with pandemics and recognized that viruses can cause covered physical loss of or damage to insured property. In the

[52] The SARS-CoV virus that caused the SARS epidemic in 2003 and the SARS-CoV-2 virus that caused the COVID-19 pandemic are separate and distinct viruses. *See* Healthline, *COVID-19 vs. SARS: How Do They Differ* (last updated April 2, 2020), https://www.healthline.com/health/coronavirus-vs-sars#bottom-line (last visited June 22, 2021).

Insurance Service Office, Inc.'s ("ISO") July 6, 2006 Circular regarding an ISO endorsement (CP 01 40 07 06) for exclusion of viruses, ISO stated:

> Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses.

65. The vast majority of insurance policies issued in the United States that cover business income losses contain an exclusion for losses caused by "virus." According to a June 2020 report by the National Association of Insurance Commissioners, 83 percent of insurance policies covering business income losses contain a virus exclusion.[53]

66. Defendant knew about but specifically chose not to use the ISO approved exclusion, or any other alternative policy language, to eliminate coverage for loss or damage caused by viruses or bacteria. In fact, one of the syndicate insurance carriers that contributed to coverage for Plaintiff's properties, but who is not a defendant in this case, specifically excluded losses caused by viruses and communicable diseases in its concurrent policy. That policy was bound simultaneously with the Zurich Policy issued by the same broker.

67. Sophisticated insurance companies like Zurich knew that viruses cause direct physical loss of or damage to property and that such losses are covered by its policies unless specifically limited or excluded. That is why, upon information and belief, Zurich specifically limited certain losses caused by a "virus" in policies bound after the onset of the coronavirus

[53] National Association of Insurance Commissioners, *COVID-19 Property & Casualty Insurance: Business Interruption Data Call: Part 1, Premiums and Policy Information*, at 3 (June 2020), https://content.naic.org/sites/default/files/inline-files/COVID-19%20BI%20Nat%27l%20Aggregates_2.pdf (last visited June 22, 2021).

pandemic. Zurich failed to limit or exclude losses caused by viruses or pandemics in Plaintiff's Policy.

D. PLAINTIFF'S INSURANCE POLICY WITH DEFENDANT

68. To protect its businesses against property damage or business interruptions, Plaintiff purchased insurance from a syndicate of carriers, including Zurich, who each undertook to provide primary coverage for a certain percentage of covered losses. Each carrier issued a separate policy, with varying limits, conditions, and exclusions.

69. The Zurich Policy, number PPR-0147460-01 and attached as ***Exhibit D***, provides coverage against all risks, including "loss resulting from the necessary interruption or reduction of business operations conducted by the Insured and caused by direct physical loss, damage or destruction of the property" insured, occurring between May 1, 2019 through May 1, 2020. Plaintiff is a "First Named Insured."

70. The Policy has a maximum limit of liability in any one occurrence of 11% part of $100,000,000, for a total of $11,000,000 in excess of the policy deductible. The relevant Policy coverages and sublimits are: (a) $1,000,000 for Claims Preparation Expense; (b) $10,000,000 for "Contingent 'Time Element' Per Attraction Property located within 10 miles of the Insured Location, including ports and airports; (c) Extra Expenses with no sublimits; (d) $10,000,000 for Loss of Attraction; and (e) no sublimit for Demolition, Increased Cost of Construction Property Damage, and Law, Ordinance or Regulation "Time Element". The relevant time limits are: (a) 365 consecutive days for Extended Period of Recovery; (b) 24 months for Loss of Profits and Period of Recovery; (c) 120 consecutive days for Interruption by Civil or Military Authority; and (d) 90 consecutive days for Loss of Ingress or Egress.

71. The Policy contains the following provisions, subject to the foregoing sublimits and exclusions:

II. INSURING AGREEMENT

This policy insures against all risks of direct physical loss, damage or destruction occurring during the term of this policy to the type of property insured hereunder including "General Average Contributions and Salvage Charges"and all other charges on shipments insured hereunder except as hereinafter excluded.

V. TIME ELEMENT

A. BUSINESS INTERRUPTION

1. This Policy insures loss resulting from the necessary interruption or reduction of business operations conducted by the Insured and caused by direct physical loss, damage or destruction, of the property of the type insured hereunder, by a peril insured by this Policy.

2. If such a loss occurs during the term of this Policy, it shall be adjusted on the basis of the 'Actual Loss Sustained' by the Insured during the Period of Recovery resulting from the interruption or reduction of operations. 'Actual Loss Sustained' is defined as the reduction in 'Gross Earnings' less charges and expenses that do not necessarily continue during the interruption or reduction of the business operations.

4. Resumption of Operations: If it is reasonably possible for the Insured to reduce the loss resulting from the interruption or reduction of operations,

a. By a complete or partial resumption of operations or

b. By making use of available "finished stock" or "merchandise,"

Such reduction shall be taken into account in arriving at the amount of loss hereunder.

B. BUSINESS INTERRUPTION LOSS OF PROFITS

Coverage under 'Business Interruption Loss of Profits' applies only where there is a "primary policy" in force providing Loss of Profits Insurance, which insures the loss.

This Policy insures:

1. Loss of gross profit resulting from the necessary interruption or reduction of business operations conducted by the Insured and caused by direct physical loss, damage or destruction of property insured by a peril insured by this Policy.

C. EXTRA EXPENSE
This Policy insures:

1. 'Extra expense' incurred by the Insured resulting from direct physical loss, damage or destruction of property insured by a peril insured by this Policy.

2. 'Extra expense' means the reasonable and necessary extra costs incurred by the Insured during the Period of Recovery to temporarily continue as nearly normal as practicable the conduct of the Insured's business and extra costs of temporarily using property of the Insured or others less any value remaining at the end of the Period of Recovery for property obtained in connection with an 'extra expense' loss.

J. PROVISIONS APPLICABLE TO "TIME ELEMENT"

1. The Period of Recovery

a. Applicable to "Time Element" as defined in 'Business Interruption,' 'Extra Expense,' 'Rental Value' and 'Soft Costs' above:

i. Shall not exceed such length of time required with the exercise of due diligence and dispatch to rebuild, repair, or replace lost, damaged or destroyed property and to make such property ready for operations under the same or equivalent physical and operating conditions that existed prior to the loss, including time as may be required with the exercise of due diligence and dispatch to retrain staff, and such additional time as may be required to obtain "Green" Certification, and including such time as may be required to restore or recreate lost or destroyed valuable papers and records, electronic media and electronic data.

ii. Shall include an additional length of time, known as an 'Extended Period of Recovery,' not to exceed the time specified in the DECLARATIONS, to restore the Insured's business to the condition that would have existed had no "Time Element" loss occurred.

b. Applicable to "Time Element" as defined in Business Interruption Loss of Profits, the Period of Recovery shall be the period beginning with the occurrence of the direct physical loss, damage or destruction and ending not later than the 'Maximum Period of Recovery' thereafter during which the results of the business are affected in consequence of the loss, damage or destruction.

The 'Maximum Period of Recovery' shall be the greater of:
i. The Period of Recovery on the "primary policy," or

ii. The Period of Recovery for Business Interruption Loss of Profits stated in the DECLARATIONS of this Policy.

c. Applicable to "Time Element" as defined in Business Interruption, Business Interruption Loss of Profits and Rental Value, the Period of Recovery applying to alterations, additions, and property while in the course of testing, commissioning, construction, erection, installation, or assembly, shall be determined as provided in a. or b. above, as applicable, but the length of time shall be applied to the planned level of production or the planned level of business
operation.

d. Applicable to actions taken by the Insured in relation to "Preservation of Property" efforts as insured elsewhere in this Policy, shall commence at the time of initiation of the "Preservation of Property" efforts.
f. Except as provided in V.H.1.c and V.H.1.d above, for all "Time Element," the Period of Recovery shall commence with the date of the loss, damage or destruction of property of the type insured by a peril insured by this Policy and shall not be limited by the date of expiration of this Policy.

2. Expenses to Reduce Loss

This policy also insures such expenses incurred for the purpose of reducing any loss under this policy, even though such expenses may exceed the amount by which the loss under this policy is thereby reduced.

3. Contingent "Time Element" Coverage

Subject to all TIME ELEMENT provisions including Interruption by Civil or Military Authority, Loss of Ingress or Egress and Service Interruption as defined below, this Policy insures the "Time Element" loss resulting from direct physical loss, damage or destruction, by a peril insured by this Policy, of:[54]

a. Property of the type insured by this Policy of a direct or indirect supplier or a direct or indirect receiver of the Insured, which prevents the rendering or acceptance of goods and/or services to or from the Insured.

b. Property of others of the type insured by this Policy in the vicinity of a "location" of the Insured that attracts customers to the Insured's "location"

[54] The Lexington Policy varies slightly as follows:

a. Property of the type insured by this Policy of a direct or indirect supplier or a direct or indirect receiver of the Insured, which prevents the rendering or acceptance of goods and/or services to or from the Insured.
The term "indirect" shall mean tier 2 suppliers and receivers.
b. Property of others of the type insured by this Policy within five miles of a "location" of the Insured that attracts customers to the Insured's location."

and shall include airlines, railroads, railway stations, cruise ships, ports and other means of transportation involved in the transport of patrons, equipment or other goods to the Insured's "location(s)".

Contingent "Time Element" coverage does not apply to any loss or damage insured under Service Interruption as defined below.

5. Interruption by Civil or Military Authority

This Policy insures the "Time Element" loss sustained during the period of time when, as a result of direct physical loss, damage or destruction or imminent loss by a peril insured by this Policy within *five* miles of an insured "location," normal business operations are interrupted or reduced because access to that "location" is *prohibited* by order of civil or military authority.

6. Loss of Ingress or Egress

This Policy insures the "Time Element" loss sustained during the period of time when, as a result of direct physical loss, damage or destruction by a peril insured by this Policy within *five* miles of an insured "location," normal business operations are interrupted or reduced because ingress to or egress from that "location" is prevented or impaired.

8. Law, Ordinance, Regulation or Governmental Directive:

In the event reconstruction, restoration, repair or use of property insured is regulated or prohibited by the enforcement of any law, ordinance, regulation or governmental directive that is in force at the time of direct physical loss, damage or destruction by a peril insured by this Policy, this Policy shall pay for any increase in "Time Element" loss insured by this Policy arising out of the additional time required to bring both the damaged and undamaged property into full compliance with the law, ordinance, regulation or governmental directive.

11. Loss of Attraction:

This policy is extended to cover the actual loss sustained by the Insured resulting from cancellationof or inability to accept bookings for accommodations and/or a cessation or diminution of trade due to a loss of potential customers, as a direct result of: a) The occurrence at an insured location of murder, suicide, rape, attempted rape, armed robbery, and malicious activities, contagious and/or infectious disease, food or drink poisonings, vermin, pests or defective sanitation. b) The outbreakof a contagious and/or infectious disease, the discovery of which causes restrictions on the use ofthat location on the order of the competent local authority. The Insurer shall not be liable for any loss herein unless the insured occurrence exceeds 24 hours. In addition, this Policy excludes any loss directly or indirectly arising out of,

contributed to, or by resulting from Severe Acute RespiratorySyndrome (SARS), Avian Flu, and or atypical pneumonia, or fear or threat thereof.

72. The Zurich Policy contains the following relevant definitions:

O. LOCATION

1. A site listed on a report provided the Insurer at inception; or

2. when insured:
   a. as a "Miscellaneous Unreported Location" or
   b. under Automatic Coverage for Newly Acquired Property or
   c. under the Errors and Omissions clause

This definition of "location" shall further include a building, yard, dock, wharf, pier or bulkhead (or any group of the foregoing) bounded on all sides by public streets, clear land space or open waterways, each not less than fifty feet wide. Any bridge or tunnel crossing such street, space or waterway shall render such separation inoperative for the purpose of this definition.

U. OCCURRNCE
Except as specifically defined under "Earthquake," "Flood" and "Named Storm," all loss, damage or destruction that is attributable to one cause or to one series of similar causes. All such losses shall be added together and the total amount of such losses shall be treated as one "occurrence" irrespective of the period of time or area over which the losses occur.

Should any "occurrence" commence prior to the expiration of this Policy and extend beyond the expiration date of this Policy, this Policy shall pay for all such losses occurring during such period as if such period fell entirely within the term of this Policy. But the Insurer shall not be liable for any loss commencing before the effective date and time or commencing after the expiration date and time of this Policy.

73. The Policy does not contain any exclusion that would apply to preclude or limit coverage for Plaintiff's losses. None of the applicable exclusions refer to communicable diseases or pandemics.

1. **Business Interruption and Business Interruption Loss of Profits**

74. As a result of COVID-19, Plaintiff has sustained direct physical loss of or damage to property of the type insured under the Policy: (a) to property described in the Policy (i.e., Real and Personal Property at the covered Locations) and not otherwise excluded by the Policy; (b) that

Plaintiff used; (c) is located at the covered Locations; and (d) occurred during the Periods of Liability. In fact, as a result of COVID-19 and the direct physical loss of or damage to the properties beginning in mid-March 2020, Plaintiff was forced to close, suspend, or reduce operations within its properties for extended periods of time. Plaintiff lost substantial income from the loss of revenue due to a decrease in income, as Plaintiff was unable to operate at all or operate at full capacity during this time. Plaintiff continues to suffer losses as a result of business interruptions related to COVID-19 and the resulting physical loss of or damage to its properties (i.e., reduced occupancy and significant drops in revenue from the termination, suspension and/or interruption of business at its wind tunnels). Therefore, Plaintiff has suffered Time Element losses that are covered under the **Business Interruption and Business Interruption Loss of Profits** coverages of the Policy.

75. As a result of COVID-19 and the direct physical loss of or damage caused thereby, Plaintiff has been: (a) wholly or partially prevented from continuing business operations or services; (b) unable to make up lost production within a reasonable period of time; (c) unable to continue such operations or services during the Period of Liability; and (d) able to demonstrate a loss of sales for the operations or services prevented. Therefore, Plaintiff is entitled to coverage for their losses under the **Business Interruption and Business Interruption Loss of Profits** coverages of the Policy.

2. Denial of Access by Civil Authority and Loss of Ingress or Egress

76. Plaintiff has sustained losses as a result of direct physical loss of or damage to their insured properties that is not excluded in the Policy. In addition, the Civil Authority Orders have prevented and/or impaired access to Plaintiff's properties, as well as to the businesses within five miles of Plaintiff's properties. Accordingly, Plaintiff is entitled to coverage for their losses under

the **Denial of Access by Civil Authority and Loss of Ingress or Egress** provision. Further, Plaintiff incurred costs, expenses, and losses to mitigate the spread of COVID-19 in response to the Civil Authority Orders.

3. **Extra Expenses**

77. Plaintiff has incurred reasonable and necessary extra expenses to mitigate its losses and temporarily continue as nearly normal as practicable the retail, industrial, and office operations and services within the properties at the covered Locations. Plaintiff's losses and **Extra Expenses** incurred were a direct result of the direct physical loss of or damage to the covered Locations. None of the exclusions apply. As a result, Plaintiff is entitled to coverage for the extra costs and expenses under the for **Extra Expenses** provision of the Policy.

4. **Demolition and Increased Cost of Construction, and Law, Ordinance, Regulation or Governmental Directive**

78. Plaintiff has sustained losses and increased costs of repair as a result of direct physical loss of or damage to the covered Locations caused by COVID-19. Plaintiff has sustained increased loss or costs for business interruption and extra expense arising out of the additional time required to comply with laws and ordinances that required Plaintiff to increase their costs in the form of, among other things, purchasing personal protective equipment and increased cleaning/sanitary procedures at the covered Locations.

79. Accordingly, Plaintiff is entitled to coverage for their losses under the **Demolition and Increased Cost of Construction, and Law, Ordinance, Regulation or Governmental Directive** provisions of the Policy.

5. **Loss of Attraction**

80. Plaintiff has sustained Loss of Attraction as a result of direct physical loss of or damage to the covered Locations caused by COVID-19. Plaintiff incurred costs for reimbursement

of charges for customers occasioned by the occurrence of COVID-19 at or around its locations. Further, Plaintiff has incurred losses from cancellation of or inability to accept bookings for accommodations and/or a cessation or diminution of trade due to a loss of potential customers, as a direct result of the outbreak of COVID-19, the discovery of which caused restrictions on the use of all insured Locations on the order of the competent local authority. Accordingly, Plaintiff is entitled to coverage for its losses under the **Loss of Attraction** provision of the Policy.

E. PLAINTIFF'S CLAIM FOR COVERAGE

81. COVID-19 can be present at Plaintiff's properties in various ways including: (1) respiratory droplets in the air at or surrounding the insured properties, (2) on the surface of objects or tangible things at the insured properties, and (3) in persons infected with the disease such as customers, employees, and service providers who are at or in proximity to the insured property and objects or tangible things located at or near the insured property. In effect, COVID-19 is pervasively present and ubiquitous at any time and in any place where real or personal property is located or where people are or can be.

82. In mid to late March 2020, Plaintiff's properties were forced to close and cease business operations as a result of the direct physical loss of or damage to property caused by COVID-19, the government orders issued by all 19 states and most counties where iFLY locations operate, the CDC's travel recommendations, former President Trump's travel orders, the Civil Authority Orders, and/or other states' stay-at-home orders. Plaintiff's properties experienced a loss of business income as a result of a decrease in revenue and customer traffic because of concerns and damage from COVID-19, the resulting pandemic, and the resulting Civil Authority Orders stemming from COVID-19 and the pandemic. Additionally, Plaintiff has incurred and continues to incur expenses required to comply with health and safety orders and CDC recommendations.

83. On or about April 3, 2020, and again on April 23, Plaintiff submitted its claim to the syndicate of carriers that provide primary coverage for its losses, including Zurich. Defendant refused to accept or deny the claim and has yet to begin its investigation of Plaintiff's substantial losses.

84. Once it became clear that Zurich had no intention to fulfill its obligations under the Policy and cover Plaintiff's losses, Plaintiff submitted a Sworn Proof of Loss, containing detailed information of iFLY's lost revenues, incurred expenses, and relevant civil authority orders. Defendant, by and through its claim representative and adjuster, refused to accept or reject Plaintiff's Sworn Proof of Loss, in violation of the Policy.

PLAINTIFF'S CAUSES OF ACTION

I. COUNT ONE
(BREACH OF CONTRACT)

85. Plaintiff hereby adopts and incorporates as if fully re-written herein all the allegations set forth in paragraphs 1 through 84 of this Complaint.

86. Plaintiff submitted claims for coverage under the Time Element: Business Interruption, Business Interruption Loss of Profits, Denial of Access by Civil Authority, Loss of Ingress or Egress, Extra Expense, Ordinance or Law, Loss of Attraction, and other related provisions in the Policy ("Coverage Provisions") for the direct physical loss of or damage to Plaintiff's properties caused by COVID-19 and the losses, damages and expenses caused by state, county, and local government orders prohibiting access to the insured locations, the CDC's travel recommendations, former President Trump's travel orders, and/or other states' stay-at-home orders.

87. Plaintiff is entitled to coverage for its losses, damages and expenses under the applicable Coverage Provisions.

88. Defendant denied by operation of applicable law Plaintiff's claims for coverage under the Coverage Provisions.

89. Plaintiff is entitled to recover its incurred costs, expenses, and losses to mitigate the spread of COVID-19 in complying with Civil Authority Orders, which are covered under the Policy.

90. Defendant denied by operation of applicable law Plaintiff's claims for costs, expenses, and losses to mitigate the spread of COVID-19 in complying with Civil Authority Orders.

91. Plaintiff has substantially performed all required conditions precedent under the Policy, such provisions have been waived by Defendant, or Defendant is estopped from asserting them.

92. By denying such coverage as outlined herein, Defendant materially breached the Policy.

93. As a direct and proximate result of Defendant's breaches of the Policy, Plaintiff has been damaged in an aggregate amount in excess of $50,000,000, the exact amount to be proven at trial.

94. WHEREFORE, Plaintiff respectfully prays that the Court enter a judgment in its favor and against Defendant on the breach of contract claims set forth above in Count One and award Plaintiff:

a. compensatory and general damages in an amount to be proven at trial, including consequential damages;

b. attorney fees and costs incurred in obtaining the benefits under the Insurance Policy;

c. pre-judgment and post-judgment interest at the maximum legal rate; and

d. such other and further relief as this Court finds just and proper.

II. COUNT TWO
(VIOLATION OF 215 ILCS § 5/155)

95. Plaintiff hereby adopts and incorporates as if fully re-written herein all the allegations set forth in paragraph 1 through 94 of this Complaint.

96. Section 155 of the Illinois Insurance Code, 215 ILCS § 5/155, provides in relevant part that "[i]n any action by or against a[n insurance] company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts: (a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs; (b) $60,000."

97. The totality of the circumstances relevant to this matter reflect that Defendant's conduct has been vexatious and unreasonable with respect to its purported investigation of Plaintiff's claims and its denial of coverage. Among other things, Defendant:

a. made no effort to conduct any meaningful investigation into the Plaintiff's claims;

b. falsely suggested that it had conducted an investigation into Plaintiff's claims;

c. falsely suggested that it had searched for evidence of direct physical loss of or damage to the Plaintiff's properties;

d. effectively denied coverage for losses clearly covered by the Policy; and

e. wholly disregarded facts and evidence showing that COVID-19 causes direct physical loss and damage to property, including Plaintiff's properties.

98. Defendant's conduct is particularly vexatious and unreasonable because of the specific Policy it sold to Plaintiff. Defendant knew viruses cause direct physical loss of or damage to property within the meaning of its policies but did not limit or exclude losses caused by virus in Plaintiff's Policy. However, Zurich now takes the contrary position that Plaintiff's losses related to COVID-19 are not covered.

99. WHEREFORE, Plaintiff respectfully prays that the Court enter judgment in their favor and against Defendant on the claim for violation of 215 ILCS § 5/155 set forth above in Count II and award Plaintiff:

a. attorney fees and costs incurred in obtaining the benefits due under the Insurance Policy plus the applicable additional amounts for Defendant's violation of 215 ILCS § 5/155;

b. pre-judgment and post-judgment interest at the maximum legal rate; and

c. such other and further relief as this Court finds just and proper.

DEMAND FOR TRIAL BY JURY

Plaintiff demands a jury trial on all issues and claims so triable.

Respectfully Submitted,

/s/ Peter J. Flowers
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