

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TRAIN TIMES BROADWAY LP; and
TRAIN TIMES SF LP,

Plaintiffs,

vs.

CERTAIN UNDERWRITERS AT LLOYD'S,
LONDON SUBSCRIBING TO POLICY
NUMBERS B0391 BT19ZZ00
TTB230220220221 and B0391 LRIT2018
BT1906666,

Defendants.

Index No.

COMPLAINT

JURY TRIAL DEMANDED

Plaintiffs Train Times Broadway LP (“Train Broadway”) and Train Times SF LP (“Train SF”) complain of Defendants, Certain Underwriters at Lloyd’s, London, subscribing to Policy Numbers B0391 BT19ZZ00 TTB230220220221 and B0391 LRIT2018 BT1906666 (collectively, the “Underwriters”), and allege as follows:

NATURE OF THIS LAWSUIT

1. Train Broadway and Train SF produce the play *Harry Potter & the Cursed Child Parts I & II* on Broadway at the Lyric Theatre and in San Francisco at the Curran Theatre, respectively.

2. As is common in the theater industry, Train Broadway and Train SF purchased event cancellation insurance policies to protect them in the event that the performances of *Harry Potter* were cancelled or postponed. These policies insure losses caused not only by the specified perils, but all other causes not conspicuously, expressly, and unmistakably excluded.

3. In March 2020, Train Broadway was just about to start its third year on Broadway and Train SF was in its inaugural year in San Francisco. All that changed when state, county, and

city authorities issued orders prohibiting performances from taking place, prohibiting access to venues, and prohibiting individuals from appearing in and attending performances. Like all other theatrical producers, Train Broadway and Train SF had to cancel performances of *Harry Potter* because of those orders, given guidance they received from the Broadway League, and the need to mitigate their damages. As a result, Train Broadway and Train SF have suffered, and continue to suffer, substantial financial losses. These losses are insured by the policies and the Underwriters are obligated to pay Train Broadway and Train SF for their insured losses.

4. When Train Broadway and Train SF turned to the Underwriters for the promised insurance, they reasonably expected the Underwriters to cover their losses. But the Underwriters interpreted their policies in an overly restrictive manner, wrongfully denied coverage, and refused to pay Train Broadway and Train SF for any portion of their losses.

5. The Underwriters' refusal to pay Train Broadway and Train SF for their losses is meritless. Thus, Train Broadway and Train SF seek damages for the Underwriters' contractual breaches and bad faith. Train Broadway and Train SF also seek declaratory relief confirming that their losses are insured and will continue to be insured as they are incurred.

JURISDICTION AND VENUE

6. This matter falls within this Court's general jurisdiction under Judiciary Law section 140-b.

7. This Court has personal jurisdiction over the Underwriters under N.Y. C.P.L.R. sections 301 and 302. The insurance policies contain a choice of law and jurisdiction clause. It states that all disputes arising from the policies shall be "subject to the exclusive jurisdiction of the courts of New York, USA." Policies, Risk Details. The Policies also contain a service of suit clause. It states that the Underwriters "will submit to the jurisdiction of a Court of competent

jurisdiction within the United States” if the Underwriters fail “to pay any amount claimed to be due hereunder[.]” *Id.*

8. The Commercial Division of this Court has jurisdiction over this action under section 202.70 of the Rules of the Commercial Division because the matter in controversy, exclusive of punitive damages, interests, costs, disbursements, and counsel fees claimed, exceeds \$500,000 and involves a claim for breach of contract.

9. Venue is proper under N.Y. C.P.L.R. section 501 because the Underwriters have consented to the jurisdiction of this Court and have designated Mendes & Mount, 750 Seventh Avenue, New York, New York, as its agent for service of process issued by this Court and because the policies specify that exclusive jurisdiction rests with the courts of the State of New York. Venue is also proper under N.Y. C.P.L.R section 503 because a substantial part of the events and omissions giving rise to the claims occurred in New York, New York.

THE PARTIES

10. Train Broadway is a limited partnership organized and existing under the laws of New York.

11. Train SF is a limited partnership organized and existing under the laws of California.

12. Train Broadway and Train SF are informed and believe, and on that basis allege, that the Underwriters are members of the Lloyd’s of London insurance market, located in London, England. Lloyd’s “is a market in which independent insurance underwriters join together in syndicates to sell insurance, mainly through brokers, under the umbrella of the Lloyd’s brand name.”¹

¹ *Her Majesty’s Revenue & Customs internal manual*, Lloyd’s Manual (Sept. 25, 2019), <https://www.gov.uk/hmrc-internal-manuals/lloyds-manual/llm1010>.

13. The Underwriters are members of syndicates that have underwritten and subscribed to the policies. They are obligated under the policies to provide the insurance afforded by the policies. Train Broadway and Train SF are informed and believe, and on that basis allege, that the Underwriters sell insurance covering risks in the City, County, and State of New York.

14. The lead syndicate on the policies is Brit Syndicate 2987, which is managed by Brit Syndicates Limited (“Brit”). Brit makes statements and representations its website, which it uses to market its insurance products; represent the nature of its insurance products, its policy underwriting, and its claims handling; and represent the quality of insurance and services its customers will get if they do business with it. Brit holds itself out as “a recognised lead market in Lloyd’s” that is “able to offer extensive knowledge and significant capacity” to its contingency insurance clients.² As for its claims philosophy, Brit proclaims:

Our experienced underwriting and dedicated contingency claims professionals work together to deliver service excellence in all aspects of Event Cancellation.

We live in an unpredictable world - all kinds of perils can impact an event: from weather to terrorism. We provide risk solutions that include cancellation, abandonment, postponement and interruption. We have paid claims for venue damage, denial of access, strikes and natural catastrophes. From small events such as weddings and fetes to major exhibitions and sporting events we provide innovative coverage and policy wording tailored to the client’s needs. We can assist insureds when the unexpected happens – and provide loss adjusters with the ability to save an event by rescheduling or relocating if practical.³

15. Brit understands that because of the government orders mandating closures, businesses, including Train Broadway and Train SF, had to take steps to mitigate or reduce losses. As Brit publicly stated in its 2020 year-end financial report:

² <https://www.britinsurance.com/insurance/contingency>.

³ <https://www.britinsurance.com/insurance/contingency/event-cancellation>.

The human cost, the economic impact and the toll on mental welfare has been at a level no one could have foreseen as we began the year. I am proud of the way in which everyone in Brit has responded to the challenge and not only managed to service our clients, but to excel in doing so.⁴

TRAIN BROADWAY'S AND TRAIN SF'S INSURANCE POLICIES

16. The Underwriters sold Train Broadway Contingency (Cancellation) Policy No. B0391 BT19ZZOO TTB230220220221 for the period of February 23, 2020, to February 22, 2021 (the "Train Broadway Policy").

17. The Underwriters sold Train SF Contingency (Cancellation) Policy No. B0391 LRIT2018 BT1906666 for the period of September 19, 2019, to September 18, 2020 (the "Train SF Policy").

18. The Train Broadway Policy and the Train SF Policy (together, the "Policies") contain nearly identical policy wordings, save for the names and details of the insured and insured productions, the venue, the policy period, the limit of liability, and other details pertinent to each entity. The Train Broadway Policy provides a total limit of liability of \$7,600,000. The Train SF Policy provides a total limit of liability of \$31,994,654. Policies, Limit of Liability. The Policies respectively insure Train Broadway and Train SF for losses as follows.

19. The insuring clause of the Policies states:

Subject always to the terms, conditions, limitations and exclusions contained in this Insurance or subsequently endorsed this Insurance is to reimburse the Assured for their Ascertained Net Loss should any performance of the Insured Production be necessarily Cancelled, Abandoned, Postponed, Interrupted, Curtailed, or Relocated.

Provided that:

(1.1.1) the necessary Cancellation, Abandonment, Postponement, Interruption, Curtailment or Relocation is the sole and direct result of one or more of the Insured Perils and

⁴ <https://www.britinsurance.com/media/x4ihokw1/brit-ltd-2020-results-rns-12-02-2021-final.pdf>

- (1.1.2) such Insured Peril is stated as COVERED and
- (1.1.3) such Insured Peril is beyond the control of:
 - i. the Assured and
 - ii. each and every Insured Person and
 - iii. in respect of Insured Perils 2.5 to 2.14, the Assured, the Insured Person and each and every other Participant.

Id. § 1.1.

- 20. The Policies insure Train Broadway and Train SF for their “Ascertained Net Loss.”

The Policies define “Ascertained Net Loss” to mean

such sums in excess of any Excess as represent:

(3.1.1) Expenses which have been irrevocably expended in connection with the Insured Production which has been necessarily Cancelled, Abandoned, Postponed, Interrupted, Curtailed or Relocated, less such part of the Gross Revenue retained less any savings the Assured is able to effect to mitigate such loss and

(3.1.2) the reduction in Net Profit (when Net Profit is insured) which the Assured can demonstrate would have been earned had the Insured Production taken place.

Id. § 3.1.

- 21. The Policies insure against many “Insured Perils,” including “Venue Damage,” “Denial of Access,” “Simultaneous Non-Appearance,” and “Any Other Peril Not Otherwise Excluded.” *Id.*, Risk Details, Conditions.

22. “Venue Damage” means “DAMAGE to or DESTRUCTION of the Venue, which renders the Venue unavailable or unsuitable for the Insured Production.” *Id.* § 2.6. The words with all uppercase letters are not defined in the Policies.

23. “Denial of Access” means “DENIAL OF ACCESS to the Venue.” *Id.* § 2.7. The words with all uppercase letters are not defined in the Policies.

24. “Simultaneous Non-Appearance” means “SIMULTANEOUS NON-APPEARANCE of 25% or more of the cast and/or musicians and/or crew of the Insured Production but subject always to there being a minimum of twelve members each of cast, musicians or crew in the Insured Production at all times. Where the number represents less than one whole individual this shall be rounded down to the nearest whole number.” *Id.* § 2.13. The words with all uppercase letters are not defined in the Policies.

25. “Any Other Peril Not Otherwise Excluded” means “ANY OTHER PERIL not specifically limited or excluded elsewhere in this Insurance.” *Id.*, § 2.14. The words with all uppercase letters are not defined in the Policies.

26. The Policies specify that an insured peril called “Communicable Disease” was not purchased. *Id.* The insured peril “Communicable Disease” means “COMMUNICABLE DISEASE as more fully described in the Communicable Disease Extension.” *Id.* § 2.5. No “Communicable Disease Extension” was included in the Policies.

27. The Policies define “venue” to mean “the place(s) stated in the Schedule where the Insured Production is to be held.” *Id.* § 3.14. The venues here are, for Train Broadway, the Lyric Theatre in New York, and, for Train SF, the Curran Theatre in San Francisco.

28. The Policies’ “Additional Costs” provision “indemnifies the Assured for proven additional costs or charges reasonably and necessarily paid by the Assured to avoid or diminish a loss under this Insurance provided that such additional costs or charges do not exceed the amount of loss thereby avoided or diminished.” *Id.* §1.2.

29. The Policies’ Due Diligence Clause states: “[T]he Assured shall at all times do and concur in doing all things necessary to avoid or diminish a loss under this Insurance, including where possible Postponement or Relocation of the Insured Production.” *Id.* § 5.2.

30. The Policies also state:

It is a condition precedent to the liability of the Underwriters that in the event of any happening or circumstance which could give rise to a claim under this Insurance, the Assured shall:

...

(7.1.4) take all steps to minimise or avoid any loss under this Insurance

Id. § 7.1.

31. The Policies contain an exclusion entitled “Communicable Disease.” This exclusion states that the Policies do not “cover any loss directly or indirectly arising out of, contributed to by, or resulting from: Severe Acute Respiratory Syndrome (SARS); Atypical Pneumonia; Bird Flu (Avian Flu); Swine Flu; [and] any other influenza variant deemed a pandemic or epidemic by the World Health Organisation; or any threat or fear thereof, whether actual or perceived.” *Id.* § 6.24 (paragraph references omitted) (the “Communicable Disease Exclusion”).

THE ORDERS AFFECTING THEATRICAL PERFORMANCES

32. For a year now, the world has been in the grip of a pandemic. The first reported evidence of SARS-CoV-2 was detected in or around December 2019 in Wuhan, the capital city of Hubei Province in China. The World Health Organization has named and distinguished the virus and the resulting disease:

Official names have been announced for the virus responsible for COVID-19 (previously known as “2019 novel coronavirus”) and the disease it causes. The official names are:

Disease
coronavirus disease
(COVID-19)

Virus

severe acute respiratory syndrome coronavirus 2
(SARS-CoV-2).⁵

33. The World Health Organization has also provided a straight-forward example of the distinction between a virus and a disease:

Viruses, and the diseases they cause, often have different names. For example, HIV is the virus that causes AIDS. People often know the name of a disease, but not the name of the virus that causes it. There are different processes, and purposes, for naming viruses and diseases.⁶

34. COVID-19 is a “new disease, caused by a new (novel) coronavirus that has not previously been seen in humans.”⁷ SARS-CoV-2 should not be confused with the disease known as SARS. “The virus causing coronavirus disease...is not the same as the coronaviruses that commonly circulate among humans and cause mild illness, like the common cold.”⁸ A study found that SARS-CoV-2 is “only moderately related to other known coronaviruses, with analysis indicating that they do not closely resemble any of the three previous known groups of coronavirus.”⁹

35. COVID-19 is also distinguishable from influenza because “COVID-19 and the flu are caused by different viruses. COVID-19 is caused by SARS-CoV-2, while influenza is caused by influenza A and B viruses.”¹⁰ Additionally, COVID-19 and the flu have different symptoms

⁵ [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it).

⁶ *Id.*

⁷ <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>.

⁸ <https://www.medschool.umaryland.edu/news/coronavirus/About-Novel-Coronavirus-COVID-19/>.

⁹ <https://sciencemediahub.eu/2020/04/23/the-differences-between-sars-cov-1-and-sars-cov-2/>.

¹⁰ <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-vs-flu/art-20490339>.

that “appear at different times” and “COVID-19 can cause different complications from the flu, such as blood clots and multisystem inflammatory syndrome in children.”¹¹

36. In March 2020, state, county, and city authorities throughout the United States began issuing orders that required people to stay at home, prohibited large gatherings, and mandated the closure of all non-essential in-person businesses, including theatrical productions (collectively, the “Closure Orders”).¹² The relevant Closure Orders here include the following orders affecting performances in New York and California.

37. In New York, Governor Andrew Cuomo issued Executive Order 202.1 on March 12, 2020, directing that “any theater seating five hundred or more attendees for a live performance located in [the City of New York] shall not hold any further performances after 5 pm on March 12, 2020.”¹³ Along with this order, the Broadway League announced that all Broadway performances would be suspended on the same day.¹⁴

38. On March 16, 2020, New York City Mayor de Blasio issued Emergency Executive Order No. 100 in which he directed that “all entertainment venues, including those with seating capacity below 500, are hereby closed effective Monday, March 16, 2020 at 8:00 PM. Entertainment venues shall include . . . theatres[.]”

¹¹ *Id.*

¹² *See, e.g.*, The Council of State Governments, *COVID-19 Resources for State Leaders*, <https://web.csg.org/covid19/executive-orders/> (listing most U.S. closure orders by state).

¹³ <https://www.governor.ny.gov/news/no-2021-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

¹⁴ <https://www.broadwayleague.com/press/press-releases/broadway-theatres-to-suspend-performances-through-april-12-2020/>. The Broadway League is the national trade association for the Broadway theatre industry. “The Broadway League’s 700-plus members include theatre owners and operators, producers, presenters, and general managers in North American cities, as well as suppliers of goods and services to the commercial theatre industry.” <https://www.broadwayleague.com/home/>.

39. As of March 22, 2020, Governor Cuomo issued the “New York State on PAUSE” executive order, which directed all non-essential businesses in New York to close by 8 p.m. on that date.¹⁵

40. Train Broadway was, and continues to be, impacted by many other Closure Orders, including the following state-wide actions: New York Governor Andrew Cuomo’s Executive Order No. 202 declaring a Disaster Emergency in the State of New York, Executive Orders 202.3, 202.4, 202.5, 202.6, 202.7, 202.8, 202.10, 202.11, 202.13, 202.14, 202.18, 202.31, 202.33, 202.34, 202.35, 202.36, 202.38, 202.39, 202.41, 202.45, 202.47, 202.48, 202.51, and 202.53; and Governor’s Executive Order 205 placing quarantine restrictions on travelers arriving in New York.

41. On March 11, 2020, California Governor Gavin Newsom announced that all gatherings of 250 people or more should be rescheduled or cancelled.¹⁶ On March 12, 2020, Governor Newsom issued Executive Order N-25-20, stating: “All residents are to heed any orders and guidance of state and local public health officials, including, but not limited to, the imposition of social distancing measures, to control the spread of COVID-19.”¹⁷ Executive Order No-25-20 took effect on March 12, 2020.

42. On March 11, 2020, Mayor London Breed of San Francisco issued a Public Health Order prohibiting gatherings exceeding 1,000 or more persons.¹⁸ On March 13, 2020, the Department of Public Health of the City and County of San Francisco issued Order of the Health Officer No. C19-05b (revised), prohibiting “all indoor public and private gatherings...within an

¹⁵ <https://www.governor.ny.gov/news/governor-cuomo-signs-new-york-state-pause-executive-order>.

¹⁶ <https://www.gov.ca.gov/2020/03/11/california-public-health-experts-mass-gatherings-should-be-postponed-or-canceled-statewide-to-slow-the-spread-of-covid-19/>.

¹⁷ <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.12.20-EO-N-25-20-COVID-19.pdf>.

¹⁸ https://www.sfdph.org/dph/alerts/files/PR-COVID-LargeEvents_COVID-19-03112020.pdf.

enclosed space that has a maximum occupant load of 100 people or more anywhere in San Francisco.”¹⁹ On March 16, 2020, the Department of Public Health of the City and County of San Francisco issued an Order of the Health Officer C19-07, requiring “all individuals anywhere in San Francisco to shelter in place—that is, stay at home—except for certain essential activities and work”²⁰

43. On March 19, 2020, the State of California issued an Order of the State Public Health Officer. This order required all individuals living in California to stay at home or at their place of residence “except as needed to maintain operations of the federal critical infrastructure sectors.”²¹ On that same date, Governor Newsom issued Executive Order N-33-20, expressly requiring California residents to follow the March 19, 2020, Order of the State Public Health Officer. The order incorporated by reference California Government Code 8665, which provides that “[a]ny person . . . who refused or willfully neglects to obey any lawful order . . . issued as provided in this chapter, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punishable by a fine of not to exceed one thousand dollars (\$1,000) or by imprisonment for not to exceed six months or by both such fine and imprisonment.”²²

44. Train SF was, and continues to be, impacted by many Closure Orders.

45. Other states issued their own Closure Orders at different times, for different reasons, and imposing different limitations. Those Closure Orders, for example, limited or restricted travel to New York and California, which would have impacted Train Broadway and Train SF’s ability to conduct performances as scheduled.

¹⁹ <https://sfgsa.org/sites/default/files/Document/OrderC19-05Revised3.13.pdf>.

²⁰ <https://sfgsa.org/sites/default/files/Document/OrderC19-07ShelterinPlace.pdf>.

²¹ <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Health%20Order%203.19.2020.pdf>.

²² <https://covid19.ca.gov/img/N-33-20.pdf>.

46. The Closure Orders continue to limit, restrict, and prohibit partial or total access to Train Broadway and Train SF's venues, causing losses of the type insured by the Policies.

47. The theater industry was severely impacted by the Closure Orders.²³ Starting on March 12, 2020, all theatrical productions in New York City and San Francisco were forced to cancel their performances.²⁴ Immediately before March 12, 2020, performances of *Harry Potter* were ongoing in New York and San Francisco. As of March 12, 2020, there were 95 known cases of COVID-19 in New York City²⁵ and 18 known cases of COVID-19 in San Francisco.²⁶

48. The extent of the disruption of the theater industry by the Closure Orders has evolved over time. As of the filing of this complaint, it appears likely that theatrical events may resume in part in 2021 despite the inability to eradicate SARS-CoV-2 and COVID-19.²⁷ It also appears that the Closure Orders will be modified or lifted, even with the continued presence of SARS-CoV-2 and COVID-19. Therefore, performances will eventually be able to resume in some form. However, those performances may face restrictions imposed by Closure Orders, guidance by the Broadway League, and the need to mitigate potential losses.

THE UNDERWRITERS' BREACHES AND WRONGFUL CONDUCT

49. Train Broadway and Train SF were forced to cancel performances of both productions of *Harry Potter* on March 12, 2020. The Closure Orders denied Train Broadway and

²³ <https://www.npr.org/sections/coronavirus.liveupdates/2020/06/29/884654826/broadway-to-remain-closed-for-the-rest-of-the-year>.

²⁴ <https://www.nytimes.com/2020/03/12/theater/coronavirus-broadway-shutdown.html>; <https://www.mercurynews.com/2020/03/12/harry-potter-performances-canceled-through-march-in-san-francisco/>.

²⁵ <https://www.ny1.com/nyc/all-boroughs/coronavirus/2020/03/12/governor-andrew-cuomo-coronavirus-briefing--3-12-20>.

²⁶ <https://sfist.com/2020/03/12/san-francisco-reports-4-new-covid-19-cases-3-from-community-spread/>.

²⁷ <https://www.playbill.com/article/select-broadway-venues-to-welcome-back-audiences-for-special-events-beginning-in-april>.

Train SF access to their theatres and prevented their casts and crew from appearing at performances. The Closure Orders also prohibited audience members from attending performances. Without cast and crew, without access to their theatres, and without audiences, Train Broadway and Train SF could not put on their productions. As of the filing of this complaint, performances of *Harry Potter* are still prohibited by the Closure Orders.

50. On or about May 14, 2020, Train Broadway and Train SF notified the Underwriters of their losses.

51. For more than two months after Train Broadway and Train SF notified the Underwriters, the Underwriters did not contact Train Broadway or Train SF to ask any questions about their claims. The Underwriters did not speak to any members of the productions, did not send a representative to visit the venues, and did not ask for any documentation of Train Broadway and Train SF's losses.

52. The Underwriters finally responded on July 22, 2020, and July 24, 2020, well after the time by which they were obligated to respond. They sent Train Broadway and Train SF nearly identical letters denying coverage for their losses. The Underwriters incorrectly asserted that Train Broadway and Train SF had “not demonstrated a loss covered under *any* of the Insured Perils of the Policies for the claim as presented” (emphasis added). However, the Underwriters only addressed only two of the perils insured under the Policies, wholly ignoring the other insured perils.

53. The Underwriters first stated that the cancellations of Train Broadway and Train SF's productions were “due to the outbreak of COVID-19.” The Underwriters stated that because “the Communicable Disease Peril is listed as NOT COVERED,” “[a]ny loss due to COVID-19, a Communicable Disease, would therefore not be covered.” In so stating, the Underwriters ignored relevant facts, including that other viruses have caused widespread illness and death without

forcing the closures of productions, that COVID-19 will continue long after productions re-open, and that the Closure Orders, not SARS-CoV-2 or COVID-19, are the most direct, efficient, and predominant causes of Train Broadway's and Train SF's losses.

54. The Underwriters next asserted that the covered peril "Denial of Access" was not triggered "since the proximate cause of the Cancellation of the Insured Performances is the outbreak of COVID-19, the subsequent ban on gathering and shutdown of Broadway performances that may have resulted in a *de facto* Denial of Access to the Venue are solely incidental causes." However, the Underwriters did not state how they determined what the "proximate cause" of Train Broadway and Train SF's losses was, or how they concluded that the Closure Orders were "solely incidental causes" of Train Broadway and Train SF's losses rather than direct, efficient, and predominant causes of the losses.

55. The Underwriters cited no exclusion in the Policies as a basis to deny coverage. Nor could they have, because no exclusion in the Policies could possibly apply. For example, as Underwriters know, or should know, their Communicable Disease Exclusion does not apply to Train Broadway and Train SF's losses because the Policies define "Communicable Disease" to be only five specially identified diseases, none of which is COVID-19 or the virus, SARS-CoV-2, that causes COVID-19.

56. The Underwriters wholly ignored the Policies' express coverage for the Insured Perils of Venue Damage, Simultaneous Non-Appearance, and Any Other Peril.

57. Train Broadway and Train SF are informed and believe, and on that basis allege, that before sending the letters denying coverage, the Underwriters did no real investigation of Train Broadway's and Train SF's claims, let alone the thorough investigation of possible bases supporting the claims that the law required them to conduct.

58. In stark contrast to the Underwriters' contentions, Train Broadway's and Train SF's losses were not caused by a peril "not covered" by the Policies. Train Broadway and Train SF did not cancel their performances due to a "Communicable Disease" as that term is used in the Insured Perils section of the Policies. The performances did not, and could not, take place because of the Closure Orders (a Peril "not specifically limited or excluded" by the Policies) and the Non-Appearance of 25% or More of Cast, Musicians, and/or Crew because of the inability of cast and crew to access the venues or otherwise appear. The venues were also rendered unavailable and unsuitable for use and therefore damaged because of the Closure Orders. Moreover, to date, Train Broadway and Train SF are not aware of any cast, crew, or patron having COVID-19 while at the theatres, meaning that even if COVID-19 were a "Communicable Disease" as that term is used in the Policies, the cancellations were not caused by it.

59. No other disease in the last 100 years has resulted in such Closure Orders, including the influenza pandemic in 1968 that caused more than 100,000 deaths in the United States. Likewise, the annual outbreaks of flu in the United States, which kill tens of thousands of people each year, have not resulted in such orders. Even though COVID-19 apparently will not be eradicated in the near future, Closure Orders are being lifted, and the venues (and venues across the United States) are expected to re-open. SARS-CoV-2 and COVID-19 are not going anywhere. Just as the flu returns year after year, SARS-CoV-2 and COVID-19 are expected to remain for years. The presence of COVID-19 itself cannot be said to be the sole (if any) cause of Train Broadway's and Train SF's losses. Thus, the Underwriters' position that a non-covered "Communicable Disease" is the cause of the loss is wrong.

60. Furthermore, nothing in the Policies states that even if one Peril that may contribute to a loss is "not covered," there is no coverage if another Insured Peril also contributed to causing a loss. In fact, the Policies do not have any exclusion for loss arising from COVID-19 or SARS-

CoV-2. Therefore, the Underwriters simply and plainly were wrong in denying coverage on the grounds they asserted.

61. By cancelling all remaining performances in 2020 and so far in 2021, Train Broadway and Train SF took mitigative steps as required by the “Due Diligence” clause to minimize their overall losses and to avoid further losses. The Underwriters are obligated to pay Train Broadway and Broadway SF for their losses and expenses incurred in these efforts.

62. Train Broadway and Train SF are entitled to the maximum amount of coverage needed to indemnify them for their losses for the maximum periods of time provided by and under the Policies.

63. To the extent not waived or excused, Train Broadway and Train SF complied with the provisions contained in the Policies. Therefore, Train Broadway and Train SF are entitled to all benefits of insurance provided by the Policies.

FIRST CAUSE OF ACTION

(Train Broadway’s Claim for Breach of Contract)

64. Train Broadway realleges and incorporates by reference paragraphs 1 through 63, above.

65. Train Broadway performed all obligations required of it under the Train Broadway Policy, except as otherwise excused.

66. The Underwriters have breached their duties under the Train Broadway Policy by acting as alleged above, by denying coverage solely based on the “not covered” peril of “Communicable Disease,” by ignoring the reality that one or more covered perils caused the cancellations of Train Broadway’s production, and by denying coverage for all of Train Broadway’s losses.

67. As a direct and proximate result of the Underwriters' breaches, Train Broadway has sustained, and continues to sustain, millions of dollars in damages, in an amount to be proven at trial.

68. As a result of the Underwriters' breaches, Train Broadway requests entry of judgment for breach of contract, awarding payment of damages in an amount equal to the amount owed under the Train Broadway Policy and consequential damages, each in amounts to be proven at trial.

SECOND CAUSE OF ACTION

(Train SF's Claim for Breach of Contract)

69. Train SF realleges and incorporates by reference paragraphs 1 through 63, above.

70. Train SF performed all obligations required of it under the Train SF Policy, except as otherwise excused.

71. The Underwriters have breached their duties under the Train SF Policy by acting as alleged above, by denying coverage solely based on the "not covered" peril of "Communicable Disease," by ignoring the reality that one or more covered perils caused the cancellations of Train SF's production, and by denying coverage for all of Train SF's losses.

72. As a direct and proximate result of the Underwriters' breaches, Train SF has sustained, and continues to sustain, millions of dollars of damages, in an amount to be proven at trial.

73. As a result of the Underwriters' breaches, Train SF requests entry of judgment for breach of contract, awarding payment of damages in an amount equal to the amount owed under the Train SF Policy and consequential damages, each in amounts to be proven at trial.

THIRD CAUSE OF ACTION

(Train Broadway's Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing)

74. Train Broadway realleges and incorporates by reference each allegation in paragraphs 1 through 63 and 65 through 68 above.

75. The law imposes on the Underwriters an implied covenant of good faith and fair dealing in the Train Broadway Policy. The Underwriters breached their implied covenant of good faith and fair dealing in multiple ways, including: (i) on information and belief, undertaking absolutely no investigation whatsoever of Train Broadway's claim, and instead, arbitrarily and with reckless disregard of Train Broadway's rights, refusing to acknowledge coverage or even conduct an investigation before denying Train Broadway's claim for coverage; (ii) denying Train Broadway's claim with either actual knowledge or reckless disregard of the fact that their acts and omissions constituted an unreasonable failure to honor their contractual obligations; (iii) knowingly and recklessly basing their denial of coverage on frivolous grounds unsupported by fact, law or the Train Broadway Policy itself and in doing so, showing no regard whatsoever for their insured; and (iv) compelling Train Broadway to file this suit in order to receive the contractual benefits which it bought and paid for.

76. Based on the terms of the Train Broadway Policy, the Underwriters consciously understood and/or led Train Broadway to reasonably believe that, based on the Underwriters' warranties, such losses would be covered under the Train Broadway Policy.

77. Train Broadway has incurred and continues to incur consequential damages, including, but not limited to, ongoing extra expenses and attorneys' fees due to the Underwriters' wrongful, unjustified, and unreasonable failure to issue payment of amounts due, and improper treatment of the claim, all with the result of wrongfully diverting Train Broadway from its recovery efforts.

78. The consequential damages resulting from the Underwriters' bad faith conduct and their breaches of their duty to act in good faith were within the contemplation of the parties when the Train Broadway Policy was sold, as the natural and probable result of a breach of the Train Broadway Policy.

79. The consequential damages resulting from the Underwriters' bad faith conduct and their breaches of their duty to act in good faith were foreseen or should have been foreseen when the Train Broadway Policy was sold.

80. Train Broadway's damages were foreseeable given the purpose and particular circumstances of the event cancellation coverage sold by the Underwriters under the Train Broadway Policy.

81. As a result of the foregoing, Train Broadway requests entry of judgment and an award of damages in an amount to be proven at trial.

FOURTH CAUSE OF ACTION

(Train SF's Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing)

82. Train SF realleges and incorporates by reference each allegation in paragraphs 1 through 60 and 70 through 73 above.

83. The law imposes on the Underwriters an implied covenant of good faith and fair dealing in the Train SF Policy. The Underwriters breached their implied covenant of good faith and fair dealing in multiple ways, including: (i) undertaking absolutely no investigation whatsoever of Train SF's claim, and instead, arbitrarily and with reckless disregard of Train SF's rights, refusing to acknowledge coverage or even conduct an investigation before denying Train SF's claim for coverage; (ii) denying Train SF's claim with either actual knowledge or reckless disregard of the fact that their acts and omissions constituted an unreasonable failure to honor their contractual obligations; (iii) knowingly and recklessly basing their denial of coverage on frivolous

grounds which are unsupported by fact, law or the Train SF Policy itself and in doing so, showing no regard whatsoever for their insured; and (iv) compelling Train SF to file this suit in order to receive the contractual benefits which it bought and paid for.

84. Based on the terms of the Train SF Policy, the Underwriters consciously understood, or Train SF was reasonably led to believe that, based on the Underwriters' warranties, such losses would be covered under the Train SF Policy.

85. Train SF has incurred and continues to incur consequential damages, including, but not limited to, ongoing extra expenses and attorneys' fees due to the Underwriters' wrongful, unjustified, and unreasonable failure to issue payment of amounts due, and improper treatment of the claims, all with the result of wrongfully diverting Train SF from its recovery efforts.

86. The consequential damages resulting from the Underwriters' bad faith conduct and their breaches of their duty to act in good faith were within the contemplation of the parties at the time the Train SF Policy was sold, as the natural and probable result of a breach of the Train SF Policy.

87. The consequential damages resulting from the Underwriters' bad faith conduct and their breaches of their duty to act in good faith were foreseen or should have been foreseen when the Train SF Policy was sold.

88. Train SF's damages were foreseeable given the purpose and particular circumstances of the event cancellation coverage sold by the Underwriters under the Train SF Policy.

89. As a result of the foregoing, Train SF requests entry of judgment and an award of damages in an amount to be proven at trial.

FIFTH CAUSE OF ACTION**(Train Broadway's Claim for Declaratory Judgment)**

90. Train Broadway realleges and incorporates by reference each allegation in paragraphs 1 through 63, 65 through 68, and 75 through 81 above.

91. Pursuant to the Train Broadway Policy, the Underwriters are obligated to pay Train Broadway for the losses it continues to suffer as a result of the cancellations of *Harry Potter*. Train Broadway is informed and believes, and on that basis alleges, that the Underwriters dispute that Train Broadway is entitled to such coverage. Therefore, an actual and justiciable controversy exists between Train Broadway, on the one hand, and the Underwriters, on the other hand.

92. Train Broadway therefore seeks a judicial declaration from this Court confirming that Train Broadway's contentions, as stated above, are correct.

93. A declaration is necessary so that the parties' dispute may be resolved and that they may be aware of their respective rights and duties.

SIXTH CAUSE OF ACTION**(Train SF's Claim for Declaratory Judgment)**

94. Train SF realleges and incorporates by reference each allegation in paragraphs 1 through 63, 70 through 73, and 83 through 89 above.

95. Pursuant to the Train SF Policy, the Underwriters are obligated to pay Train SF for the losses it continues to suffer as a result of the cancellations of *Harry Potter*. Train SF is informed and believes, and on that basis alleges, that the Underwriters dispute that Train SF is entitled to such coverage. Therefore, an actual and justiciable controversy exists between Train SF, on the one hand, and the Underwriters, on the other hand.

96. Train SF therefore seeks a judicial declaration from this Court confirming that Train SF's contentions, as stated above, are correct.

97. A declaration is necessary so that the parties' dispute may be resolved and that they may be aware of their respective rights and duties.

PRAYER FOR RELIEF

WHEREFORE, Train Broadway and Train SF pray for relief as follows:

ON THE FIRST CAUSE OF ACTION

1. For damages, plus interest and costs of suit, in an amount to be determined at trial;

ON THE SECOND CAUSE OF ACTION

2. For damages, plus interest and costs of suit, in an amount to be determined at trial;

ON THE THIRD CAUSE OF ACTION

3. For judgment against the Underwriters, awarding Train Broadway consequential damages, plus interest, in an amount to be determined at trial;

ON THE FOURTH CAUSE OF ACTION

4. For judgment against the Underwriters, awarding Train SF consequential damages, plus interest, in an amount to be determined at trial;

ON THE FIFTH CAUSE OF ACTION

5. For declarations in accord with Train Broadway's contentions stated above;

ON THE SIXTH CAUSE OF ACTION

6. For declarations in accord with Train SF's contentions stated above;

ON ALL CAUSES OF ACTION

7. For costs of suit herein; and
8. For such other, further, and/or different relief as may be deemed just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs Train Times Broadway LP and Train Times SF LP hereby demand a trial by jury on all issues so triable.

Dated: New York, New York
March 11, 2021

PASICH LLP

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