

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

SPORTIME CLUBS, LLC

Plaintiff,

v.

AMERICAN HOME ASSURANCE COMPANY,

Defendant.

Index No.

Summons

To the above named Defendant:

American Home Assurance Company
175 Water Street
18th Floor
New York, New York 10038

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's attorney within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of venue is that it is where a substantial part of the events or omissions giving rise to the claim occurred, and Plaintiff's principal office is located in Kings Park, New York.

Dated: New York, New York
October 5, 2020

PASICH LLP

By:  _____

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

<p>SPORTIME CLUBS, LLC</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>AMERICAN HOME ASSURANCE COMPANY,</p> <p style="text-align: center;">Defendant.</p>
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COMPLAINT

Plaintiff Sportime Clubs, LLC (“Sportime”), as and for its complaint against American Home Assurance Company (“Assurance”), alleges as follows:

PRELIMINARY STATEMENT

1. For more than 24 years, Sportime has operated state-of-the-art tennis clubs with related multi-sport, fitness, wellness, and camp facilities, catering to players, athletes, and participants of all ages and levels of interest, and of all socioeconomic levels.

2. Sportime owns and/or operates 12 clubs, which include 13 discrete facilities, in Manhattan, Long Island, Westchester, and the New York Capital Region (the “Insured Clubs”).

3. These 13 facilities feature: 151 tennis courts (55 indoor, 65 outdoor, and 31 seasonal indoor/outdoor); 5 multi-sport and turf sports centers; 5 fitness facilities (including Sportime Randall’s Island’s athletic training center); 4 heated outdoor pools; multiple tennis and sports specialty pro-shops; social event and party spaces; cafes at certain locations; and additional facilities.

4. Sportime serves over 30,000 tennis and sports program participants and visitors each year, 16,000 of whom are Sportime members, and more than 3,000 of whom are youth campers during the summer months. Sportime also operates the John McEnroe Tennis Academy

(“JMTA”) at four sites, and the Sportime Volleyball Club (“VBC”) at its Bethpage Multi-Sport site, the premier tennis and volleyball academies, respectively, in the New York Metropolitan area.

5. Throughout its history, Sportime has shown a commitment to serving under-resourced young athletes, and to giving back to the communities where it operates, with low-cost and free programming, and full and partial scholarships. Since 2012, at Sportime Randall’s Island specifically, Sportime’s flagship facility in NYC and the flagship home of JMTA, Sportime has introduced tennis as a life-long health, fitness and social activity to thousands of under-resourced NYC area children, focusing on those living in East Harlem and the South Bronx, two communities immediately adjacent to Sportime Randall’s Island, directly and through the Johnny Mac Tennis Project (“JMTP”), a 501(c)(3) organization. JMTP has provided over 16,000 hours of free group tennis instruction and has impacted close to 6,000 students. In addition, JMTP has awarded over 340 individual scholarships to gifted and deserving athletes. These scholarships and free group tennis instruction are, in the aggregate, valued at more than \$6.5 million through 2019. JMTP’s scholarship recipients have received admission to some of the country’s best colleges and universities through fully funded, tennis-based scholarships.

6. By this action, Sportime seeks insurance coverage for business income losses and extra expenses incurred as a direct result of actions of civil authorities. These actions caused direct physical loss or damage to the Insured Clubs and directly affected Sportime’s use of the Insured Clubs by requiring physical alterations to them that substantially impaired and/or rendered them incapable of performing the intended function of the Insured Clubs—providing access to high-quality tennis, fitness, sports and camp facilities, and instructional, competitive, recreational and educational playing opportunities to participants of all ages and backgrounds.

7. By way of example, as a result of civil authority actions, Sportime Randall's Island was closed from March 16 through June 21. On June 22, Sportime Randall's Island was able to open its outdoor courts only, subject to capacity limitations, but not its indoor tennis courts or its other indoor facilities. On July 6, Sportime Randall's Island was able to commence operation of its JMTA summer training camp. On July 18, Sportime Randall's Island opened its indoor tennis courts, again subject to capacity and other limitations. Sportime Randall's Island's indoor athletic training center was able to reopen on September 2, on a very limited basis. Its food and beverage operation remains closed. To reopen each of the above facility components, however, Sportime Randall's Island had to make physical alterations to its space that have left it substantially impaired and able only to serve a fraction of the customers that it could before COVID-19. In addition, Sportime Randall's Island has been, and continues to be, unable to host most special events. This year, for example, it was unable to serve as an official US Open practice facility, which it has for the past few years.

8. When Sportime turned to Assurance, its commercial property and business interruption insurer, Sportime reasonably expected Assurance to afford coverage for its financial losses. After all, Assurance sold Sportime an "advanced, broad, all-risk property damage and business interruption" policy "designed to maximize our client's recovery in the event of loss." And, indeed, a policy that—unlike the overwhelming majority of its business interruption policies—did not contain a virus exclusion.

9. Instead of honoring its promises, Assurance wrongfully withheld the policy benefits that Sportime is entitled to receive—and that it needs to weather the past, present, and future circumstances associated with the spread of the SARS-CoV-2 (the virus that causes the

disease COVID-19), COVID-19, and actions to “flatten the curve,” to rebound from its financial losses, and to continue operating as a productive member of New York’s economy.

10. Assurance’s wrongful denial deprived Sportime of millions of dollars of promised insurance, advanced Assurance’s own interests at the expense of its insured, and breached the terms of the Policy as well as the duty of good faith and fair dealing.

11. By this lawsuit, Sportime seeks compensatory and consequential damages in excess of \$9,000,000 and a declaration that: (1) Sportime’s business income losses and extra expenses as a result of SARS-CoV-2 and COVID-19, and the effects therewith, are covered under the Policy; (2) those perils caused “direct physical loss or damage” to the Insured Clubs; (3) those perils directly “affect[ed] [Sportime’s] use of the covered property;” and (4) they are Covered Causes of Loss not excluded by any provisions in the Policy including the Polluter’s exclusion.

THE PARTIES

12. Sportime is a limited liability company existing under the laws of the State of New York and has its principal place of business in Kings Park, New York. The members of Sportime and their members are citizens of California, Delaware, Florida, Idaho, Illinois, New York, Ohio, and Vermont.

13. Sportime owns and/or operates 12 clubs, which include 13 discrete facilities, in Manhattan, Long Island, Westchester, and the New York Capital Region.

Sportime Amagansett

14. Sportime Amagansett Tennis and Swim, located in East Hampton, Suffolk County, New York, is a seasonal, outdoor facility, open from approximately May 2nd through November 1st, and features 33 clay tennis courts, 1 hard tennis and multi-sport court, a heated outdoor swimming pool, a mini-basketball court, a playground, 3 natural turf sports fields, 2

clubhouses, a camp house, a tennis pro-shop, and a cafe. Sportime Amagansett Tennis and Swim offers the East Hampton Sports Camp @ Sportime Amagansett, which this year ran from June 29, 2020 to September 4, 2020, and JMTA summer training camp.

15. Sportime Amagansett Multi-Sport Arena, managed in conjunction with Sportime Amagansett Swim and Tennis, is located in East Hampton, Suffolk County, New York, and is operated pursuant to a license agreement with the Town of East Hampton. The facility features an air conditioned, regulation sized rink, convertible into three basketball courts or three competition volleyball courts. Two motorized rink divider curtains allow for small group training and team practices for roller hockey, soccer, lacrosse, pickle ball, basketball, and volleyball.

Sportime Bethpage Tennis

16. Sportime Bethpage Tennis is located in Bethpage, Nassau County, New York, and is an indoor tennis facility featuring 6 indoor tennis courts, a tennis pro-shop, a lobby/lounge and locker rooms.

Sportime Bethpage Multi-Sport

17. Sportime Bethpage Multi-Sport, located in Bethpage, Nassau County, New York, is a 45,000 square foot indoor sports facility that features one regulation roller hockey rink and a smaller rink, which are convertible, depending upon configuration, into two NCAA regulation basketball courts, five competition volleyball courts or a full-size soccer or lacrosse field. The facility also includes changing rooms, locker rooms with showers, a concession stand, and a viewing mezzanine.

Sportime Harbor Island

18. Sportime Harbor Island, located in Harbor Island Park, Mamaroneck, in Westchester County, New York, is an indoor/outdoor tennis facility operated by Sportime

pursuant to a municipal license agreement with the Village of Mamaroneck, and features 8 indoor/outdoor red clay courts, a lobby, a pro-shop and locker room facilities.

Sportime Kings Park

19. Sportime Kings Park, located in Kings Park, Suffolk County, New York, is a tennis, fitness, multi-sport and camp facility featuring 3 indoor hard tennis courts, 4 indoor clay courts, a full fitness center, a multi-sport court, an indoor turf sports center housed in a conditioned air-structure, a heated outdoor swimming pool, a playground and a variety of other camp amenities, a tennis pro-shop, and full locker room facilities.

Sportime Lake Isle

20. Sportime Lake Isle, located in Eastchester, Westchester County, New York, is an indoor/outdoor tennis facility, and the Westchester home of JMTA. In 2012, Sportime constructed this \$6.5 million club, sited on the grounds of the Lake Isle Country Club, and operates it as a licensee of the Town of Eastchester. It features 8 indoor/outdoor clay tennis courts and a 5,000 square foot, two-story clubhouse with locker rooms, lobby/lounge with court viewing, a pro-shop, and a small athletic training area.

Sportime Lynbrook

21. Sportime Lynbrook, located in Lynbrook, Nassau County, New York, is an indoor tennis, fitness and multi-sport facility, including 5 hard tennis courts, a 7,000 square foot multi-sport court, a 6,000 square foot indoor turf field, a full service health club and group exercise studio, lounge areas, locker rooms and a pro-shop.

Sportime Quogue

22. Sportime Quogue is a year-round indoor/outdoor tennis, fitness, sports and camp facility located in East Quogue, Suffolk County, New York and serves the surrounding New York towns of Westhampton, Remsenberg, Quogue, Southampton, Hampton Bays, Eastport,

Riverhead, the Moriches and the North Fork. Sportime Quogue features 4 indoor clay courts, 22 outdoor clay courts, a heated outdoor pool, a full-service health and fitness club, multiple group exercise studios, a multi-sport court, a child-care center, locker rooms, a playground, a pro-shop and a cafe.

Sportime Randall's Island

23. Sportime Randall's Island is the NYC Metro Area's premier tennis center and is the flagship home of JMTA. The \$20 million Randall's Island facility, which Sportime constructed in 2009 and operates pursuant to a license agreement with the City of New York, is located on Randall's Island, New York County, New York. It features 160,000 square feet of tennis courts and support facilities including: 5 indoor hard tennis courts, 5 indoor/outdoor hard tennis courts, 10 indoor/outdoor clay tennis courts, a training and fitness center, lounge areas, adult and junior locker rooms, steam rooms, a pro-shop, a cafe, classrooms, and facilities for meetings and special events.

Sportime Roslyn

24. Sportime Roslyn, located in Roslyn, Nassau County, New York, is an indoor tennis facility featuring 9 indoor clay tennis courts, a tennis pro-shop, a small lobby, and locker room facilities.

Sportime Syosset

25. Sportime Syosset, located on Jericho Turnpike in Syosset, Nassau County, New York, is an indoor tennis and multi-sport facility, and the Long Island home of JMTA. This facility features 6 clay tennis courts, 5 hard tennis courts, a 5,000 square foot multi-sport court and party room, an athletic training center, lounge areas, a tennis pro-shop, a child-care room and full locker room facilities.

Sportime Schenectady

26. Sportime Schenectady, located on Curry Road in Schenectady, Schenectady County, New York, is an indoor/outdoor tennis, fitness, multi-sport and camp facility, featuring 8 indoor hard tennis courts, 8 outdoor clay tennis courts, 2 racquetball courts, a fitness center on two levels, group exercise studio, indoor cycling studio, full locker room facilities, treatment rooms, heated outdoor pool, a pool house and a pro-shop.

Assurance

27. Assurance is incorporated under the laws of the State of New York and has its principal place of business in New York, New York.

28. Assurance is a member of the American International Group, Inc. ("AIG").

29. AIG makes various representations on behalf of its member companies on its website. Specifically, AIG offers the following "Claims Promise":

AIG helps clients reduce and manage risks through the use of global claims data, fraud trend analysis, market leading insights, and a dedicated professional network of specialist adjusters.

A proactive partnership with the customer is key to resolving claims quickly, understanding potential risks, and learning ways to avoid a loss.

<https://www.aig.com/business/business-claims/claims-capabilities>

30. Regarding Property claims capabilities, AIG represents the following to the public:

Through advanced data and analytics, innovative technology, and a keen focus on helping our clients maintain business continuity AIG's Property Claims Promise has been an industry standard when it comes to handling some of the largest, most complex property claims.

Id.

31. Moreover:

AIG brings you global property insurance solutions, deep industry knowledge, and local expertise. We'll help you keep your business running after natural disasters, equipment failures, acts of terror, and more. Our experienced team of underwriters, risk engineers, and claims adjusters provide expert consultation to help empower you to keep moving forward – whatever the circumstances.

<https://www.aig.com/business/insurance/property>

32. AIG proclaims the following on their website with respect to COVID-19:

As the COVID-19 pandemic continues to evolve, AIG remains focused on protecting the health and safety of our colleagues and those around us, as well as continuing to serve clients, policyholders, business partners and other stakeholders.

The company has activated its Business Continuity Plans and colleagues across our General Insurance and Life & Retirement businesses remain available to help meet the needs of clients and other business partners

Helping individuals, businesses and communities prepare for times of uncertainty is at the heart of what we do.

<https://www.aig.com/about-us/coronavirus-updates>

33. AIG's Business Continuity Plans include an Infectious Disease Preparedness plan to address planning and response for potential pandemics. "AIG can invoke these procedures based on pandemic warnings from the World Health Organization, the U.S. Centers for Disease Control and Prevention, and/or other official local governance bodies."

<https://www.aig.com/business-resilience-disclosure>

34. AIG echoed its purported concern for its insureds in a news release in April, as follows:

Brian Duperreault, AIG's Chief Executive Officer, said: "In the face of COVID-19, an unprecedented global catastrophe, our colleagues have shown great resilience and remain focused on what we do, which is helping our clients manage risk, especially in

difficult times. It has been heartbreaking to watch this humanitarian crisis unfold over the last few months.”

<https://aig.gcs-web.com/node/45206/pdf>.

35. On a first-quarter earnings call in May, Peter Zaffino, the president and global chief operating officer of AIG and CEO of its general insurance division reportedly said that “AIG is not expecting to pay business interruption on most of its property policies.”

<https://www.businessinsurance.com/article/20200505/NEWS06/912334409/AIG-expects-wide-industry-COVID-losses-cuts-insurtech-unit-American-Internation>

36. According to Mr. Zaffino:

The “overwhelming majority” of AIG’s business interruption policies contain a virus exclusion “and otherwise require a showing that the virus caused direct physical loss or damage that was the cause of the business interruption.”

Id.

JURISDICTION AND VENUE

37. This Court has jurisdiction over this action under Judiciary Law § 140-b.

38. The Court has jurisdiction over Assurance pursuant to CPLR § 301, because the Assurance was, at all relevant times, authorized to transact business in the State of New York and/or conducted continuous and substantial business in the State of New York.

39. The Court also has jurisdiction over Assurance pursuant to CPLR § 302, because Assurance transacted business in the State of New York and/or contracted to supply services within the State of New York and this action arises from such transactions and/or contracts.

40. Venue is proper in this county pursuant to CPLR § 503 because it is where a substantial part of the events or omissions giving rise to the claim occurred, and Sportime’s principal office is located in Kings Park, New York.

**THE COVID-19 PANDEMIC AND
SUBSEQUENT CIVIL AUTHORITY ORDERS**

41. COVID-19 is a disease caused by a recently discovered virus known as SARS-CoV-2. The World Health Organization has named the virus and a resulting disease as follows:

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).

[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)

42. The World Health Organization 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, such as measles, but not the name of the virus that causes it (rubella).

There are different processes, and purposes, for naming viruses and diseases.

Id.

43. The first reported cases of COVID-19 in humans were diagnosed in or around December 2019 in Wuhan, the capital city of the Hubei Province in China. Since then, SARS-CoV-2 and COVID-19 have spread throughout the world, prompting the World Health Organization to declare a global pandemic.

44. As explained by the World Health Organization,

[p]eople can catch COVID-19 from others who have the [SARS-CoV-2] virus. The disease can spread from person to person through small droplets from the nose or mouth which are spread when a person with COVID-19 coughs or exhales. These droplets land on objects and surfaces around the person. Other people then catch COVID-19 by touching these objects or surfaces, then touching their eyes, nose or mouth. People can also catch COVID-19 if they breathe in droplets from a person with COVID-19 who coughs out or exhales droplets.

“How does COVID-19 spread?,” World Health Organization (April 16, 2020), *available at* <https://www.who.int/news-room/q-a-detail/q-acoronaviruses>.

45. Aerosolized droplets exhaled by normal breathing can travel significant distances and stay suspended in air for hours until gravity ultimately forces them to the nearest surface. Studies suggest that the SARS-CoV-2 virus can remain contagious on some surfaces for up to six days. Alex W.H. Chin, *et al.*, “Stability of SARS-CoV-2 in different environmental conditions,” *The Lancet Microbe* (April 2, 2020), *available at*

[https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247\(20\)30003-3/fulltext](https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247(20)30003-3/fulltext).

46. In a recently published study, researchers determined that, “[a]irborne transmission of viable SARS-CoV-2 is likely and plays a critical role in the spread of COVID-19” and that for aerosol-based transmission, “measures such as physical distancing by 6 feet would not be helpful in an indoor setting” John A. Lednicky, *et al.*, “Viable SARS-CoV-2 in the air of a hospital room 1 with COVID-19 patients,” (Aug. 4, 2020), *available at*

<https://www.medrxiv.org/content/10.1101/2020.08.03.20167395v1.full.pdf>.

47. A study in Guangzhou, China, identified a COVID-19 outbreak in an air-conditioned restaurant. The study concluded that, “[I]n this outbreak, droplet transmission was prompted by air-conditioned ventilation. The key factor for infection was the direction of the airflow.” Jianyun Lu, *et al.*, “COVID-19 Outbreak Associated with Air Conditioning in

Restaurant, Guangzhou, China, 2020,” *Emerging Infectious Diseases* (July 2020), available at https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article.

48. Indeed, the potential danger of COVID-19 in health clubs and indoor tennis facilities is significant. Sportime serves over 30,000 tennis and sports participants and visitors each year. Countless individuals, asymptomatic, pre-symptomatic, and otherwise, experienced the Insured Clubs prior to the closure orders described below, and may have unknowingly spread COVID-19 inside the Insured Clubs. Additionally, the operation of Insured Clubs involves large gatherings of people within enclosed spaces for prolonged periods, increasing the likelihood that SARS-CoV-2 or COVID-19 would be in the airspace and on surfaces, and that such Insured Clubs would be potential sources of exposure.

49. Sportime is indeed aware of customers and employees who tested positive for COVID-19.

50. Since January 1, 2020, there have been more than 35,109,300 confirmed cases of COVID-19 throughout the world, more than 1,035,300 of which have resulted in death as of the date of filing of this complaint. See <https://covid19.who.int/>. There have been more than 7,305,270 confirmed cases of COVID-19 in the United States, more than 208,000 of which have resulted in death. There have been confirmed cases of COVID-19 in every state, and in every county in New York. Moreover, due in part to the initial absence and later limited availability of tests, and questions about the accuracy of the tests, it is believed that the true number of COVID-19 cases is significantly higher than the reported numbers might suggest. See <https://www.nbcnews.com/health/health-news/how-many-people-have-had-coronavirus-no-symptoms-n1187681>.

51. In response to COVID-19, civil authorities throughout the United States began issuing “stay-at-home” and “shelter in place” orders, requiring the suspension of non-essential business operations, and ordering businesses to close in March 2020.

52. To help create a framework for the implementation of such policies, Governor Andrew Cuomo issued Executive Order No. 202 on March 7, 2020, declaring a state of emergency in New York. The Executive Order makes reference to the World Health Organization’s designation of “the novel coronavirus, COVID-19, outbreak” and that “both travel-related cases and community contact transmission of COVID-19 have been documented in New York and more are expected to continue.”

53. In apparent recognition of these facts, Executive Order 202.6 was issued by Governor Cuomo on March 16, 2020, directing that all non-essential businesses to be closed, effective on March 20, 2020.

54. On March 16, 2020, New York City Mayor Bill de Blasio issued Executive Order No. 100 in which he declared that “the virus is causing property loss and damage” (“March 16 Order”). In that same Executive Order, the Mayor directed the closure of restaurants and cafes, entertainment venues, and commercial gyms. Subsequent Executive Orders continued to describe the physical property damage being sustained by New York businesses.

55. On March 16, in an e-mail to Sportime, the New York City Department of Parks and Recreation, the City agency that, in the context of the aforementioned license agreement, manages the relationship between Sportime and the City of New York, mandated the closure of all New York City Park indoor tennis concessions by 8:00pm that evening.

56. As of March 22, 2020, all of New York State was subject to the “New York State on PAUSE” executive order which directed all non-essential businesses to close by 8 p.m. on that date (“March 20 Order”).

57. On April 26, 2020, Governor Cuomo announced a phased approach to reopen industries and businesses based upon a data-driven, regional analysis.

58. Suffolk, Nassau, Schenectady, and Westchester Counties all issued States of Emergency due to COVID-19 in March 2020, and followed Governor Cuomo’s executive orders and restrictions set forth below.

Indoor and Outdoor Tennis and Sports

59. On May 15, 2020, Governor Cuomo announced that the State of New York, excluding New York City, had entered Phase One of its reopening which permitted lower risk recreational activities, including socially distant sports such as outdoor tennis, to continue.

60. On June 8, 2020, New York City entered Phase One and then, on June 22, 2020, joined Phase Two with the rest of the State and outdoor tennis was resumed in the City.

61. On July 6, 2020, Governor Cuomo announced that New York State, excluding New York City, was entering Phase Three, which permitted indoor recreational activities, like indoor tennis, to resume throughout the State subject to the following restrictions:

- a. Capacity of venues must be limited to 50 percent;
- b. Business must limit sport spectators to no more than two spectators per player;
- c. Businesses must ensure that a distance of at least six feet is always maintained among individuals unless safety or the core activity requires a shorter distance;
- d. Businesses must ensure that employees at check-in or appointments desks always maintain a six feet distance from each other or install a physical barrier;
- e. Businesses must post signage throughout the site, consistent with New York State Department of Health COVID-19 signage requirements;

- f. Businesses must monitor and control the flow of traffic into the facility to ensure adherence to maximum capacity requirements;
- g. Businesses must ensure that employees and spectators wear face coverings;
- h. Businesses must procure acceptable face coverings for their employees at no cost to the employee;
- i. Businesses must clean or replace face coverings after every use;
- j. Businesses must train workers on how to wear and discard PPE like face coverings;
- k. Businesses must provide and maintain hand hygiene stations on site consisting of soap, running warm water, disposable paper towels and/or an alcohol-based hand sanitizer where handwashing facilities may not be practical;
- l. Businesses must provide appropriate cleaning and disinfection supplies for shared and frequently touched surfaces to be cleaned before and after use;
- m. Businesses must ensure regular cleaning and disinfection of restrooms; and
- n. Businesses must implement mandatory daily health screening practices for employees and vendors.

62. On July 18, 2020, New York City joined with the rest of the State and indoor tennis resumed in the City as well, subject to the restrictions in the prior paragraph and further restrictions, as related to Sportime's Randall's Island facility, set forth by the NYC Department of Parks and Recreation.

Gyms & Fitness Centers

63. On August 24, 2020, Governor Cuomo allowed gyms and fitness centers to open throughout New York State, excluding New York City, subject to the following restrictions:

- a. Businesses are limited to 33 percent capacity;
- b. Face coverings required for both Patrons and Employees;
- c. Both employees and patrons must take and pass "health screenings;"
- d. 6 feet distance between patrons (explicitly mandatory during exercises and discouragement of "spotting" while lifting weights but if absolutely necessary must be done in the shortest amount of time necessary);
- e. Equipment must be moved and/or modified so that patrons are 6 feet apart;
- f. Businesses are required to install physical barriers required where social distancing is not possible (e.g., reception desks);

- g. Businesses must post COVID-19 signage consistent with Department of Health requirements);
- h. Communal showers must remain closed, individual showers may open but must be disinfected between each use;
- i. Businesses are required to install physical barriers between sinks and toilets;
- j. Business must provide and implement of touchless soap and paper towels;
- k. Businesses must implement the use of appointments or reservations;
- l. Businesses that provide work-out classes are encouraged to hold such classes outdoors and keep classes at 33 percent of the typical class size while maintaining that patrons are able to be 6 feet apart during class;
- m. Businesses that provide personal training are required to have those participating in personal training to wear a face covering and remain 6 feet apart and participants cannot share items, and businesses must clean and disinfect gear used during personal training between each use;
- n. The following amenities must remain closed: whirlpools, saunas, and steam rooms; communal showers; common seating areas within the gym or fitness center (e.g., couches near reception desks); water fountains (however, water bottle refill stations may remain open); and self-serve bars and samplers;
- o. In addition to the necessary PPE as required for certain workplace activities, Businesses must procure, fashion, or otherwise obtain acceptable face coverings, and provide such coverings to their employees while at work at no cost to the employee and those face coverings cannot be reused;
- p. Businesses must train workers on how to adequately don, doff, clean (as applicable), and discard PPE, including but not limited to, appropriate face coverings;
- q. Businesses must provide and maintain hand hygiene stations on site, as follows: For handwashing: soap, running warm water, and disposable paper towels, for hand sanitizing: an alcohol-based hand sanitizer containing at least 60% alcohol for areas where handwashing facilities may not be available or practical, hand sanitizer must be available throughout the gym or fitness center for use by employees and patrons (e.g., entrances, exits, appointment desks, next to workout stations), and touch-free hand sanitizer dispensers should be installed where possible;
- r. Businesses must conduct regular cleaning and disinfection of the gym or fitness center and more frequent cleaning and disinfection for high risk areas used by many individuals and for frequently touched surfaces. Cleaning and disinfection must be rigorous and ongoing and should occur frequently throughout the hours of operations and whenever needed;

- s. Businesses must ensure regular cleaning and disinfection of locker rooms and restrooms, specifically every two hours or more often depending on frequency of use;
- t. Businesses must ensure that shared workstations (e.g., check-in desks) are cleaned and disinfected between use by different employees; and
- u. Businesses must provide for the cleaning and disinfection of exposed areas in the event an individual is confirmed to have a positive case of COVID-19, with such cleaning and disinfection to include, at a minimum, all heavy transit areas and high-touch surfaces (e.g., fitness equipment, machines, handrails, check-in desks).
- v. Local governments will inspect fitness businesses to make sure that each business meets the State's requirements before they open and can stop gyms from holding indoor fitness classes.

64. The Mayor of the City of New York announced that gyms would open no earlier than September 2, 2020, and would not initially allow indoor fitness classes or indoor pools to operate.

Childcare and Day Camps

65. On June 2, 2020, Governor Cuomo announced that summer day camps could open statewide on June 29, 2020 pursuant to the following restrictions:

- a. Businesses should ensure a six feet distance between all employees when possible and must provide face coverings when distancing is not possible;
- b. Businesses must ensure all employees wear face coverings when interacting with children or campers, regardless of distance;
- c. Businesses must ensure that employee and children groupings are as static as possible by having the same group of children stay with the same staff wherever and whenever possible;
- d. Businesses must limit camper groups to no more than 15 children;
- e. Businesses must clean and disinfect shared workspaces between users;
- f. Businesses must post signs throughout the site, consistent with Department of Health COVID-19 signage;
- g. For pool and aquatic activities, businesses must ensure face coverings are not worn in the water, keep stable groups of children separated, encourage water activities where the staff can safely supervise without having to be in the water with the children, ensure appropriate social distancing is kept when possible, and enhance cleaning and disinfection protocols;

- h. For sport and athletic activities, businesses must keep stable groups of children separated and focus on activities with little or no physical contact;
- i. For food services, businesses must serve individual portions to children, keep stable groups of children separated, consider staggering mealtimes to reduce occupancy, and separate tables with seating at least six feet apart from other tables, as feasible;
- j. Businesses must make all reasonable efforts to discourage field trips;
- k. Businesses must limit in person employee gatherings to the greatest extent possible and use other methods such as video or teleconferencing whenever possible;
- l. Businesses must establish designated areas for pickups and deliveries and prohibit non-essential visitors to the facility, to the extent possible;
- m. Businesses must procure acceptable face coverings to provide to employees at no cost to the employee that must be cleaned or replaced after every use;
- n. Businesses must train their employees on how to wear, take off, clean, and discard PPE like face coverings;
- o. Businesses must put in place reasonable measures to limit the sharing of objects such as electronic equipment, arts and crafts materials, as well as the touching of shared surfaces or require employees to wear gloves;
- p. Businesses must ensure that employees and children perform hand hygiene immediately upon arrival, between all program activities, after using the restroom, before eating, and before departing the last program activity;
- q. Businesses must provide appropriate cleaning and disinfection supplies for shared and frequently touched surfaces;
- r. Businesses must conduct regular cleaning and disinfection of the site and more frequently cleaning and disinfection for high risk areas like common areas, doorknobs, handrails, bathrooms, and kitchens;
- s. Businesses must ensure that equipment and toys are regularly cleaned and disinfected using registered disinfectants and discourage use of equipment and toys that cannot be adequately cleaned; and
- t. Businesses must implement measures to limit sharing of personal times between children.

Restaurants and Cafes

66. With regard to restaurants and cafes, Executive Order No. 202.3, prohibited gatherings over a certain size and required “[a]ny restaurant or bar in the state of New York [to] cease serving food or beverage on-premises effective at 8:00 PM on March 16, 2020. Outdoor dining at restaurants in New York was not permitted until June 6, 2020, per Executive Order

202.38, when the Governor allowed “a restaurant or bar to serve patrons food or beverage on-premises only in outdoor space, provided such restaurant or bar is in compliance with Department of Health guidance promulgated for such activity.”

67. Executive Order No. 202.38 further required that:

- Tables must be 6 feet apart;
- Restaurants can only have as many tables that can fit while still keeping 6 feet distance;
- Tables are limited to a maximum of 10 people; and
- Restaurants are not permitted to sell alcohol to patrons who are not also purchasing food.

68. Pursuant to Executive Order Nos. 202.48 and 202.55, the prohibition on indoor dining was continued into September 2020.

69. On September 9, 2020, Governor Cuomo announced that the prohibition on indoor dining in New York City would be lifted on September 30, 2020. As of September 30, New York City restaurants were permitted to have indoor dining limited to 25 percent of their regular occupancy limit.

70. On June 22, 2020, New York City entered in Phase Two of Reopening. Phase Two permitted outdoor, though not indoor, dining at restaurants. In accordance with the State guidelines referenced above, the Mayor issued Emergency Executive Order No. 127.

Emergency Executive Order No. 127 permitted:

restaurants, bars and other establishments participating in the Open Restaurants Program established pursuant to Emergency Executive Order No. 126, dated June 18, 2020, to provide onsite service in accordance with all guidance and procedures applicable to such program. All restaurants, bars and other establishments offering food or drink may continue to provide take-out and delivery service, in accordance with the aforementioned Emergency Executive Orders.

71. As of the date of this filing, New York City is in a limited Phase Four of New York's reopening plan.

72. There is no set or anticipated date by which gyms, childcare programs, or restaurants will be permitted to reopen at full capacity (or will ever be permitted to do so absent, for example, the worldwide availability of a vaccine).

73. Based on conditions imposed upon Sportime, the reopening of the Insured Clubs, at each stage, has required physical and structural alterations, including the erection of protective barriers and partitions, installation of sanitary supplies throughout the Insured Clubs including on each tennis court, field, rink and at other activity areas new or re-designed air flow, filtration and HVAC systems, and even the redesign and physical alteration of the Insured Clubs themselves, including seating, restrooms, pathways for access and egress, relocation of reception and gate control, and areas for customers and employees.

Closures and Physical Alterations to the Clubs

74. In line with the above, all of the Insured Clubs were closed on March 16, 2020.

75. Starting on or about May 15, 2020, the Insured Clubs began to open in a limited capacity—only certain clubs, only outdoor courts, and only singles play or private lessons. Over time, more Insured Clubs were permitted to reopen, and doubles play and small group programs were also allowed. Eventually, as the Summer went on, all of the Insured Clubs were permitted to reopen, and this ultimately included access to indoor tennis, food and beverage, and pro-shops. In addition, summer camps at all of the Insured Clubs were ultimately permitted to open.

76. In late August, gyms and fitness centers began to reopen in certain locations outside of New York City.

77. As foreshadowed above, re-openings came with significant physical alterations and modifications to the Insured Clubs.

78. All Insured Clubs implemented facility safety modifications including the following:

- a. Use of “traffic” patterns and signage to maintain minimum physical distance throughout the facilities;
- b. Installation of protective Plexiglass barriers at reception and other customer service counters, and throughout offices and other workspaces, to create physical separation;
- c. Offices and reception areas relocated or reconfigured to create physical distancing, proper check-in, etc.;
- d. Tables, chairs, lounge and other furniture have been removed, pared down and/or rearranged throughout Sportime clubs to ensure physical distancing and to discourage gathering/lingering on club premises;
- e. Hand sanitizers and sanitizing supplies installed and available to staff and to customers, including in all tennis courts and playing areas, facility lobbies, locker rooms, offices, and common areas;
- f. Full time cleaning staff stationed in gyms and in other high traffic club areas including locker rooms and offices during peak use periods;
- g. Water coolers or non-contact water bottle fillers (installed at certain Sportime sites, e.g. 12 water fountains at Sportime Randall’s Island were replaced with non-contact bottle fillers) are provided on court with hand sanitizer and disinfection supplies are located adjacent to each water device (all water fountains are taken out of service);
- h. All “demo” use rackets must be sanitized by staff before and after every use;
- i. All Sportime staff, members, players, students, and campers are required to wear protective face coverings;
- j. Social distancing of six feet must be maintained in all programs and lessons;
- k. Spectators may watch matches and practices from outdoors and if permitted inside will be required to physically distance and wear protective face coverings;
- l. Daily health screenings will be required for summer campers; and
- m. All Sportime Gym/Fitness Centers are limited to 33 percent of their usual occupancy limit;
- n. Gym/Fitness equipment has been rearranged, with some taken out of service entirely to facilitate physical distancing.

79. All Insured Clubs implemented alterations to tennis courts including the following:

- a. No more than two players can play on the same side of the net and no more than four players per court;

- b. Players who are not hitting must wait in designated areas;
- c. Players must change ends using the sideline paths designated by cones;
- d. All balls must be cleared with rackets or feet and cannot be touched by hands;
- e. All players and coaches must wear masks when they come onto a court and when leaving a court and on court when six feet distancing from others is not possible;
- f. Provide hand sanitizer and disinfectant wipes between all tennis courts;
- g. All players and coaches must wash their hands before coming onto a court, use hand sanitizers during breaks, and use hand sanitizers or wash their hands at the end of matches, sessions, or lessons;
- h. All equipment touched by players or coaches must be disinfected by the coach at the end of the session;
- i. Players and coaches are encouraged to change their grips and/or disinfect their rackets after each play;
- j. Fitness warmups will be separated so to keep each court limited to 4 players;
- k. During the outdoor season, in case of rain, participants, other than those who can remain on the indoor courts, will be sent home, unless camp is in session in which case all participants may be sent home; and
- l. Some Insured Clubs adjusted group tennis program start and end times in order to avoid large groups of players entering and exiting courts and clubs at the same time.

80. All Insured Clubs implemented the following rules for employees:

- a. All employees must stay 6 feet away from others and eliminate all physical contact with others, wear Sportime supplied protective face coverings, and implement regular hand sanitizing; and
- b. All employees must complete a daily self-assessment and an on-site daily health screening prior to commencing work.

81. As a result of the above, Sportime has suffered losses and incurred expenses in excess of \$9,000,000 through August 2020. These losses are continuing.

**ASSURANCE'S KNOWLEDGE OF THE RISKS OF PANDEMICS
AND ITS DECISION TO PROVIDE COVERAGE**

82. Well before the Policy was sold to Sportime, Assurance knew of the possibility of a pandemic and the potential losses that could be associated with a pandemic. In fact, Assurance has long known that if there were a pandemic, it could be obligated to pay substantial amounts

under all risk policies such as the Policy. For years, including for the fiscal year ended December 31, 2019, AIG stated as follows in its Form 10-K filed with the United States Securities and Exchange Commission:

Our consolidated results of operations, liquidity, financial condition and ratings are subject to the effects of natural and man-made catastrophic events. Events such as hurricanes, windstorms, flooding, earthquakes, wildfires. . . pandemic and other highly contagious diseases, mass torts and other catastrophes have adversely affected our business in the past and could do so in the future.

AIG further stated in its Form 10-K that, “Catastrophic events, and any relevant regulations, could expose us to . . . widespread claim costs associated with property [and] business interruption” claims. *Id.* Indeed, in the same 10-K, AIG notes concern about its losses and its ability to mitigate its exposure “if the frequency and severity of catastrophic events such as pandemics. . . continue to increase.” Further in that 10-K, AIG presciently concedes that:

[O]ur current business continuity and disaster recovery plans may not be sufficient to reduce the impact of pandemics and other natural or man-made catastrophic events that are beyond our anticipated thresholds or impact tolerances. If our risk management policies and procedures are ineffective, we may suffer unexpected losses and could be materially adversely affected.

83. In that 10-K, AIG discusses its modeling for risk exposure due to a pandemic.

Under “Risk Measurement, Monitoring and Limits,” in their words:

We use a number of approaches to measure our insurance risk exposure, including: . . .

Scenario analysis. Scenario or deterministic analysis is used to measure and monitor risks such as terrorism and pandemic or to estimate losses due to man-made catastrophic scenarios.

84. In the “General Insurance Companies’ Key Risks” section of that 10-K, where Assurance is identified as a “General Insurance Company,” AIG notes that, “Other risks, such as

man-made catastrophes or pandemic disease, could also adversely affect our business and operating results to the extent they are covered by our insurance products.”

85. Thus, Sportime is informed and believes, and on that basis alleges, that AIG knew that its property and business interruption policies, such as the Policy, would cover losses associated with pandemics. In fact, as these disclosures show, instead of warning its insureds, including Sportime, that their policies would not cover pandemic-associated losses, AIG warned the public and their shareholders that the amounts they might have to pay for such losses could affect their financial condition.

86. There were many other publicly available reports about the risks of pandemics and what insurers should do—in the months and years before Assurance sold the Policy to Sportime in 2019. *See, e.g.*, “What the 1918 Flu Pandemic Can Teach Today’s Insurers,” *AIR* (Mar. 29, 2018), <https://www.air-worldwide.com/publications/air-currents/2018/What-the-1918-Flu-Pandemic-Can-Teach-Today-s-Insurers/> (“Even with today’s technology, a modern severe pandemic would cause substantive direct financial losses to the insurance community. In addition, indirect losses would be severe, most notably on the asset side of the balance sheet.”).

87. One insurance industry repository shows the proverbial tip of the iceberg about how much information was available to insurers regarding the risks of pandemics. The Insurance Library Association of Boston, founded in 1887, describes itself as “the leading resource for and provider of literature, information services, and quality professional education for the insurance industry and related interests.” <http://insurancelibrary.org/about-us/>. The Association states on its website:

The past 20 years has seen the rise of a number of pandemics. Slate recently published an article on what has been learned about treating them in that time. We thought it might be

apt for us to take a look back and see what the insurance industry has learned as well.

<http://insurancelibrary.org/pandemics-and-insurance/>.

88. Thus, Assurance knew, and publicly acknowledged, that it could be obligated to pay for massive losses in the event of a pandemic. Assurance also knew that they could use common and widely available exclusions to guard against being obligated to pay for pandemic-associated losses. However, they decided not to do so here, selling Sportime an all-risks Policy and deliberately omitting from the Policy any potentially applicable exclusion associated with a virus-related pandemic.

THE POLICY

89. Assurance sold Sportime a Property Performance Policy, identified by Policy No. 025032601, for the period May 15, 2019 to May 15, 2020 (the “Policy”). A true and correct copy of the Policy is attached hereto as Exhibit 1 and incorporated herein by reference. For ease of reference, the Policy has been bates stamped ST000001 – ST000180.

90. In advance of selling the Policy to Sportime, Assurance engaged in, or had reasonable opportunities to engage in, an extensive underwriting investigation, and became familiar with and knowledgeable of the nature and scope of Sportime’s business and the nature of the risks that Indemnity was insuring against.

91. The Property Performance form marketing materials describe the form as providing “advanced, broad, all-risk property damage and business interruption in a concise form” and a “true reflection of AIG’s continued commitment to deliver innovative solutions that respond to a world of ever-changing needs.”

<https://www.aig.com/content/dam/aig/america-canada/us/documents/business/property/4090d-whats-inside-property-performance-digital-final.pdf>

92. As to “Improving Business Continuity,” the marketing materials state that the form “is designed to maximize our client’s recovery in the event of loss. Our broad all risks coverage responds to the complex exposures faced by our clients.” *Id.*

93. The Policy is an “all risk” property insurance policy—that is, a policy that insures all risks of physical loss or damage except those plainly, clearly, conspicuously, and expressly excluded.

94. The Policy insures, among other things, Sportime’s interests in the real and personal property at the following locations (collectively, the “Insured Clubs”):

- 275 Old Indian Head Road, Kings Park, NY
- 175-181 Merrick Road, Lynbrook, NY
- 4101 and 4105 Hempstead Turnpike Bethpage Multi-Sport, Bethpage, NY
- 2571 Quogue Riverhead Road, East Quogue, NY
- 150 Town Lane, Amagansett, NY
- Harbor Island Park, Mamaroneck, NY
- 2 Landing Road, Roslyn, NY
- 75 Haskett Drive – Bethpage Syosset Tennis, Syosset, NY
- 101 Norcross Avenue – Bethpage Syosset, Bethpage, NY
- 1 Randall’s Island, New York, NY
- 2699 Curry Road, Schenectady, NY
- 660 White Plains Road, Lake Isle Country Club (Sportime Lake Isle Club), Eastchester, NY
- 320 Abrahams Path, Amagansett, NY; and
- 385 Abrahams Path, Amagansett, NY.

See Schedule of Locations, attached hereto as Exhibit 2.

95. The Policy is comprised of a number of forms and endorsements that define the scope of coverage. Like most commercial property insurance policies, the Policy insures not only against physical loss or damage to covered property, but also for resulting economic and financial losses. In the Policy, these coverages are referred to as “Time Element Coverages”. See ST000034. The Policy contains a per occurrence policy limit of \$84,952,133. ST000001.

Time Element Coverages

96. The Policy’s Time Element Coverages are designed, understood, stated, and intended to insure Sportime, for economic losses. Specifically, Assurance promised to:

[p]ay the actual business income loss sustained by you due to the necessary partial or total interruption of your business operations, services or production during the period of indemnity as a result of direct physical loss or damage to: (1) covered property by a covered cause of loss or (2) property of the type insured under this Policy by a covered cause of loss which directly affects your use of the covered property, provided that you are a lessee or occupant of the premises where the direct physical loss or damage occurred.

ST000032.

97. “Covered cause(s) of loss” is defined to mean “a peril or other type of loss, not otherwise excluded under this Policy.” ST000039.

98. The “Period of Indemnity” is no more than one year. ST000043; ST000005.

99. The wording “direct physical loss or damage” is not defined in the Policy.

100. The Time Element Coverages includes a number of “Additional Time Element Coverages.”

101. The Additional Time Element Coverage for “Attraction Property” requires Assurance to pay for the “actual business income loss sustained by you” and “extra expense caused by direct physical loss or damage by a covered cause of loss to property of the type

insured under this Policy that attracts business to a covered location” within 1 mile of the covered location. ST000036; ST000004.

102. Attraction Property coverage begins on the date and time that the attraction property sustains such direct physical loss or damage and ends on the date and time that the attraction property could be reopened for business but not more than 30 days. *Id.*

103. The Additional Time Element Coverage for “Contingent Time Element” requires Assurance to pay actual business income loss and extra expense sustained where “direct physical loss or damage by a covered cause of loss to property of the type insured under this Policy is sustained by your direct supplier or your direct customer, anywhere in the world and such loss or damage” wholly or partially prevents your direct supplier or direct customer from supplying/accepting goods or services. ST000036.

104. The Additional Time Element Coverage for Contingent Time Element also provides coverage for actual business income loss and extra expense sustained by a direct supplier or direct customer in accordance with the Ingress & Egress, Interruption by Civil or Military Authority, and Crisis Management Additional Time Element Coverages. *Id.*

105. The Additional Time Element Coverage for “Crisis Management” requires Assurance to pay actual business income loss and extra expense due to an order of civil authority that “limits, restricts or prohibits partial or total access to a covered location, provided that such order is a direct result of: ...b. A death or bodily injury (not including, disease or sickness) at such covered location.”

106. The Additional Time Element Coverage for “Extended Period of Indemnity” requires Assurance, in certain circumstances, to pay business income loss “for the additional

length of time required to restore to the condition that would have existed had no loss occurred commencing with the later of the following dates:

- a. The date of which our liability for loss or damage would otherwise terminate; or
- b. The earlier date on which either:
 - (1) Normal operations resume; or
 - (2) Repairing, replacing, or rebuilding of the covered property that has been damaged is actually completed,

but in no event for a period of time exceeding [365 days].” ST000026; ST0000005.

107. The Additional Time Element Coverage for “Extra Expense” requires Assurance to pay “extra expense during the period of indemnity resulting from direct physical loss or damage caused by a covered cause of loss.” ST000027. Extra expense means reasonable and necessary:

- a. Extra expense incurred to temporarily continue as nearly normal as practicable the conduct of your business;
- b. Extra costs of costs of temporarily using your property or facilities or the property or facilities of others...

Id.

108. The Additional Time Element Coverage for “Ingress & Egress” requires Assurance to pay “the actual business income loss sustained by you and extra expense caused by direct physical loss or damage by covered cause of loss to property not insured under the Policy,” provided that:

- a. Such direct physical loss or damage to such property partially or totally prevents physical ingress to or egress from a covered location; and
- b. Such property not insured under this Policy is within [1 mile from the covered location].

Id.; ST000005.

109. The Additional Time Element Coverage for Ingress & Egress begins on the date and time that ingress to or egress from the covered location is partially or totally prevented and ends on the date and time that the covered located could be reopened for business, but in no event more than 30 days. *Id.*

110. The Additional Time Element Coverage for “Interruption by Civil or Military Authority” requires Assurance to pay “the actual business income loss sustained by you and extra expense if an order of civil or military authority limits, restricts or prohibits access to property not insured under this Policy provided that:

- a. Such property direct physical loss or damage by a covered cause of loss;
- b. Such property is within [1 mile from the covered location]; and
- c. The effect of such order is to partially or totally prohibit access to a covered location.

Id.; ST000005.

111. The Additional Time Element Coverage for Interruption by Civil or Military Authority “begins on the effective date and time of such order and ends on the date and time that the covered location could be reopened for business, but in no event more than [30 days].” *Id.*

112. Critically, unlike many policies that provide business income coverage and the “overwhelming majority” of AIG’s business interruption policies,” the Policy does not contain any exclusion for losses caused by or resulting from the spread of viruses, communicable diseases, or pandemics. Because the Policy is an “all-risks” policy that expressly insures all risks not expressly excluded, it insures losses caused by or resulting from viruses, communicable diseases, and pandemics. Simply put, because these perils are not excluded, they are expressly insured as “covered causes of loss.”

113. Sportime is informed and believes, and on that basis alleges, that when Assurance sold Sportime the Policy, it knew for over a decade that there were standard-form exclusions available in the insurance marketplace that could exclude coverage for losses caused by viruses and pandemics; that other insurers included such exclusions in policies they sold; and, in fact, that it and other AIG insurers included such exclusions in the “overwhelming majority” of policies they sold.

114. Sportime reasonably expected Assurance to pay under its policy for Sportime’s financial losses. After all, Assurance markets its Property Performance form as providing “advanced, broad, all-risk property damage and business interruption in a concise form” that “is designed to maximize our client’s recovery in the event of loss.” Instead of honoring those promises, AIG wrongfully withheld the policy benefits that Sportime is entitled to receive – and that it needs to weather the past, present, and future circumstances associated with the spread of SARS-CoV-2 and actions to “flatten the curve,” to rebound from its financial losses, and to continue operating as a productive member of New York’s economy.

115. Worse yet, Assurance predetermined that it would deny all business income losses associated with SARS-CoV-2, COVID-19, and closure orders. Per the CEO of AIG’s General

Insurance Division, which includes Assurance, “AIG is not expecting to pay business interruption on most of its property policies.”

116. Assurance took this position six weeks after the March 16 Order declaring that “the virus physically is causing property loss and damage.” AIG also took the same position through its trade association, the American Property Casualty Insurance Association in a letter to the United States House of Representatives Committee on Business. The Association wrote on March 18, 2020, just two days after the March 16 Order, stating: “Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19.” *See* March 18, 2020, Letter, American Property Casualty Insurance Association, The Council of Insurance Agents & Brokers, Big Independent Insurance Agents & Brokers of America, and National Association of Mutual Insurance Companies to House Committee on Small Business. Thus, it is clear that before Assurance did any meaningful investigation (if it did any investigation at all), it already had decided it would not pay Sportime for its losses under the Policy.

117. There is no merit to Assurance’s refusal to honor its contractual promises to Sportime. In selling its broad, “all-risk” Property Performance form “designed to maximize our client’s recovery in the event of loss,” Assurance promised to insure financial losses attributable to “direct physical loss or damage” to property as insured under the Policy unless an exclusion clearly and conspicuously applied as a bar to coverage. Pursuant to governing principles of New York insurance law, as well as authority from other states throughout the country, the presence of SARS-CoV-2 in a building’s airspace and on or around property constitutes “direct physical loss or damage” to property. Even if it did not, the closures, “stay-at-home,” and other orders of civil authorities substantially impaired and rendered incapable the performance of the intended

function of Sportime's properties. Moreover, even though the insurance industry has employed a standard-form "virus" exclusion since 2006 and has known of the risk of pandemics for years, Assurance sold Sportime a policy without any exclusions for financial losses attributable to viruses, communicable diseases, or pandemics.

118. Additionally, even if the Insured Clubs did not sustain damage from the presence of SARS-CoV-2, Sportime was obligated under the Policy to take such steps, such as closing, to prevent or mitigate loss, and Assurance was obligated to pay for losses Sportime incurred, and incurs, in doing so.

119. Furthermore, even if Sportime suffered no "direct physical loss or damage" to its insured property, other provisions in the Policy insure Sportime for its losses resulting from the presence of SARS-CoV-2 elsewhere, losses caused by the issuance of orders of civil authority, and interference with ingress or egress to its premises.

ASSURANCE'S BREACHES AND WRONGFUL CONDUCT

120. As a result of the "necessary partial or total interruption" of Sportime's business operations, Sportime sustained covered business income loss as defined in the Policy. These losses were sustained due to the "direct physical loss or damage to: (1) covered property by a covered cause of loss or (2) property of the type insured under this Policy by a covered cause of loss which *directly affects your use of the covered property.*" (Emphasis added). These losses were also caused by the actions of the City and State of New York, and Suffolk, Nassau, Schenectady, and Westchester Counties, each of which are a "civil authority" (collectively, the "Civil Authorities").

121. The actions undertaken by the Civil Authorities were issued due to the presence of SARS-CoV-2 and COVID-19 in the jurisdictions of the Civil Authorities, and the desire to avoid the spread of COVID-19. Because the SARS-CoV-2 virus and/or COVID-19 can adhere

to surfaces of property for at least several days and can linger in the air in buildings for at least several hours, the presence of the SARS-CoV-2 virus and/or COVID-19 on or around property amounts to “direct physical loss or damage to property,” as that phrase is used in the Policy.

122. Given the manner in which the SARS-CoV-2 virus and/or COVID-19 lingers in the air and on surfaces, and its manner of transmission, and the desire to “flatten the curve,” the Insured Clubs were not capable of being used for their essential functions. Accordingly, the actions taken by the Civil Authorities substantially impaired Sportime’s properties, constituting “direct physical loss or damage to” the Insured Clubs.

123. And, as required to trigger Interruption by Civil or Military Authority coverage under the Policy, the orders of the Civil Authorities limited, restricted, and prohibited access to property not insured under the Policy and: (a) the property sustained direct physical loss or damage by a covered cause of loss; (b) the property was within 1 mile of the covered location, and; (c) the *effect* of the order was to *partially or totally prohibit* access to a covered location.

124. As previously noted, the Civil Authorities expressly referenced the community spread and transmission of SARS-CoV-2 and COVID-19 in their respective jurisdictions when taking action to prohibit access to the Insured Clubs.

125. Likewise, the Contingent Time Element coverages under the Policy were triggered. “Direct physical loss or damage to” properties around the world prevented Sportime’s direct customers from accepting Sportime’s goods and/or services. This includes the partial or total prevention of ingress/egress from the location of Sportime’s direct customers as well as orders of civil authority which prohibited access to their locations.

126. Additionally, the closures were necessary to prevent SARS-CoV-2 and COVID-19 from spreading inside of the Insured Clubs. The costs and losses associated with the closures

therefore constitute reasonable costs incurred to reduce, prevent, and/or mitigate loss. Assurance is obligated to pay these amounts to Sportime pursuant to the Policy which obligated Sportime “[i]n case of imminent loss or damage, [to] make reasonable efforts to protect property from such loss or damage,” and in case of loss or damage to “[p]rotect the property from further loss or damage,” as well as the common law doctrine of mitigation. *See* ST000044; ST000048.

127. Although Sportime sustained business income losses that fall squarely within the Policy’s Time Element Coverages, Assurance failed and refused to acknowledge coverage for those losses and refused to pay any portion of them, including the amounts Sportime has incurred, and is incurring, to mitigate its otherwise insured losses.

128. Indeed, after a perfunctory “investigation” into Sportime’s losses, Assurance denied Sportime’s claim and incorrectly asserted that its losses were not caused by any direct physical loss or damage to covered property or leased property. Assurance further took the position that there was no direct physical loss or damage that prevented physical ingress or egress, and no order restricting or prohibiting access to property within one mile partially or totally prohibiting access to a covered location.

129. Regarding civil authority coverage, Assurance took the position that “the reason for the [civil authority] order is because of the COVID-19 virus. The COVID-19 virus is a virus which, per the policy, is defined as a contaminant or pollutant and is specifically excluded by the policy.”

130. Assurance took this position even though Civil Authorities had issued orders in response to the presence of COVID-19 in New York, even though Mayor de Blasio had declared that SARS-CoV-2 virus was causing property damage, and even though the presence of SARS-

CoV-2 virus and/or COVID-19 on or around property amounts to “direct physical loss or damage to property” under the governing rules of insurance policy interpretation.

131. Sportime is informed and believes, and on that basis alleges, that Assurance also took this position and denied Sportime’s claim despite knowing for decades that the contamination of property by a hazardous substance has been deemed to constitute property damage, and, that members of the AIG group of companies had litigated and lost this issue. *See, e.g., AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 842 (1990) (“contamination of the environment satisfies” the requirement of property damage); *Sentinel Mgt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (“[A] building’s function may be seriously impaired or destroyed and the property rendered useless by the presence of contaminants. . . . Under these circumstances, we must conclude that contamination by asbestos may constitute a direct, physical loss to property under an all-risk insurance policy.”); *Manpower Inc. v. Ins. Co. of PA* 807 F. Supp. 2d 806 (E.D. Wisc. 2011). At a minimum, in light of these and many other court decisions, Assurance knew that its policy language reasonably could be interpreted to cover losses associated with pandemics and viruses, like Sportime’s losses. Sportime is informed and believes and, on that basis alleges, that rather than define “direct physical loss or damage to property,” Assurance elected to leave the language as is, knowing that insureds could, and likely would, understand it to mean that virus and pandemic-associated losses would be insured.

132. Sportime is informed and believes, and on that basis alleges, that Assurance denied Sportime’s claim despite knowing for decades that Polluter’s exclusions have been limited to environmental and industrial pollution and that members of the AIG group of companies had litigated this issue. *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Am. Re-Ins.*

Co., 351 F. Supp. 2d 201 (S.D.N.Y. 2005) (AIG prevails on argument for re-insurance coverage that a similar Polluter’s exclusion applies to environmental and industrial pollution); *Pro-Boll Chemical & Fertilizer Co., Inc. v. U.S. Fire & Guar. Co.*, 2004 WL 3494045 (W.D. La. Nov. 15, 2004) (finding that the AIG-related defendants did not have to provide coverage under a similar Polluter’s exclusion and noting that the purpose of such an exclusion is “to strengthen environmental standards by imposing the full risk of loss due to personal injury or property damage from pollution upon the polluter by eliminating the option of spreading that risk through insurance coverage”); *see also Parks Real Estate Purchasing Group v. St. Paul Fire and Marine Ins. Co.*, 472 F.3d 33, 48 (2d Cir. 2006); *Janart 55 West 8th LLC v. Greenwich Insurance Company*, 614 F. Supp. 2d 473 (S.D.N.Y. 2009); *Johnson v. Clarendon Nat. Ins. Co.*, No. G039659, 2009 WL 2522619, at *13 (Cal. Ct. App. Feb. 4, 2009) (“Does a policyholder pollute the environment by sneezing and passing a virus to their neighbor? A layperson would not reasonably interpret the exclusionary language to apply to the above scenarios.”). At a minimum, in light of these and many other court decisions, Assurance knew that its policy language applied to environmental and industrial pollution, and could therefore reasonably be interpreted to cover and not bar losses associated with pandemics, communicable diseases, and viruses, like Sportime’s losses.

133. The Policy does not include, and Assurance consciously decided not to include, any exclusions conspicuously, plainly, clearly, and unambiguously barring coverage for losses attributable to viruses, communicable diseases or pandemics.

134. Numerous property and business interruption insurers, including AIG, issue policies purporting to exclude coverage for losses caused by or resulting from viruses and/or communicable diseases, and such exclusions have been in broad circulation for well over a

decade. For instance, as noted above, in 2006, the Insurance Services Office (“ISO”) introduced a form exclusion titled “Exclusion for Loss Due to Virus or Bacteria.” ISO is responsible for drafting many of the insurance policy forms relied on by property insurers throughout the United States, and many domestic property and business interruption insurers employ ISO forms in their policies. In the July 6, 2006, circular prepared as part of its filing of the exclusion with state insurance regulators, ISO recognized that viruses could cause property damage, stating:

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, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses. Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage.

135. ISO and the insurance industry have long recognized that the presence of a virus on or around property can constitute direct physical loss or damage to property, and many insurers throughout the country employ exclusions purportedly designed to limit or bar coverage for certain losses and expenses caused by the presence of a virus.

136. To the extent not waived or otherwise excused, Sportime has complied with all terms and conditions precedent contained in the Policy. Therefore, Sportime is entitled to all benefits of insurance provided by the Policy.

FIRST CAUSE OF ACTION

(Breach of Contract)

137. Sportime realleges and incorporates by reference herein each allegation contained in paragraphs 1 through 136 above.

138. The Policy constitutes a valid contract of insurance coverage between Sportime and Assurance, and its terms and conditions have been triggered to provide coverage to Sportime.

139. Sportime has complied with all conditions precedent to coverage and satisfied all obligations to the extent that they have not been waived or abrogated by the Assurance's conduct, omissions or actions.

140. All insurance premium due under the Policy has been paid.

141. Thus, Sportime is rightfully entitled to the coverage benefits of the Policy.

142. Assurance has breached its duties under the Policy by unreasonably stating that: Sportime sustained no "direct physical loss or damage;" there was no physical loss or damage that prevented physical ingress or egress to the covered location; there was no order restricting or prohibiting access to property within one mile partially or totally prohibiting access to a covered location; there is no civil authority coverage because COVID-19 is a virus and is excluded based on the Polluter's exclusion; and by denying coverage for all of Sportime's losses.

143. As a direct and proximate result of Assurance's acts, Sportime has been damaged and will continue to sustain damages in an amount to be determined at trial.

144. In addition, Sportime has incurred and continues to incur consequential damages, including claim preparation fees, internal costs, ongoing extra expenses, and attorneys' fees, due to Assurance's wrongful, unjustified and unreasonable failure to issue payment of amounts due, and improper treatment of the claim, all with the result of wrongfully diverting Sportime from its recovery efforts.

145. The consequential damages resulting from Assurance's conduct were within the contemplation of the parties at the time the Policy was sold, as the natural and probable result of

a breach of the Policy.

146. Sportime’s damages were foreseeable given the purpose and particular circumstances of the property damage and business interruption coverage sold by Assurance under the Policy.

147. As a result of Assurance’s breach, Sportime requests entry of judgment for breach of contract, awarding payment of damages in an amount equal to the amount owed under the Policy and consequential damages, each in amounts to be proven at trial.

SECOND CAUSE OF ACTION

(Declaratory Judgment)

148. Sportime realleges and incorporates by reference herein each allegation contained in paragraphs 1 through 136 above.

149. Pursuant to the terms of the Policy, Assurance is obligated to pay business income losses and extra expenses covered under the Policy that are not specifically, clearly, and unambiguously excluded.

150. Sportime’s losses are covered under multiple Policy coverage grants and are not excluded.

151. Assurance disputes and denies that it has any contractual obligation to cover any of Sportime’s losses under the Policy.

152. An actual and justiciable controversy has arisen between Sportime and Assurance as to Assurance’s obligation to acknowledge Sportime’s covered loss and pay Sportime under the Policy.

153. Sportime and Assurance dispute the meaning, scope and application of a variety of key terms and provisions in the Policy, including without limitation disputes concerning “direct physical loss or damage,” “property of the type insured under this Policy by a covered

cause of loss which directly affects your use of the covered property,” “Covered Cause of Loss,” and the scope of the Polluter’s exclusion.

154. Resolution of these controversies will establish Sportime’s right to recover payments under the Policy as a result of SARS-CoV-2 and COVID-19, and events therewith.

155. To date, Assurance has failed or refused to acknowledge their contractual obligations to pay Sportime’s covered loss.

156. By reason of the foregoing, an actual substantial and justiciable controversy exists between Sportime and Assurance, and a judicial declaration is necessary and appropriate so that the parties may ascertain their respective rights and duties.

157. Sportime seeks a declaration by the Court that Sportime is entitled to payment of its business income losses and extra expenses as a result of SARS-CoV-2 and COVID-19, and the effects therewith, as those perils caused “direct physical loss or damage” to the Insured Clubs, they directly “affect [Sportime’s] use of the covered property,” they are Covered Causes of Loss not excluded by any provisions in the Policy including the Polluter’s exclusion, and resolving in favor of Sportime any other disputes over terms and provisions of the Policy that arise in the course of this action.

PRAYER FOR RELIEF

WHEREFORE, Sportime prays for the following relief:

(a) On the First Cause of Action, Sportime requests that the Court enter judgment in favor of Sportime and against Assurance in an amount to be determined by the Court, including compensatory damages, consequential damages, and pre- and post-judgment interest; and

(b) On the Second Cause of Action, Sportime requests that the Court enter judgment in favor of Sportime and against Assurance, including a declaration that:

(1) Sportime is entitled to payment of its business income losses and extra expenses as a result of SARS-CoV-2 and COVID-19, and the effects therewith;

(2) SARS-CoV-2 and COVID-19, and the effects therewith, caused direct physical loss or damage to the Insured Clubs;

(3) SARS-CoV-2 and COVID-19, and the effects therewith, directly “affect [Sportime’s] use of the covered property;”

(4) SARS-CoV-2 and COVID-19, and the effects therewith are Covered Causes of Loss not excluded by any provisions in the Policy, including the Polluter’s exclusion; and

(5) Resolving in favor of Sportime any other disputes over terms and provisions of the Policy that arise in the course of this action.

(c) On all Causes of Action, Sportime requests that the Court award Sportime attorneys’ fees, costs, and other relief as this Court may deem appropriate.

DEMAND FOR JURY TRIAL

Sportime hereby demands a trial by jury on all issues so triable.

Dated: New York, New York
October 5, 2020

PASICH LLP

By:  _____

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