

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA**

THE LAST RESORT- MOBILE LLC,
individually and on behalf of all others
similarly situated,

Plaintiff,

v.

WESTCHESTER SURPLUS LINES
INSURANCE COMPANY,

Defendant.

Civil Action No. _____

Complaint - Class Action

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiff The Last Resort- Mobile LLC (d/b/a Poindexters) (“Poindexters”), individually and on behalf of the other members of the below-defined nationwide classes (collectively, the “Class”), brings this class action against Defendant Westchester Surplus Lines Insurance Company (“Westchester”), and in support there of states the following:

I. NATURE OF THE ACTION

1. Plaintiff owns and operates Poindexters, a bar and grill located in Mobile, Alabama. Poindexters’ existence, however, is now threatened by SARS-

CoV-2, sometimes called “Coronavirus” or by one of the names of the disease that it causes and that spreads it. For ease of reference, SARS-CoV-2 will be referred to as “COVID-19” herein.

2. To protect its business in the event that it suddenly had to suspend operations for reasons outside of its control, or in order to prevent further property damage, Plaintiff purchased insurance coverage from Westchester, including property coverage, as set forth in Westchester’s Business Income (And Extra Expense) Coverage Form (Form No. CP 00 30 10 12) (“Special Property Coverage Form”).

3. Westchester’s Special Property Coverage Form provides “Business Income” coverage, which promises to pay for loss due to the necessary suspension of operations caused by physical loss of or damage to the insured premises.

4. Westchester’s Special Property Coverage Form also provides “Civil Authority” coverage, which promises to pay for actual loss of Business income and necessary Extra Expense caused by the action of a civil authority that prohibits access to the insured premises because of damage at other property.

5. Westchester’s Special Property Coverage Form also provides “Extra Expense” coverage, which promises to pay the expense incurred to minimize the suspension of business and to continue operations.

6. Westchester's Special Property Coverage Form, under a section entitled "Duties in the Event of Loss" mandates that Westchester's insureds "must see that the following are done in the event of loss. . . [t]ake all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim."

7. Unlike many policies that provide Business Income coverage (also referred to as "business interruption" coverage), Westchester's Special Property Coverage Form does not include, and is not subject to, any exclusion for losses caused by viruses or communicable diseases.

8. Plaintiff was forced to suspend or reduce business at its restaurant and bar due to COVID-19 (a.k.a. the "coronavirus" or "SARS-CoV-2") and the resultant Closure Orders mandating the closure of businesses like Poindexters for on-site services, as well as in order to take necessary steps to prevent further damage and minimize the suspension of business and continue operations.

9. The presence of COVID-19 on property damages the property. It makes it unsafe.

10. Moreover, due to COVID-19, Plaintiff's property at Poindexters has suffered direct physical loss and damage under the plain meaning of those words.

COVID-19 has impaired Plaintiff's property by making it unusable in the way that it had been used before COVID-19.

11. For months, Poindexters was limited to serving carry-out. Instead of being able to pack in patrons, Poindexters can now, at most, only (1) serve takeout or (2) serve a severely limited number of customers at any one time, provided that tables are spaced for six feet social distancing. To do anything else would lead to the emergence or reemergence of COVID-19 at the restaurants. Until COVID-19 was brought even slightly under control, even such limited use as this was not possible.

12. The loss is "direct." Poindexters is not, for example, asking Westchester to reimburse Poindexters after someone obtained a judgment against Poindexters for getting them sick. Rather, Poindexters directly lost the functionality of its property for business purposes due to COVID-19.

13. The loss is "physical." The physical space of Plaintiff's property is unable to function in the manner in which it had previously functioned prior to the COVID-19 pandemic. Also, the loss is physical because COVID-19 is transmittable in aerosols and on physical surfaces. The probability of illness prevents the functioning of the physical space in no different of a way than how, on a rainy day,

an open roof caused by a tornado would make the interior space of a business unusable.

14. The loss is a “loss.” Poindexters has lost the use and function of physical space. While its property could once accommodate many, now they can physically only accommodate a few.

15. Westchester has, on a widescale and uniform basis, refused to pay its insureds under its Business Income, Civil Authority, Extra Expense, and Sue and Labor coverages for losses suffered due to COVID-19, any orders by civil authorities that have required the necessary suspension of business, and any efforts to prevent further property damage or to minimize the suspension of business and continue operations.

II. JURISDICTION AND VENUE

16. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(d), because Plaintiff and Defendant are citizens of different states, and because: (a) the Class consists of at least 100 members; (b) the amount in controversy exceeds \$5,000,000 exclusive of interest and costs; and (c) no relevant exceptions apply to this claim.

17. This Court has personal jurisdiction over Defendant because Westchester is organized under the laws of Georgia and maintains its principal place of business within the State of Georgia.

18. Venue is proper in this District under 28 U.S.C. § 1391, because Defendant resides in this District and a substantial portion of the acts and conduct giving rise to the claims occurred within the District.

III. THE PARTIES

19. Plaintiff The Last Resort- Mobile LLC is a limited liability company organized and existing under the laws of Alabama, which is located at 5955 Old Shell Road, Mobile, Alabama 36608.

20. Upon information and belief, Defendant Westchester Surplus Lines Insurance Company is an insurance company organized under the laws of Georgia, with its principal place of business at 11575 Great Oaks Way, Suite 200, Alpharetta, Georgia 30022. At all times material hereto, Westchester conducted and transacted business through the selling and issuing of insurance policies within Alabama, including, but not limited to, selling and issuing property and business coverage to Plaintiff.

IV. FACTUAL BACKGROUND

A. *The Special Property Coverage Form*

21. In return for the payment of a premium, Westchester issued Policy Number F15253113 001 to Plaintiff for a policy period of January 24, 2020, to January 24, 2021, including a Business Income (And Extra Expense) Coverage Form (For Number CP 00 30 10 12). Policy Number F15253113 001 is attached hereto as Exhibit A. Plaintiff has performed all of its obligations under Policy Number F15253113 001, including the payment of premiums. The Covered Property, with respect to the Special Property Coverage Form, is Poindexters at 5955 Old Shell Road, Mobile, Alabama 36608.

22. In many parts of the world, property insurance is sold on a specific peril basis. Such policies cover a risk of loss if that risk of loss is specifically listed (e.g., hurricane, earthquake, H1N1, etc.). Most property policies sold in the United States, however, including those sold by Westchester, are all-risk property damage policies. These types of policies cover all risks of loss except for risks that are expressly and specifically excluded. With respect to the Special Property Coverage Form provided to Plaintiff, Westchester agreed to pay “Covered Causes of Loss,” meaning “direct physical loss” to Covered Property “unless the loss is excluded or limited” by the policy.

23. In the policy, Westchester did not exclude or limit coverage for losses from the spread of viruses or communicable diseases.

24. Losses due to COVID-19 are a Covered Cause of Loss under Westchester policies with the Special Property Coverage Form.

25. In the Special Property Coverage Form, Westchester agreed to pay for its insureds' actual loss of Business Income sustained due to the necessary suspension of its operations during the "period of restoration" caused by direct physical loss or damage. A "slowdown or cessation" of business activities at the Covered Property is a "suspension" under the policy, for which Westchester agreed to pay for loss of Business Income during the "period of restoration" that begins seventy-two hours after the time of direct physical loss.

26. "Business Income" means net income (net profit or loss before income taxes) that Plaintiff and the other Class Members would have earned or incurred, as well as continuing normal operating expenses incurred.

27. Plaintiff and the other Class Members' Covered Property suffered direct physical loss or damage. Due to COVID-19, their Covered Property has become unsafe, and thus does not function, for its intended purpose. Their Covered Properties' business functions have been impaired. If they were to conduct business as usual, the disease and virus would show up and people would get sick. This is

not a non-physical or remote loss such as one occasioned by a breach of contract, loss of a market, or the imposition of a governmental penalty.

28. The presence of virus or disease can constitute physical damage to property, as the insurance industry has recognized since at least 2006. When preparing so-called “virus” exclusions to be placed in some policies, but not others, the insurance industry drafting arm, Insurance Services Office (“ISO”), circulated a statement to state insurance regulators that included the following:

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. An allegation of property damage may be a point of disagreement in a particular case.

29. Plaintiff and the other Class Members’ Covered Property suffered direct physical loss or damage in the manner insurers anticipated in paragraph 28 above, as well.

30. In the Special Property Coverage Form, Westchester also agreed to pay necessary Extra Expense that its insureds incur during the “period of restoration”

that the insureds would not have incurred if there had been no direct loss or damage to the Covered Property.

31. “Extra Expense” includes expenses to avoid or minimize the suspension of business, continue operations, and to repair or replace property.

32. Westchester also agreed to “pay for the actual loss of Business Income” that its insureds sustain and necessary Extra Expense “caused by action of civil authority that prohibits access to” the Covered Property when a Covered Cause of Loss causes damage to property other than the Covered Property, the civil authority prohibits access to property immediately surrounding the damaged property, the Covered Property is within the prohibited area, and the civil authority action is taken “in response to dangerous physical conditions.”

33. COVID-19 caused damage to property near Plaintiff’s Covered Property and the Covered Property of the other Class Members in the same manner described above that it did so with Plaintiff’s Covered Property.

34. Westchester’s Special Property Coverage Form, under a section entitled “Duties in the Event of Loss” mandates that Westchester’s insureds “must see that the following are done in the event of loss. . . [t]ake all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the

settlement of the claim.” This type of coverage has historically been known as “sue and labor” coverage or a “sue and labor” provision, and property policies have long provided coverage for these types of expenses.

35. Losses caused by COVID-19 and the related orders issued by local, state, and federal authorities triggered the Business Income, Extra Expense, Civil Authority, and Sue and Labor provisions of the Westchester policy.

36. Indeed, many governmental bodies specifically found that COVID-19 causes property damage when issuing stay at home orders. *See* N.Y.C. Emergency Exec. Order No. 100, at 2 (Mar. 16, 2020)¹ (emphasizing the virulence of COVID-19 and that it “physically is causing property loss and damage”); Broward Cty. Fla. Administrator’s Emergency Order No. 20-01, at 2 (Mar. 22, 2020)² (noting that COVID-19 “constitutes a clear and present threat to the lives, health, welfare, and safety of the people of Broward County”); Harris Cty. Tex. Office of Homeland Security & Emergency Mgmt., Order of Cty. J. Lina Hidalgo, at 2 (Mar. 24, 2020)³ (emphasizing that the COVID-19 virus can cause “property loss or damage” due to its contagious nature and transmission through “person-to-person contact, especially in group settings”); Napa Cty. Cal. Health & Human Service Agency, Order of the

¹ <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-100.pdf>

² <https://www.broward.org/CoronaVirus/Documents/BerthaHenryExecutiveOrder20-01.pdf>

³ https://www.taa.org/wp-content/uploads/2020/03/03-24-20-Stay-Home-Work-Safe-Order_Harris-County.pdf

Napa Cty. Health Officer (Mar. 18, 2020)⁴ (issuing restrictions based on evidence of the spread of COVID-19 within the Bay Area and Napa County “and the physical damage to property caused by the virus”); City of Key West Fla. State of Local Emergency Directive 2020-03, at 2 (Mar. 21, 2020)⁵ (COVID-19 is “causing property damage due to its proclivity to attach to surfaces for prolonged periods of time”); City of Oakland Park Fla. Local Public Emergency Action Directive, at 2 (Mar. 19, 2020)⁶ (COVID-19 is “physically causing property damage”); Panama City Fla. Resolution No. 20200318.1 (Mar. 18, 2020)⁷ (stating that the resolution is necessary because of COVID-19’s propensity to spread person to person and because the “virus physically is causing property damage”); Exec. Order of the Hillsborough Cty. Fla. Emergency Policy Group, at 2 (Mar. 27, 2020)⁸ (in addition to COVID-19’s creation of a “dangerous physical condition,” it also creates “property or business income loss and damage in certain circumstances”); Colorado Dep’t of Pub. Health & Env’t, Updated Public Health Order No. 20-24, at 1 (Mar. 26, 2020)⁹ (emphasizing the danger of “property loss, contamination, and damage”

⁴ <https://www.countyofnapa.org/DocumentCenter/View/16687/3-18-2020-Shelter-at-Home-Order>

⁵ https://www.cityofkeywest-fl.gov/egov/documents/1584822002_20507.pdf

⁶ <https://oaklandparkfl.gov/DocumentCenter/View/8408/Local-Public-Emergency-Action-Directive-19-March-2020-PDF>

⁷ <https://www.pcgov.org/AgendaCenter/ViewFile/Item/5711?fileID=16604>

⁸ <https://www.hillsboroughcounty.org/library/hillsborough/media-center/documents/administrator/epg/saferathomeorder.pdf>

⁹ <https://www.pueblo.us/DocumentCenter/View/26395/Updated-Public-Health-Order---032620>

due to COVID-19’s “propensity to attach to surfaces for prolonged periods of time”); Sixth Supp. to San Francisco Mayoral Proclamation Declaring the Existence of a Local Emergency, 26 (Mar. 27, 2020)¹⁰ (“This order and the previous orders issued during this emergency have all been issued ... also because the virus physically is causing property loss or damage due to its proclivity to attach to surfaces for prolonged periods of time”); and City of Durham NC, Second Amendment to Declaration of State of Emergency, at 8 (effective Mar. 26, 2020)¹¹ (prohibiting entities that provide food services from allowing food to be eaten at the site where it is provided “due to the virus’s propensity to physically impact surfaces and personal property”).

B. The Covered Cause of Loss

37. The threat and presence of COVID-19 with respect to other property has caused civil authorities throughout the country to issue orders requiring the suspension of business at a wide range of establishments, including civil authorities with jurisdiction over Plaintiff’s business (the “Closure Orders”).

¹⁰ https://sfgov.org/sunshine/sites/default/files/sotf_061020_item3.pdf

¹¹ https://durhamnc.gov/DocumentCenter/View/30043/City-of-Durham-Mayor-Emergency-Dec-Second-Amdmt-3-25-20_FINAL

1. The COVID-19 Pandemic

38. On March 11, 2020, the World Health Organization declared that COVID-19 constituted a global pandemic.

39. According to the CDC, “COVID-19 is caused by a coronavirus called SARS-CoV-2. Coronaviruses are a large family of viruses that are common in people and [many] different species of animals, including camels, cattle, cats, and bats. Rarely, animal coronaviruses can infect people and then spread between people.”¹² “The virus that causes COVID-19 is thought to spread mainly from person to person, mainly through respiratory droplets produced when an infected person coughs or sneezes. These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs. Spread is more likely when people are in close contact with one another (within about 6 feet).”¹³

40. “It may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes.”¹⁴ A scientific study investigating the stability of COVID-19 in different environmental conditions found that, following COVID-19 contamination,

¹² <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics>. All websites last visited June 28, 2020.

¹³ *Id.*

¹⁴ <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

the virus could be detected hours later for tissues and paper, days later for wood, cloth and glass, or even a week later for stainless steel and plastic.¹⁵

2. The Closure Orders

41. The presence of COVID-19 has caused civil authorities throughout the country to issue orders requiring the suspension of business at a wide range of establishments, including civil authorities with jurisdiction over Plaintiff's business (the "Closure Orders").

42. On March 19, 2020, the Alabama State Health Officer issued a civil authority order suspending all gatherings, events, or activities of twenty-five or more persons and gatherings of any size where six-foot distance between persons could not be maintained. The Order also prohibited on-premises consumption of food or drink at all restaurants and bars, effective March 19, 2020. The Order recognizes that "COVID-19 in the State poses the potential of widespread exposure to an infectious agent that poses significant risk of substantial harm to a large number of people."

43. On March 20, 2020, the Alabama State Health Officer issued another civil authority order amending the March 19, 2020, Order to implement more

¹⁵ See Alex W.H. Chin, et al., "Stability of SARS-CoV-2 in different environmental conditions," *The Lancet Microbe* (April 2, 2020), available at [https://doi.org/10.1016/S2666-5247\(20\)30003-3](https://doi.org/10.1016/S2666-5247(20)30003-3).

stringent measures, prohibiting all non-work related gatherings of twenty-five persons or more, or non-work related gatherings of any size where a six-foot distance between persons could not be maintained. The Order reiterated the prohibition of on-premises consumption of food or drink at all restaurants and bars.

44. On March 27, 2020, the Alabama State Health Officer issued a civil authority order requiring the closure of all nonessential businesses and services and prohibiting all non-work related gathering of 10 or more persons. The Order reiterated the prohibition of on-premises consumption of food or drink at all restaurants and bars. This order has been in effect since March 28, 2020. The Order recognizes that “COVID-19 in the State poses the potential of widespread exposure to an infectious agent that poses significant risk of substantial harm to a large number of people.”

45. On April 3, 2020, the Alabama State Health Officer issued a civil authority Stay-at-Home order requiring Alabama residents to “stay at his or her place of residence except as necessary to perform . . . ‘essential activities.’” The Order reiterated the prohibition of on-premises consumption of food or drink at all restaurants and bars.

46. On April 28, 2020, the Alabama State Health Officer issued a civil authority Safer-at-Home order allowing certain businesses to re-open with

restrictions but maintained the prohibition of on-premises consumption of food or drink at all restaurants and bars.

47. On May 8, 2020, the Alabama State Health Officer issued a civil authority Safer-at-Home order allowing on-premises consumption of food and drink at restaurants and bars beginning on May 11, 2020, subject to compliance with CDC and Alabama Department of Public Health guidelines.

48. These Closure Orders and proclamations, as they relate to the closure of all “non-essential businesses,” evidence an awareness on the part of both state and local governments that COVID-19 causes damage to property. This is particularly true in places where business is conducted, such as Plaintiff’s, as the requisite contact and interaction causes a heightened risk of the property becoming infected with COVID-19.

49. The Closure Orders were issued in response to the rapid spread and presence of COVID-19 throughout Alabama.

50. The Closure Orders prohibited access to Plaintiff’s Covered Property and the area immediately surrounding Covered Property, in response to dangerous physical conditions resulting from a Covered Cause of Loss under the Policy, *i.e.* the COVID-19 pandemic.

3. The Impact of COVID-19 and the Closure Orders

51. On March 19, 2020, as a result of the COVID-19 pandemic and the Civil Authority Orders referenced herein, Plaintiff was forced to close its doors to on-premises food and drink consumption at its restaurant and bar. The Civil Authority Orders expressly precluded Plaintiff from operating its business.

52. Indeed, the March 19, 2020, the Closure Order issued by the Alabama State Health Officer required restaurants and bars—including Plaintiff—to suspend on-premises consumption of food and drink.

53. The March 19th order and other Closure Orders prohibited access to the Covered Property by requiring Plaintiff to completely cease its on-premises business operations and by prohibiting Plaintiff from using the Covered Property to operate its business.

54. The threat and presence of COVID-19 caused direct physical loss of or damage to the each “Covered Property” under the Plaintiff and Class Members’ policies, and the policies of the other Class Members, by impairing the function of and damaging the Covered Property, and by causing a necessary suspension of operations during a period of restoration.

55. Plaintiff and Class Members’ actual and immediate loss of the functionality its Covered Property and loss of business income due to the COVID-

19 pandemic rendering the Covered Property uninhabitable or unfit for its intended use constitutes “direct physical loss” under the plain meaning of those words and a Covered Cause of Loss under the Policy. This direct physical loss or damage caused Plaintiff and Class Members to suspend operations at the Covered Property.

56. The Closure Orders prohibited access to Plaintiff’s and the other Class Members’ Covered Property, and the area immediately surrounding Covered Property, in response to dangerous physical conditions described above resulting from a Covered Cause of Loss.

57. As a result of the threat and presence of COVID-19 and the Closure Orders, Plaintiff and the other Class Members lost Business Income and incurred Extra Expense.

58. On or about March 30, 2020, Plaintiff submitted a claim for loss to Westchester under its policy due to the presence of COVID-19 and the Closure Orders.

59. On or about April 28, 2020, Defendant denied Plaintiff’s claim. *See* Exhibit B.

60. Indeed, Westchester has, on a widescale basis refused to provided Business Income, Extra Expense, Civil Authority, or Sue and Labor coverage due

the COVID-19 and the resultant orders by civil authorities that have required the suspension of business.

V. CLASS ACTION ALLEGATIONS

61. Plaintiff brings this action pursuant to Rules 23(a), 23(b)(1), 23(b)(2), 23(b)(3), and 23(c)(4) of the Federal Rules of Civil Procedure, individually and on behalf of all others similarly situated.

62. Plaintiff seeks to represent nationwide classes defined as:

- All persons and entities that: (a) had Business Income coverage under a property insurance policy issued by Westchester; (b) suffered a suspension of business related to COVID-19, at the premises covered by their Westchester property insurance policy; (c) made, or attempted to make, a claim under their property insurance policy issued by Westchester; and (d) were denied Business Income coverage, or otherwise told no covered loss existed, by Westchester for the suspension of business resulting from the presence or threat of COVID-19 (the “Business Income Breach Class”).
- All persons and entities that: (a) had Civil Authority coverage under a property insurance policy issued by Westchester; (b) suffered loss of Business Income and/or Extra Expense caused by action of a civil authority; (c) made, or attempted to make, a claim under their property insurance policy issued by Westchester; and (d) were denied Civil Authority coverage, or otherwise told that no covered loss existed, by Westchester for the loss of Business Income and/or Extra Expense caused by a Closure Order (the “Civil Authority Breach Class”).

- All persons and entities that: (a) had Extra Expense coverage under a property insurance policy issued by Westchester; (b) sought to minimize the suspension of business in connection with COVID-19 at the premises covered by their Westchester property insurance policy; (c) made, or attempted to make, a claim under their property insurance policy issued by Westchester; and (d) were denied Extra Expense coverage, or otherwise told that no covered loss existed, by Westchester despite their efforts to minimize the suspension of business caused by COVID-19 (the “Extra Expense Breach Class”).
 - All persons and entities that: (a) had Ingress and Egress coverage under a property insurance policy issued by Westchester; (b) suffered a suspension of business, caused by COVID-19, at the premises covered by their Westchester property insurance policy; (c) made, or attempted to make, a claim under their property insurance policy issued by Westchester; and (d) were denied Ingress and Egress coverage, or otherwise told that no covered loss existed, by Westchester for the suspension of business caused by COVID-19 (the “Ingress and Egress Breach Class”).
 - All persons and entities that: (a) had a Sue and Labor provision under a property insurance policy issued by Westchester; (b) sought to prevent property damage caused by COVID-19 by suspending or reducing business operations, at the premises covered by their Westchester property insurance policy; (c) made, or attempted to make, a claim under their property insurance policy issued by Westchester; and (d) were denied Sue and Labor coverage, or otherwise told that no covered loss existed, by Westchester in connection with the suspension of business caused by COVID-19 (the “Sue and Labor Breach Class”).
63. Plaintiff seeks to represent nationwide classes defined as:

- All persons and entities with Business Income coverage under a property insurance policy issued by Westchester that suffered a suspension of business due to COVID-19 at the premises covered by the business income coverage (the “Business Income Declaratory Judgment Class”).
- All persons and entities with Civil Authority coverage under a property insurance policy issued by Westchester that suffered loss of Business Income and/or Extra Expense caused by a Closure Order (the “Civil Authority Declaratory Judgment Class”).
- All persons and entities with Extra Expense coverage under a property insurance policy issued by Westchester that sought to minimize the suspension of business in connection with COVID-19 at the premises covered by their Westchester property insurance policy (the “Extra Expense Declaratory Judgment Class”).
- All persons and entities with a Sue and Labor provision under a property insurance policy issued by Westchester that sought to prevent property damage caused by COVID-19 by suspending or reducing business operations at the premises covered by their Westchester property insurance policy (the “Sue and Labor Declaratory Judgment Class”).

64. Excluded from each defined Class is Defendant and any of its members, affiliates, parents, subsidiaries, officers, directors, employees, successors, or assigns; governmental entities; and the Court staff assigned to this case and their immediate family members. Plaintiff reserves the right to modify or amend each of the Class definitions, as appropriate, during the course of this litigation.

65. This action has been brought and may properly be maintained on behalf of each Class proposed herein under the criteria of Rule 23 of the Federal Rules of Civil Procedure.

66. **Numerosity—Federal Rule of Civil Procedure 23(a)(1).** The members of each defined Class are so numerous that individual joinder of all Class Members is impracticable. While Plaintiff is informed and believes that there are thousands of members of each Class, the precise number of Class Members is unknown to Plaintiff but may be ascertained from Defendant's books and records. Class Members may be notified of the pendency of this action by recognized, Court-approved notice dissemination methods, which may include U.S. Mail, electronic mail, internet postings, and/or published notice.

67. **Commonality and Predominance—Federal Rule of Civil Procedure 23(a)(2) and 23(b)(3).** This action involves common questions of law and fact, which predominate over any questions affecting only individual Class Members, including, without limitation:

- a. Westchester issued all-risk policies to the members of the Class in exchange for payment of premiums by the Class Members;
- b. whether the Class suffered a covered loss based on the common policies issued to members of the Class;

- c. whether Westchester wrongfully denied all claims relating to COVID-19;
- d. whether Westchester's Business Income coverage applies to a suspension of business caused by COVID-19;
- e. whether Westchester's Civil Authority coverage applies to a loss of Business Income caused by the orders of state governors requiring the suspension of business as a result of COVID-19;
- f. whether Westchester's Extra Expense coverage applies to efforts to minimize a loss caused by COVID-19; and
- g. whether Westchester's Sue and Labor provision applies to require Westchester to pay for efforts to reduce damage caused by COVID-19;
- h. whether Westchester has breached its contracts of insurance through a blanket denial of all claims based on business interruption, income loss, or closures related to COVID-19 and the related Closure Orders; and
- i. whether Plaintiff and Class Members are entitled to an award of reasonable attorney fees, interest, and costs.

68. **Typicality—Federal Rule of Civil Procedure 23(a)(3).** Plaintiff's claims are typical of the other Class Members' claims because Plaintiff and the other Class Members are all similarly affected by Defendant's refusal to pay under its Business Income, Civil Authority, Extra Expense, and Sue and Labor coverages. Plaintiff's claims are based upon the same legal theories as those of the other Class Members. Plaintiff and the other Class Members sustained damages as a direct and proximate result of the same wrongful practices in which Defendant engaged.

69. **Adequacy of Representation—Federal Rule of Civil Procedure 23(a)(4).** Plaintiff is an adequate Class representative because its interests do not conflict with the interests of the other Class Members who it seeks to represent, Plaintiff has retained counsel competent and experienced in complex class action litigation, including successfully litigating class action cases similar to this one, where insurers breached contracts with insureds by failing to pay the amounts owed under their policies, and Plaintiff intends to prosecute this action vigorously. The interests of the above-defined Classes will be fairly and adequately protected by Plaintiff and their counsel.

70. **Inconsistent or Varying Adjudications and the Risk of Impediments to Other Class Members' Interests—Federal Rule of Civil Procedure 23(b)(1).** Plaintiff seeks class-wide adjudication as to the interpretation,

and resultant scope, of Defendant's Business Income, Civil Authority, Extra Expense, and Sue and Labor coverages. The prosecution of separate actions by individual members of the Classes would create an immediate risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for the Defendant. Moreover, the adjudications sought by Plaintiff could, as a practical matter, substantially impair or impede the ability of other Class Members, who are not parties to this action, to protect their interests.

71. **Declaratory and Injunctive Relief—Federal Rule of Civil Procedure 23(b)(2).** Defendant acted or refused to act on grounds generally applicable to Plaintiff and the other Class Members, thereby making appropriate final injunctive relief and declaratory relief, as described below, with respect to the Class Members.

72. **Superiority—Federal Rule of Civil Procedure 23(b)(3).** A class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action. Individualized litigation creates a potential for inconsistent or contradictory judgments and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer

management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

VI. CLAIMS FOR RELIEF

COUNT I

BREACH OF CONTRACT -- BUSINESS INCOME COVERAGE
(Claim Brought on Behalf of the Business Income Breach Class)

73. Plaintiff repeats, realleges, and incorporates by reference the allegations set forth in paragraphs 1-72 as if fully set forth herein.

74. Plaintiff brings this Count individually and on behalf of the other members of the Business Income Breach Class.

75. Plaintiff's Westchester policy, as well as those of the other Business Income Breach Class Members, are contracts under which Westchester was paid premiums in exchange for its promise to pay Plaintiff's and the other Business Income Breach Class Members' losses for claims covered by the policy.

76. In the Businessowner's Coverage Form, Westchester agreed to pay for its insureds' actual loss of Business Income sustained due to the necessary suspension of its operations during the "period of restoration."

77. In the Businessowner's Coverage Form, Westchester agreed to pay for its insureds' actual loss of Business Income sustained due to the necessary "suspension of [their] operations" during the "period of restoration" caused by direct

physical loss or damage. A “partial slowdown or complete cessation” of business activities at the Covered Property is a “suspension” under the policy, for which Westchester agreed to pay for loss of Business Income during the “period of restoration” “that occurs within 24 consecutive months after the date of direct physical loss or damage.”

78. “Business Income” under the policy means the “Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred if no physical loss or damage had occurred.”

79. COVID-19 caused direct physical loss and damage to Plaintiff’s and the other Business Income Breach Class Members’ Covered Properties, requiring suspension of operations at the Covered Properties. Losses caused by COVID-19 thus triggered the Business Income provision of Plaintiff’s and the other Business Income Breach Class Members’ Westchester policies.

80. Plaintiff and the other Business Income Breach Class Members have complied with all applicable provisions of their policies and/or those provisions have been waived by Westchester or Westchester is estopped from asserting them, and yet Westchester has abrogated its insurance coverage obligations pursuant to the Policies’ clear and unambiguous terms.

81. By denying coverage for any Business Income losses incurred by Plaintiff and the other Business Income Breach Class Members in connection with the COVID-19 pandemic, Westchester has breached its coverage obligations under the Policies.

82. As a result of Westchester's breaches of the Policies, Plaintiff and the other Business Income Breach Class Members have sustained substantial damages for which Westchester is liable, in an amount to be established at trial.

COUNT II
BREACH OF CONTRACT – CIVIL AUTHORITY COVERAGE
(Claim Brought on Behalf of the Civil Authority Breach Class)

83. Plaintiff repeats, realleges, and incorporates by reference the allegations set forth in paragraphs 1-72 as if fully set forth herein.

84. Plaintiff brings this Count individually and on behalf of the other members of the Civil Authority Breach Class.

85. Plaintiff's Westchester policy, as well as those of the other Civil Authority Breach Class Members, are contracts under which Westchester was paid premiums in exchange for its promise to pay Plaintiff's and the other Civil Authority Breach Class Members' losses for claims covered by the policy.

86. Westchester's Businessowner's Coverage Form provides "Civil Authority" coverage, which promises to pay "the actual loss of Business Income you

sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.”

87. The Closure Orders triggered the Civil Authority provision under Plaintiff’s and the other members of the Civil Authority Breach Class’s Westchester policies. COVID-19 caused direct physical loss or damage to property near the Covered Property in the same manner described above that it caused direct physical loss or damage to the Covered Property. The civil authority orders were actions taken in response to the dangerous physical conditions resulting from the direct physical loss or damage to such properties. And, the civil authority orders prohibited access to an immediately surrounding area that included the Covered Property.

88. Plaintiff and the other members of the Civil Authority Breach Class have complied with all applicable provisions of the Policies and/or those provisions have been waived by Westchester or Westchester is estopped from asserting them, and yet Westchester has abrogated its insurance coverage obligations pursuant to the Policies’ clear and unambiguous terms.

89. By denying coverage for any business losses incurred by Plaintiff and other members of the Civil Authority Breach Class in connection with the Closure

Orders and the COVID-19 pandemic, Westchester has breached its coverage obligations under the Policies.

90. As a result of Westchester's breaches of the Policies, Plaintiff and the other members of the Civil Authority Breach Class have sustained substantial damages for which Westchester is liable, in an amount to be established at trial.

COUNT III
BREACH OF CONTRACT – EXTRA EXPENSE COVERAGE
(Claim Brought on Behalf of the Extra Expense Breach Class)

91. Plaintiff repeats, realleges, and incorporates by reference the allegations set forth in paragraphs 1-72 as if fully set forth herein.

92. Plaintiff brings this Count individually and on behalf of the other members of the Extra Expense Breach Class.

93. Plaintiff's Westchester policy, as well as those of the other Extra Expense Breach Class Members, are contracts under which Westchester was paid premiums in exchange for its promise to pay Plaintiff's and the other Extra Expense Breach Class Members' losses for claims covered by the policy.

94. In the Businessowner's Coverage Form, Westchester also agreed to pay necessary Extra Expense that its insureds incur during the "period of restoration" that the insureds would not have incurred if there had been no direct physical loss or damage to the described premises. "Extra Expense" means expenses "to avoid or

minimize the suspension of business and to continue ‘operations,’” and to repair or replace property.

95. Due to COVID-19 and the Closure Orders, Plaintiff and the other members of the Extra Expense Breach Class incurred Extra Expense at Covered Property

96. Plaintiff and the other members of the Extra Expense Breach Class have complied with all applicable provisions of the Policies and/or those provisions have been waived by Westchester or Westchester is estopped from asserting them, and yet Westchester has abrogated its insurance coverage obligations pursuant to the Policies’ clear and unambiguous terms.

97. By denying coverage for any business losses incurred by Plaintiff and the other members of the Extra Expense Breach Class in connection with the Closure Orders and the COVID-19 pandemic, Westchester has breached its coverage obligations under the Policies.

98. As a result of Westchester’s breaches of the Policies, Plaintiff and the other members of the Extra Expense Breach Class have sustained substantial damages for which Westchester is liable, in an amount to be established at trial.

COUNT IV
BREACH OF CONTRACT – SUE AND LABOR COVERAGE
(Claim Brought on Behalf of the Sue and Labor Breach Class)

99. Plaintiff repeats, realleges, and incorporates by reference the allegations set forth in paragraphs 1-72 as if fully set forth herein.

100. Plaintiff bring this Count individually and on behalf of the other members of the Sue and Labor Breach Class.

101. Plaintiff's Westchester policies, as well as those of the other Sue and Labor Breach Class Members, are contracts under which Westchester was paid premiums in exchange for its promise to pay Plaintiff's and the other Sue and Labor Breach Class Members' losses for claims covered by the policy.

102. In the Businessowner's Coverage Form, Westchester agreed to give due consideration in settlement of a claim to expenses incurred in taking all reasonable steps to protect Covered Property from further damage.

103. In complying with the Closure Orders and otherwise suspending or limiting operations, Plaintiff and other members of the Sue and Labor Breach Class incurred expenses in connection with reasonable steps to protect Covered Property.

104. Plaintiff and the other members of the Sue and Labor Breach Class have complied with all applicable provisions of the Policies and/or those provisions have been waived by Westchester or Westchester is estopped from asserting them, and

yet Westchester has abrogated its insurance coverage obligations pursuant to the Policies' clear and unambiguous terms.

105. By denying coverage for any Sue and Labor expenses incurred by Plaintiff and the other members of the Sue and Labor Breach Class in connection with the Closure Orders and the COVID-19 pandemic, Westchester has breached its coverage obligations under the Policies.

106. As a result of Westchester's breaches of the Policies, Plaintiff and the other members of the Sue and Labor Breach Class have sustained substantial damages for which Westchester is liable, in an amount to be established at trial.

Count V
DECLARATORY JUDGMENT – BUSINESS INCOME COVERAGE
(Claim Brought on Behalf of the Business Income
Declaratory Judgment Class)

107. Plaintiff repeats and realleges Paragraphs 1-72 as if fully set forth herein.

108. Plaintiff brings this Count individually and on behalf of the other members of the Business Income Declaratory Judgment Class.

109. Plaintiff's Westchester policy, as well as those of the other Business Income Declaratory Judgment Class members, are contracts under which Westchester was paid premiums in exchange for its promise to pay Plaintiff's and

the other Business Income Declaratory Judgment Class members' losses for claims covered by the Policies.

110. Plaintiff and the other Business Income Declaratory Judgment Class Members have complied with all applicable provisions of the Policies and/or those provisions have been waived by Westchester or Westchester is estopped from asserting them, and yet Westchester has abrogated its insurance coverage obligations pursuant to the policies' clear and unambiguous terms and has wrongfully and illegally refused to provide coverage to which Plaintiff and the other Business Income Declaratory Judgment Class Members are entitled.

111. Westchester has denied claims related to COVID-19 on a uniform and class wide basis, without individual bases or investigations, such that the Court can render declaratory judgment irrespective of whether members of the Class have filed a claim.

112. An actual case or controversy exists regarding Plaintiff's and the other Business Income Declaratory Judgment Class Members' rights and Westchester's obligations under the policies to reimburse Plaintiff for the full amount of Business Income losses incurred by Plaintiff and the other Business Income Declaratory Judgment Class Members in connection with the suspension of their businesses stemming from the COVID-19 pandemic.

113. Pursuant to 28 U.S.C. § 2201, Plaintiff and the other Business Income Declaratory Judgment Class Members seek a declaratory judgment from this Court declaring the following:

- i. Plaintiff's and the other Business Income Declaratory Judgment Class Members' Business Income losses incurred in connection with the Closure Orders and the necessary interruption of their businesses stemming from the COVID-19 pandemic are insured losses under their policies; and
- ii. Westchester is obligated to pay Plaintiff and the other Business Income Declaratory Judgment Class members for the full amount of the Business Income losses incurred and to be incurred in connection with the Closure Orders during the period of restoration and the necessary interruption of their businesses stemming from the COVID-19 pandemic.

COUNT VI
DECLARATORY JUDGMENT – CIVIL AUTHORITY COVERAGE
(Claim Brought on Behalf of the Civil Authority Declaratory Judgment Class)

114. Plaintiff repeats and realleges Paragraphs 1-72 as if fully set forth herein.

115. Plaintiff brings this Count individually and on behalf of the other members of the Civil Authority Declaratory Judgment Class.

116. Plaintiff's Westchester insurance policy, as well as those of the other Civil Authority Declaratory Judgment Class Members, are contracts under which Westchester was paid premiums in exchange for its promise to pay Plaintiff's and the other Civil Authority Declaratory Judgment Class Members' losses for claims covered by the policy.

117. Plaintiff and the other Civil Authority Declaratory Judgment Class Members have complied with all applicable provisions of the policies and/or those provisions have been waived by Westchester or Westchester is estopped from asserting them, and yet Westchester has abrogated its insurance coverage obligations pursuant to the policies' clear and unambiguous terms and has wrongfully and illegally refused to provide coverage to which Plaintiff and the other Class Members are entitled.

118. Westchester has denied claims related to COVID-19 on a uniform and class wide basis, without individual bases or investigations, such that the Court can render declaratory judgment irrespective of whether members of the Class have filed a claim.

119. An actual case or controversy exists regarding Plaintiff's and the other Civil Authority Declaratory Judgment Class Members' rights and Westchester's obligations under the policies to reimburse Plaintiff and the other Civil Authority Declaratory Judgment Class Members for the full amount of covered Civil Authority losses incurred by Plaintiff and the other Civil Authority Declaratory Judgment Class Members in connection with Closure Orders and the necessary interruption of their businesses stemming from the COVID-19 pandemic.

120. Pursuant to 28 U.S.C. § 2201, Plaintiff and the other Civil Authority Declaratory Judgment Class Members seek a declaratory judgment from this Court declaring the following:

- i. Plaintiff's and the other Civil Authority Declaratory Judgment Class Members' Civil Authority losses incurred in connection with the Closure Orders and the necessary interruption of their businesses stemming from the COVID-19 pandemic are insured losses under their policies; and
- ii. Westchester is obligated to pay Plaintiff and the other Civil Authority Declaratory Judgment Class Members the full amount of the Civil Authority losses incurred and to be incurred in connection with the covered losses related to the Closure Orders and the necessary

interruption of their businesses stemming from the COVID-19 pandemic.

COUNT VII
DECLARATORY JUDGMENT – EXTRA EXPENSE COVERAGE
(Claim Brought on Behalf of the Extra Expense Declaratory Judgment Class)

121. Plaintiff repeats and realleges Paragraphs 1-72 as if fully set forth herein.

122. Plaintiff brings this Count individually and on behalf of the other members of the Extra Expense Declaratory Judgment Class.

123. Plaintiff's Westchester insurance policy, as well as those of the other Extra Expense Declaratory Judgment Class Members, are contracts under which Westchester was paid premiums in exchange for its promise to pay Plaintiff's and the other Extra Expense Declaratory Judgment Class Members' losses for claims covered by the policy.

124. Plaintiff and the other Extra Expense Declaratory Judgment Class Members have complied with all applicable provisions of the policies and/or those provisions have been waived by Westchester or Westchester is estopped from asserting them, and yet Westchester has abrogated its insurance coverage obligations pursuant to the policies' clear and unambiguous terms and has wrongfully and

illegally refused to provide coverage to which Plaintiff and the other Class Members are entitled.

125. Westchester has denied claims related to COVID-19 on a uniform and class wide basis, without individual bases or investigations, such that the Court can render declaratory judgment irrespective of whether members of the Class have filed a claim.

126. An actual case or controversy exists regarding Plaintiff's and the other Extra Expense Declaratory Judgment Class Members' rights and Westchester's obligations under the policies to reimburse Plaintiff and the other Extra Expense Declaratory Judgment Class Members for the full amount of Extra Expense losses incurred in connection with Closure Orders and the necessary interruption of their businesses stemming from the COVID-19 pandemic.

127. Pursuant to 28 U.S.C. § 2201, Plaintiff and the other Extra Expense Declaratory Judgment Class Members seek a declaratory judgment from this Court declaring the following:

- i. Plaintiff's and the other Extra Expense Declaratory Judgment Class Members' Extra Expense losses incurred in connection with the Closure Orders and the necessary interruption of their businesses

stemming from the COVID-19 pandemic are insured losses under their policies; and

- ii. Westchester is obligated to pay Plaintiff and the other Extra Expense Declaratory Judgment Class Members for the full amount of the Extra Expense losses incurred and to be incurred in connection with the covered losses related to the Closure Orders during the period of restoration and the necessary interruption of their businesses stemming from the COVID-19 pandemic.

COUNT VIII

DECLARATORY JUDGMENT – SUE AND LABOR COVERAGE **(Claim Brought on Behalf of the Sue and Labor Declaratory Judgment Class)**

128. Plaintiff repeats and realleges Paragraphs 1-72 as if fully set forth herein.

129. Plaintiff brings this Count individually and on behalf of the other members of the Sue and Labor Declaratory Judgment Class.

130. Plaintiff's Westchester insurance policy, as well as those of the other Sue and Labor Declaratory Judgment Class Members, are contracts under which Westchester was paid premiums in exchange for its promise to pay Plaintiff's and the other Sue and Labor Declaratory Judgment Class Members' reasonably incurred expenses to protect Covered Property.

131. Plaintiff and the other Sue and Labor Declaratory Judgment Class Members have complied with all applicable provisions of the policies and/or those provisions have been waived by Westchester or Westchester is estopped from asserting them, and yet Westchester has abrogated its insurance coverage obligations pursuant to the policies' clear and unambiguous terms and has wrongfully and illegally refused to provide coverage to which Plaintiff is entitled.

132. Westchester has denied claims related to COVID-19 on a uniform and class wide basis, without individual bases or investigations, such that the Court can render declaratory judgment irrespective of whether members of the Class have filed a claim.

133. An actual case or controversy exists regarding Plaintiff's and the other Sue and Labor Declaratory Judgment Class Members' rights and Westchester's obligations under the policies to reimburse Plaintiff and the other Sue and Labor Declaratory Judgment Class Members for the full amount Plaintiff and the other members of the Sue and Labor Declaratory Judgment Class reasonably incurred to protect Covered Property from further damage by COVID-19.

134. Pursuant to 28 U.S.C. § 2201, Plaintiff and the other Sue and Labor Declaratory Judgment Class Members seek a declaratory judgment from this Court declaring the following:

- i. Plaintiff's and the other Sue and Labor Declaratory Judgment Class Members' reasonably incurred expenses to protect Covered Property from further damage by COVID-19 are insured losses under their policies; and
- ii. Westchester is obligated to pay Plaintiff and the other Sue and Labor Declaratory Judgment Class Members for the full amount of the expenses they reasonably incurred to protect Covered Property from further damage by COVID-19.

VII. REQUEST FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the other Class Members, respectfully requests that the Court enter judgment in its favor and against Defendant as follows:

- a. Entering an order certifying the proposed nationwide Classes, as requested herein, designating Plaintiff as Class representative, and appointing Plaintiff's undersigned attorneys as Counsel for the Classes;
- b. Entering judgment on Counts I-IV in favor of Plaintiff and the Members of the Business Income Breach Class, the Civil Authority Breach Class, the Ingress and Egress Breach Class, the Extra Expense Breach Class, and the Sue and Labor

Breach Class; and awarding damages for breach of contract in an amount to be determined at trial;

c. Entering declaratory judgments on Counts V-VIII in favor of Plaintiff and the members of the Business Income Declaratory Judgment Class, the Civil Authority Declaratory Judgment Class, the Extra Expense Declaratory Judgment Class, and the Sue and Labor Declaratory Judgment Class as follows:

- i. Business Income, Civil Authority, Extra Expense, and Sue and Labor losses incurred in connection with the Closure Orders and the necessary interruption of their businesses stemming from the COVID-19 pandemic are insured losses under their policies; and
- ii. Westchester is obligated to pay for the full amount of the Business Income, Civil Authority, Extra Expense, and Sue and Labor losses incurred and to be incurred related to COVID-19, the Closure Orders and the necessary interruption of their businesses stemming from the COVID-19 pandemic;

d. Ordering Defendant to pay both pre- and post-judgment interest on any amounts awarded;

e. Ordering Defendant to pay attorneys' fees and costs of suit; and

f. Ordering such other and further relief as may be just and proper.

VIII. JURY DEMAND

Plaintiff hereby demands a trial by jury on all claims so triable.

Respectfully submitted on this 25th day of August, 2020,

/s/ Chris D. Glover

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