

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

THILL 13014, LLC d/b/a
THUNDERHILL SELF STORAGE
13014 Big Tree Road
East Aurora, New York 14052

and

CAL 2626 LLC d/b/a WNY EMPIRE STORAGE,
for themselves and on behalf of a class of
similarly situated policyholders,
2926 West Main Street
Caledonia, New York 14423

Plaintiffs,

- v -

FINGER LAKES FIRE & CASUALTY
COMPANY,
6905 Route 227
P.O. Box 550
Trumansburg, New York 14886

Defendant.

SUMMONS

Index No.: _____

*Presiding Judge to be determined
upon judicial assignment*

TO THE ABOVE NAMED DEFENDANT(S):

YOU ARE HEREBY SUMMONED AND REQUIRED to appear in this action and to serve upon Plaintiff's attorney, at the address stated below, a written Answer to the attached Complaint. If this Summons is served upon you within New York State by personal service, you must respond within TWENTY (20) days after service, not including the day of service. If this Summons is not personally delivered to you within New York State, you must respond within THIRTY (30) days after service is completed, as provided by law. If you do not respond to the attached Complaint within the applicable time limitation stated above, a judgment will be entered against you by default for the relief demanded in the Complaint, together with the costs and disbursements of this action, without further notice to you.

Plaintiff designates the County of Erie as the place of trial because of the location of the Premises, wherein a substantial part of the events giving rise to the claims at issue occurred.

Dated: Buffalo, New York
January 20, 2021

DUKE HOLZMAN PHOTIADIS & GRESENS LLP

/s/ Christopher M. Berloth

By: _____

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

THILL 13014, LLC d/b/a
THUNDERHILL SELF STORAGE; and
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FINGER LAKES FIRE & CASUALTY
COMPANY,

Defendant.

COMPLAINT

Index No.: _____

*Presiding Judge to be determined
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Plaintiffs THILL 13014, LLC d/b/a Thunderhill Self Storage (“Thunderhill”) and CAL 2626, LLC d/b/a WNY Empire Storage (“WNY Empire”) (collectively “Plaintiffs” or the “Insureds”), for themselves and as representatives of a proposed class of plaintiff policyholders, by and through their attorneys, Duke Holzman Photiadis & Gresens LLP, as and for their Complaint against Defendant Finger Lakes Fire & Casualty Company (“Finger Lakes” or “Defendant”), state and allege as follows:

INTRODUCTION

1. The instant matter arises from contracts of insurance entered into between (a) Plaintiffs and other Class members, and (b) Defendant.

2. The Policies issued by Defendant to Plaintiffs and the Class members are generally known as commercial property insurance, and include, without limitation: (a) policies identified by Defendant as “Business Owners Policy” (“BO Policy”); (b) Business Owners Policy “Agreement” and “General Policy Provisions” Part, Form SF-20 (Ed. 1/88); (c) Business Owners

Policy “Causes of Loss-Coverage A” Part, Form SF-3 (Ed. 9/96); and (d) Business Owners Policy “Loss of Income” Part, Form SF-312 (Ed. 1/88) (the “Policy”).

3. The Policy issued by Defendant to Plaintiffs and the other Class members is “all risk” and, as such, provides coverage for physical loss of property resulting from any cause unless the loss is “Excluded” or “Limited.”

4. The Policy issued by Defendant to Plaintiffs and Class members does not contain an exclusion or limitation expressly addressing losses caused by or related to a virus.

5. Defendant has stated that the Policy does not provide Plaintiffs and other Class members with insurance coverage benefits for losses due to and/or relating to the novel coronavirus (the “Virus”), the disease caused by the Virus—COVID-19 (“CV-19”), and/or the actions of various civil authorities in response to the Virus and/or CV-19 (“CA Orders”), including that there is no coverage for business interruption, the loss of business income, extended business income, loss based on the actions of civil authorities to limit access to property, property loss, extra expense loss, and dependent property loss (collectively “BI Losses”).

6. The Business Owners Policy “Agreement” and “General Policy Provisions” Part, under “**WHAT YOU MUST DO IN CASE OF A LOSS,**” directs and requires:

...

2. ***Protect Property-You*** must take all reasonable steps to protect covered property at and after an insured loss to avoid further damage. ***We*** pay for repairs which are reasonable and necessary to protect the property from further damage, provided ***you*** keep an accurate record of such expenses.

(Emphasis in original). Commonly referred to as a “Sue and Labor” provision, policyholders are entitled to coverage for reimbursement of costs and expenses incurred as a result of complying with such provision. (“SL Losses”).

7. Defendant has denied coverage to Plaintiffs and other Class members for BI Losses, SL Losses, and other damages arising from and related to the Virus, CV-19, and the CA Orders.

8. Defendant breached its insurance contracts with Plaintiffs and other Class members by failing to provide the coverage and benefits as identified herein.

PARTIES

9. Plaintiff THILL 13014, LLC d/b/a Thunderhill Self Storage is a New limited liability company with its principal place of business located in the State of New York, County of Erie, at 13014 Big Tree Road, East Aurora, New York (the “Thunderhill Premises”).

10. Plaintiff CAL 2626, LLC, LLC d/b/a WNY Empire Storage is a New York limited liability company with its principal place of business located in the State of New York, County of Livingston, at 2926 West Main Street, Caledonia, New York (the “WNY Empire Premises”) [The foregoing Thunderhill and WNY Empire Premises shall hereinafter be referred to collectively as the “Properties”].

11. Upon information and belief, Defendant Finger Lakes is a business corporation organized under the laws of and registered and duly authorized to transact insurance business in the State of New York.

JURISDICTION AND VENUE

12. This Court has jurisdiction over Defendant pursuant to Article 3 of the CPLR.

13. This action is brought in the County of Erie pursuant to CPLR § 503(a), based upon (a) Plaintiffs’ place of business, and (b) a substantial part of the events or omissions giving rise to the claims occurred in Erie County, including (i) Plaintiffs’ purchase of the insurance policies, (ii) Plaintiffs’ business operations, (iii) the Properties that are the subject of the insurance policies

is in the State of New York, County of Erie, and (iv) the loss events impacting Plaintiffs' business and Properties for which coverage was denied took place in Erie County.

14. This litigation seeks damages exceeding the jurisdictional limits of all lower courts.

FACTS

A. The Policy

15. Defendant Finger Lakes issued and delivered to Plaintiff Thunderhill an insurance policy bearing the policy number BOP015007002 (the "Thunderhill Policy"). A copy of the Thunderhill Policy is attached hereto as *Exhibit A*.

16. Defendant Finger Lakes issued and delivered to Plaintiff WNY Empire an insurance policy bearing the policy number BOP015007003 (the "WNY Empire Policy"). (The Thunderhill Policy and WNY Empire Policy are hereinafter collectively referred to as "Plaintiffs' Policy"). A copy of the WNY Empire Policy is attached hereto as *Exhibit B*.

17. The Plaintiffs' Policy is the same or substantially similar to each Policy issued by Defendant to Class members.

18. Each Policy, including the Plaintiffs' Policy, was issued in consideration of a premium which was paid to, received, and retained by Defendant.

19. The Thunderhill Policy covered certain losses occurring between May 20, 2019, and May 20, 2020, including losses occurring at the Thunderhill Premises.

20. The WNY Empire Policy covered certain losses occurring between May 20, 2019, and May 20, 2020, including losses occurring at the WNY Empire Premises.

21. The Plaintiffs' Policy identifies Defendant Finger Lakes as the Insurer.

22. Thunderhill is identified in the Thunderhill Policy as the "Named Insured."

23. WNY Empire is identified in the WNY Empire Policy as the "Named Insured."

24. Each Policy, including the Plaintiffs' Policy, provides coverage on an "all risk" rather than specified peril basis.

25. "All risk" insurance policies cover all risks of loss except for risks that are expressly and specifically excluded.

26. Under the Business Owners Policy "Causes of Loss-Coverage A" Part, the Policy provides:

A. Covered Causes of Loss

When this for is attached to *your* policy, Covered Causes of Loss means Risks of Direct Physical Loss unless the loss is:

1. Excluded in Section B., Exclusions; or
2. Limited in Section C., Limitations; that follow.

(Exs. A & B (emphasis in original)).

27. Under the Business Owners Policy "Causes of Loss-Coverage A" Part, the Policy provides coverage for "Loss of Income", including, among other things: "a) net profit"; "b) payroll expenses"; "c) taxes"; "d) interest"; "e) rents"; and "all other necessary operating expenses incurred by the *business*." *Id.* (emphasis in original).

28. Under the Business Owners Policy "Causes of Loss-Coverage A" Part, the Policy also provides coverage extensions for, among other things: "civil authority"; and full resumption of operations (also known as extended business interruption coverage).

29. Plaintiffs and other Class members have suffered BI Losses that are expressly covered under the Policy.

30. Under the subsection titled "**WHAT YOU MUST DO IN CASE OF A LOSS**," the Policy directs and requires:

2. **Protect Property-You** must take all reasonable steps to protect covered property at and after an insured loss to avoid further damage. *We* pay for repairs which are reasonable and necessary to protect the property from further damage, provided *you* keep an accurate record of such expenses.

Id. (emphasis in original).

31. Plaintiffs Thunderhill and WNY Empire, and upon information and belief Class members, complied with the insureds' obligations under the "What You Must Do In Case of a Loss" provision and incurred SL Losses.

32. The "Exclusions" do not reference, restrict, limit, or preclude coverage for losses resulting directly or indirectly from a virus.

33. The "Limitations" do not restrict, limit or preclude coverage for losses resulting directly or indirectly from a virus.

B. Absence of "Exclusion of Loss due to Virus or Bacteria" Endorsement

34. Since in or before 2006, the insurance industry, including Defendant, has been aware of the risks of damage to property, physical loss of property, and damage to business operations associated with viruses and bacteria.

35. In or about 2006, the insurance industry adopted a standard form policy endorsement for commercial property policies commonly known as "Exclusion of Loss Due to Virus or Bacteria." This has otherwise been referred to as Multistate Form Filing CF-2006-OVBEF and/or endorsement CP 01 75 07 06 (New York) or CP 01 40 07 06 (collectively, the "Virus Exclusion").

36. Defendant is a member of the insurance industry and subscribes to, has access to, relies on, and adopts ISO forms.

37. Defendant is, and at all relevant times hereto was, aware of the Virus Exclusion.

38. Defendant chose to issue insurance policies without the Virus Exclusion despite its express and actual knowledge of the existence of the same.

39. The intended purpose of the Virus Exclusion is to eliminate virus and bacteria related losses from coverage under all risk insurance policies.

40. The Policy does not contain the Virus Exclusion.

41. The Policy does not contain an exclusion substantially the same or similar to the Virus Exclusion.

42. Defendants did not issue Plaintiffs or the Class members Policies containing any mention of a virus exclusion.

43. Defendants had knowledge of the existence of virus exclusions, including the Virus Exclusion, at the time and/or before they issued insurance policies to Plaintiffs and the Class members.

44. Upon information and belief, Defendants actually issued insurance policies containing virus exclusionary language to certain policyholders at the time and/or before they issued insurance policies to Plaintiffs and the Class members.

45. Defendants made the affirmative decision to omit virus exclusionary language when issuing insurance policies to Plaintiffs and the Class members.

46. The Policy does not exclude or limit coverage for losses experienced by Plaintiffs directly or indirectly from the Virus, CV-19, or the CA Orders.

47. Defendant's conduct, including its decision to issue all risk policies without the known Virus Exclusion and the virus exclusionary language adopted and issued by Defendant in other all risk policies, establishes that the presence of the Virus is and/or causes loss of or damage to property that is covered under the Policy.

C. Plaintiff's Covered Loss

48. Plaintiffs' employees, customers, and/or vendors: (a) were exposed to the Virus, (b) tested positive for the Virus and/or CV-19, (c) were otherwise diagnosed as infected with the Virus and/or having CV-19, (d) exhibited symptoms consistent with infection by the Virus and/or having CV-19, and/or (e) were instructed by civil authorities and/or their medical providers to self-isolate, quarantine, and/or suspend normal business operations.

49. Plaintiffs' Properties, personal property, and dependent property: (a) were exposed to the Virus, (b) had the Virus or persons with CV-19 present at their respective locations, and/or (c) could no longer be used or operated due to orders of civil authorities issued in response to the Virus and CV-19.

50. Property in the immediate area of Plaintiffs' Properties: (a) was exposed to the Virus, (b) had the Virus on surfaces therein, and/or (c) could no longer be used or operated due to orders of civil authorities issued in response to the Virus and CV-19.

51. In New York, the Virus became ubiquitous, such that it existed and/or exists throughout the State, including, without limitation, Plaintiffs' Properties and property in the immediate area of Plaintiffs' Properties.

52. The Virus was present at, in, throughout, and on Plaintiffs' Properties and property within one mile of Plaintiffs' Properties.

53. The Virus causes physical loss of and/or damage to property.

54. The presence of the Virus constitutes direct physical loss of and/or damage to property.

55. The Virus is a physical substance that lives on and is active on inert physical surfaces and is also emitted into the air, including in aerosols.

56. The presence of the Virus renders physical property in its vicinity unsafe and unusable.

57. At least two governmental entities have acknowledged that the Virus causes physical loss of and/or damage to property.

58. Annexed hereto as *Exhibit C* are copies of The City of New York, Office of the Mayor, Emergency Executive Orders, issued by Mayor Bill de Blasio (the “NYC Executive Orders”).

59. Annexed hereto as *Exhibit D* is a copy of the original Executive Order of New York State Governor Cuomo, New York State Executive Order 202.

60. The NYC Executive Orders expressly state: “WHEREAS, this order is given because of the propensity of the virus to spread person to person and *also because the virus physically is causing property loss and damage[.]*” (Ex. C(emphasis added)).

61. Similarly, New York State Executive Order 202 expressly states:

Pursuant to Section 29 of Article 2-B of the Executive Law, I [Governor Cuomo] direct the implementation of the State Comprehensive Emergency Management Plan and authorize all necessary State agencies to take appropriate action to assist local governments and individuals in containing, preparing for, responding to and recovering from this state disaster emergency, to protect state and local property, and to provide such other assistance as is necessary to protect public healthy, welfare, and safety.

(Ex. D (emphasis added)).

62. The presence of the Virus and the resulting direct physical loss of or damage to property (at Plaintiffs’ Premises, Plaintiffs’ work areas, and at property in the immediate area of the same) and persons with CV-19 caused direct physical loss of or damage to the covered property under the Plaintiffs’ Policy and the Policies of other Class members, as well as to property in the immediate area of such covered property.

63. The presence of the Virus and the resulting direct physical loss of or damage to property (both at Plaintiffs' Properties and at property in the immediate area of the same) and persons with CV-19 caused civil authorities throughout New York to issue orders requiring the suspension of business and/or use of commercial property, including the property of Plaintiffs and other Class members as well as property in the immediate area of such covered property.

64. The CA Orders prohibited access to the covered properties as a result of the damage and the ongoing and continuous loss and damage resulting from the Virus.

65. The CA Orders include, but are not limited to, the following Executive Orders of New York State Governor Cuomo:

- a. On March 7, 2020, by Executive Order 202, Governor Cuomo declared a Disaster Emergency for all of New York State because of CV-19;
- b. On March 18, 2020, by Executive Order 202.6, Governor Cuomo reduced all non-essential businesses' on-site workers by 50%, effective at 8:00 p.m. on March 20, 2020;
- c. On March 19, 2020, by Executive Order 202.7, Governor Cuomo reduced all non-essential businesses' on-site workers by 75%, effective at 8:00 p.m. on March 21, 2020;
- d. On March 20, 2020, by Executive Order 202.8, Governor Cuomo reduced all non-essential businesses' on-site workers by 100%, effective at 8:00 p.m. on March 22, 2020; and
- e. Supplemental executed Orders that restricted and/or suspended business activities at and/or use of commercial property.

66. Plaintiffs Thunderhill and WNY Empire suffered damages to their business operations as a result of the Virus, CV-19, and the CA Orders.

67. Plaintiffs suffered a direct physical loss of or physical damage to Covered Property, including the BI Losses, as a result of the Virus, CV-19, and the CA Orders ("Loss").

68. The Loss constitutes an occurrence under the Policy.

69. Plaintiffs are entitled to be covered and indemnified under the Policy for the Loss.

D. Uniform Practice to Deny Coverage for Losses related to the Virus

70. Plaintiffs timely reported the Loss to Defendant via numerous methods, including by telephone, e-mail, and/or through their agent.

71. Defendant Finger Lakes arbitrarily and wrongfully disclaimed coverage for Plaintiffs' Loss.

72. Defendant contends that the commercial property policies it issued in New York do not provide coverage for losses resulting from or related to the Virus, CV-19, or the CA Orders.

73. Defendant's denial of coverage for losses related to or arising out of the Virus, CV-19, and the CA Orders was predetermined and without regard to the individual circumstances of Plaintiffs or other insureds, including the presence of the Virus at the insured premises or property in the immediate area thereof.

74. By letter dated March 10, 2020, the New York State Department of Financial Services directed all insurers that had issued commercial property insurance in New York to provide details on the business interruption coverage provided under such policies ("DFS Directive"). A copy of the DFS Directive is attached hereto as *Exhibit E*.

75. The DFS Directive explained that the purpose of this requirement was to ensure that insurance companies "explain to policyholders the benefits under their policies and the protections provided in connection with COVID-19" and required "each Insurer examine the policies it has issued and explain the coverage each policy offers in regard to COVID-19."

76. Upon information and belief, Defendant either failed to send its insureds a response pursuant to the DFS Directive and/or prepared a template response to the DFS Directive irrespective of coverage provided for in the respective insureds' policies ("DFS Response").

77. Plaintiffs, and upon information and belief other policyholders, were the intended beneficiaries of the DFS Directive and, accordingly, the intended recipients of any DFS Response letter.

78. Upon information and belief, Defendant took the position that the Policy, and other similar commercial property policies it has issued in New York, including Commercial Lines Policies and Businessowner's Policies, do not cover losses arising from or relating to the Virus, CV-19, or the CA Orders.

79. Upon information and belief, before Plaintiffs submitted notice of and information about their claims related to the Virus, CV-19, and the CA Orders, Defendant had determined not to afford coverage for any such claims.

80. Upon information and belief, when making the determination not to provide coverage for the Virus, CV-19, and the CA Orders, Defendant had actual knowledge that it had hundreds, if not thousands, of impacted policyholders in New York.

81. To the extent DFS Response letters were sent, upon information and belief, Defendant mailed the DFS Response letters in batches due to the large number of policyholders

E. Coverage Denial for Losses related to Virus, CV-19 and CA Orders

82. Defendant denied coverage to Plaintiffs and other policyholders for losses related to the Virus, CV-19, and/or the CA Orders.

83. By letter dated May 27, 2020, Defendant issued a written coverage denial to Plaintiff Thunderhill (the "Thunderhill Denial"), noting, among other things:

... Finger Lakes must advise you that you have no coverage under the Finger Lakes Policy for your loss of income arising out of the COVID-19 pandemic and its negative effect on the economy and your business.

The reasons for the denial are that there was no direct physical loss or covered cause of loss to any of your buildings that resulted in you loss of income.

84. Annexed hereto as *Exhibit F* is a copy of the Thunderhill Denial.

85. By letter dated May 27, 2020, Defendant issued a written coverage denial to Plaintiff WNY Empire (the “WNY Empire Denial”), noting, among other things:

. . . Finger Lakes must advise you that you have no coverage under the Finger Lakes Policy for your loss of income arising out of the COVID-19 pandemic and its negative effect on the economy and your business.

The reasons for the denial are that there was no direct physical loss or covered cause of loss to any of your buildings that resulted in you loss of income.

86. Annexed hereto as *Exhibit G* is a copy of the WNY Empire Denial.

87. The Thunderhill and WNY Empire Denials are the same and/or substantially the same as one another and, upon information and belief, as denials sent to other insureds with the same or similar coverage (the “Coverage Denial”).

88. Upon information and belief, each and every denial letter sent by Defendant to its insureds relating to the Virus, CV-19, or the CA Orders was the same in form and substance to the Thunderhill Denial, WNY Empire Denial, and Coverage Denial.

89. The Coverage Denial received by Plaintiffs sets forth Defendant’s analysis of why the Policies issued in New York do not afford coverage for losses related to the Virus, CV-19, or the CA Orders.

90. The Coverage Denial does not reference any of the facts of Plaintiffs’ loss.

91. Defendant Finger Lakes refused to make payment to Plaintiffs for damages resulting from the Loss which constitutes a breach of the Policy.

92. Defendant Finger Lakes’s refusal to cover the Loss is erroneous and unsupported by the plain language of the Policy.

93. As such, Defendant Finger Lakes owes Plaintiffs insurance coverage and benefits under the Policy for the Loss, and there is no valid basis for its refusal to issue the same.

94. Plaintiffs continue to be damaged by Defendant Erie Finger Lakes' refusal to issue the full amounts due and owing under the Policy.

95. Defendant denied coverage to Plaintiffs and other policyholders for losses related to the Virus, CV-19, and/or the CA Orders based on its policy interpretation as set forth in the DFS Response and the "Coverage Denial."

96. Upon information and belief, Defendant made coverage decisions concerning policyholder claims related to the Virus, CV-19, and the CA Orders without consideration of the unique facts or circumstances of each loss and, rather, adopted a pattern and/or practice to deny such claims.

CLASS ACTION ALLEGATIONS

97. Plaintiff brings this action pursuant to Article 9 of the CPLR on behalf itself and a class consisting of:

- a. all policyholders of all-risk commercial property insurance policies issued by Defendant, including policyholders of a Business Owners Policy or a policy that includes or is comprised of Business Owners Policy "Agreement" and "General Policy Provisions" Part, Form SF-20 (Ed. 1/88); Business Owners Policy "Causes of Loss-Coverage A" Part, Form SF-3 (Ed. 9/96); and/or Business Owners Policy "Loss of Income" Part, Form SF-312 (Ed. 1/88);
- b. policyholders who are residents of the State of New York, incorporated in the State of New York, and/or otherwise domiciled in the State of New York;
- c. whose policies were in effect for any period of time on or after February 15, 2020, and through the end of the (i) declared emergency period or (ii) prohibitions, limitations, or restrictions of business property use under the CA Orders;
- d. whose policies do not contain the Virus Exclusion or a substantially similar exclusion for a virus as an endorsement; and
- e. who suffered BI Losses or SL Losses as a result of the Virus, CV-19, or the CA Orders, including policyholders that suspended or reduced business operations at the premises covered by their policy (the "Class").

98. Excluded from the Class are Defendant and its members, affiliates, parents, subsidiaries, officers, directors, employees, successors, or assigns; governmental entities as well as counsel and court staff assigned to this case and/or their immediate family members. Plaintiffs reserves the right to amend or modify the Class definition.

99. CPLR § 901(a)(1) - Numerosity. The Class members are so numerous that joinder of all members is impracticable. Upon information and belief, Defendant issued thousands of commercial property insurance policies in New York containing provisions for business interruption and related coverage, including the Business Owners Policy and policies that include the Business Owners Policy “Agreement” and “General Policy Provisions” Part, Form SF-20 (Ed. 1/88); Business Owners Policy “Causes of Loss-Coverage A” Part, Form SF-3 (Ed. 9/96); and/or Business Owners Policy “Loss of Income” Part, Form SF-312 (Ed. 1/88).

100. CPLR § 901(a)(2) - Commonality and Predominance. Common questions of law and fact exist as to all Class members and predominate over any questions solely affecting individual Class members. Among the questions of law and fact common to the Class are:

- a. Defendant issued all risk policies to Class members in exchange for premiums paid and received;
- b. Plaintiff and the Class members had the use of/access to their property and/or the operation of their business impacted by the CA Orders;
- c. Defendant’s position that the presence of a virus or the reduction of a business relating thereto does not constitute direct physical loss of or damage to property;
- d. Defendant’s interpretation of coverage for losses related to the Virus, CV-19, and the CA Orders as set forth in the DFS Response;
- e. whether Defendant’s coverage decision details were uniformly adopted and applied to all policyholder Class members;
- f. Defendant’s knowledge of and failure to adopt the Virus Exclusion in the policies issued to Class members;

- g. whether the policies issued by Defendant were ambiguous as to coverage for losses arising from the presence of a virus or the limiting or closing of a business to prevent the spread of a virus;
- h. whether the presence of a person infected with CV-19 at or in the immediate area of an insured premises constitutes a physical loss of or physical damage to property under the policies issued by Defendant;
- i. whether the closing or limiting of a business to prevent the spread of a virus constitutes a physical loss of or physical damage to property under the policies issued by Defendant; and
- j. whether New York state laws were violated by the Defendant's acts and/or omissions as alleged herein.

101. CPLR § 901(a)(3) - Typicality. The claims of the proposed Class representatives, Plaintiffs Thunderhill and WNY Empire, are typical of the claims of the Class members as all Class members were issued the same or substantially similar commercial property insurance policies by Defendant, and Plaintiff Thunderhill, Plaintiff WNY Empire, and members of the proposed class have been similarly affected by Defendant's wrongful acts complained of herein, including Defendant's position that the presence of a virus and/or the closing or limiting of a business to prevent the spread of a virus are not physical loss or damage to property.

102. CPLR § 901(a)(4) - Adequacy of Representation. The proposed Class representatives, Plaintiffs Thunderhill and WNY Empire, will fairly and adequately protect the interests of the Class and has retained counsel competent and experienced in matters involving first party insurance coverage as well as class actions. Plaintiffs have no interests which conflict with the Class. Plaintiffs and its counsel will vigorously prosecute this action, and the interests of the Class will be fairly and adequately protected.

103. CPLR § 901(a)(5) - Superiority. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Upon information and belief, Defendant issued in excess of 1,000 commercial

property policies in New York and it is undisputed that the Virus, CV-19, and/or the CA Orders have impacted every business in New York, including every policyholder in the proposed Class.

104. The damages suffered by individual class members will vary and may be relatively small in comparison to the costs of litigation. As such, the expense and burden of individual litigation could make it impossible for Class members to individually redress the wrongs done to them. There will be no unusual difficulty in the management of this action as a class action.

105. Additionally, the Class should be certified under CPLR § 901 because: (a) the prosecution of separate actions by the individual Class members would create a risk of varying results and incompatible/inconsistent standards of conduct for Defendant; (b) the prosecution of separate actions by individual Class members would create a risk of adjudications with respect to them which would, as a practical matter, be dispositive of the interests of other Class members not parties to the adjudications, or substantially impair or impede their ability to protect their interests; and (c) Defendant acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final declaratory relief with respect to the Class as a whole.

FIRST CAUSE OF ACTION
Breach of Contract and Declaratory Relief

106. Plaintiffs repeat and re-allege the preceding paragraphs as if fully set forth and incorporated herein.

107. Plaintiffs bring this cause of action on behalf of themselves and on behalf of the other Class members.

108. Plaintiffs sustained a physical loss of property, BI Losses, SL Losses, and damages as a result of a covered cause of loss under the Policy.

109. Covered Causes of Loss under the policies issued by Defendant to Class members include physical loss of property resulting from the Virus, CV-19, and/or the CV Orders.

110. Defendant had a duty under the Policy to provide coverage for BI Losses, SL Losses, and damages resulting from a covered cause of loss.

111. Plaintiffs duly notified Defendant of their claim under the Policy, including for business income coverage.

112. Defendant refused to pay Plaintiffs' BI Losses, SL Losses, and damages.

113. Defendant refused to pay BI Losses, SL Losses, and damages arising from or relating to the Virus, CV-19, and/or the CA Orders.

114. Defendant's failure and refusal to make payments to Plaintiffs for the BI Losses, SL Losses, and other damages constitutes a breach of the Policy.

115. Defendant's failure and refusal to make payments to Plaintiffs and other Class members for BI Losses, SL Losses, and damages pursuant to the terms of the policies constitutes a breach of contract.

116. Defendant's conduct has been unreasonable.

117. Defendant unreasonably obstructed and prevented Plaintiffs and other Class members from receiving prompt payment for the insurance benefits to which they are entitled under the Policy.

118. Defendant breached its duty and obligations of good faith and fair dealing.

119. Plaintiffs and the other Class members have been damaged by Defendant's wrongful conduct, including without limitation suffering extra-contractual consequential damages as a result of Defendant's failure to act promptly and in good faith.

120. It was reasonably foreseeable and contemplated by the parties, at the time the Policy was issued and/or renewed, that the failure to properly investigate a loss/occurrence and the failure to promptly provide coverage and pay insurance benefits under the Policy would negatively and

adversely affect a policyholder's business operations, including causing delays thereto, thereby forcing Plaintiffs and other Class members to incur additional business interruption losses, attorneys' fees, and litigation related expenses.

121. Plaintiffs and members of the proposed Class have been damaged by Defendant's wrongful conduct, including that they have sustained foreseeable extra-contractual consequential damages, including business interruption losses, attorneys' fees, and litigation related expenses.

122. As a result of Defendant's breach and wrongful conduct, Plaintiffs and Class members are entitled to judgment providing declaratory relief of their rights under the Policy, determining that the presence of the Virus causes physical loss of or damage to property as a matter of law.

123. As a result of Defendant's breach and wrongful conduct, Plaintiffs and Class members are entitled to judgment providing declaratory relief of their rights under the Policy, determining that Defendant is liable to Plaintiff and Class members for breach of contract, and that Plaintiff and Class members have been damaged and are entitled to judgment against Defendant in an amount to be determined at trial, plus interest.

SECOND CAUSE OF ACTION
New York General Business Law § 349

124. Plaintiffs repeat and re-allege the preceding paragraphs as if fully set forth and incorporated herein.

125. Plaintiffs bring this cause of action on behalf of themselves and on behalf of the other Class members.

126. Defendant's statements in the DFS Response sent to policyholders were inaccurate and misleading.

127. Defendant's represented to policyholders and the public that coverage

considerations depend on the particular facts and circumstances presented, as well as policy provisions and individual coverages that may be part of each particular policy.

128. Defendant did not make coverage determinations based on the particular facts and circumstances presented by Plaintiffs' claims.

129. Defendant made a uniform decision to deny all claims arising from the Virus, CV-19, and/or the CA Orders irrespective of the factual circumstances or policy provisions of individual policyholders.

130. Upon information and belief, Defendant made the uniform decision to deny all claims arising from the Virus, CV-19, and/or the CA Orders irrespective of the factual circumstances or policy provisions of individual policyholders before issuing the DFS Response.

131. Defendant expressly misrepresented to its policyholders that coverage decisions would be made on a case-by-case basis given the factual circumstances or policy provisions of individual policyholders.

132. Defendant's instructions to insurance agents and policyholder representatives that the coverages under its policies do not apply in the case of a virus were inaccurate and misleading.

133. Defendant's inaccurate and misleading statements were relied on by policyholders and induced them to refrain from filing claims with Defendant.

134. Defendant's failure to reasonably investigate the BI Losses and SL Losses as well as its refusal to pay insurance benefits through the present has, at the least, been in reckless and/or grossly negligent disregard of its obligations under each Policy issued to Plaintiffs and other Class members.

135. Defendant issued insurance policies to Plaintiffs and the Class members that did not include a virus exclusion or similar exclusionary language.

136. Defendant charged Plaintiffs and the Class members premiums for a Policy that did not include a virus exclusion.

137. Upon information and belief, Defendant issued insurance policies to certain policyholders that did contain a virus exclusion or similar exclusionary language.

138. Despite the fact that Plaintiffs and the Class members paid premiums for a Policy that did not include a virus exclusion, Defendants treated all policyholders the same by universally denying Virus-related claims regardless of whether the respective insurance policy contained a virus exclusion or similar exclusionary language.

139. Defendants induced Plaintiffs and Class members to incur costs in submitting claims to Defendants under the Policy—including testing costs, attorneys' fees, expert fees, and other expenses—by misrepresenting that Defendants would consider each insured's claim on a case-by-case basis, where Defendants already made a uniform decision to universally deny all Virus-related claims.

140. Defendant's actions are consumer oriented inasmuch as the Policy consists of standard policy forms created, maintained, and issued by Defendant.

141. Defendant's actions are consumer oriented inasmuch as the disclaimer letter issued to Plaintiffs consisted of a generic, predetermined analysis that all claims relating to the Virus, CV-19, and the CA Orders were denied.

142. Defendant pre-determined that as a general rule its standard form policies of insurance issued to insureds in New York State simply do not afford coverage for losses stemming from the Virus, CV-19, and the CA Orders, irrespective of the fact that the policies do not contain a Virus Exclusion.

143. Illustrating the predetermined nature of Defendant's coverage decisions, neither the denial letter nor the DFS Response reference or contain an analysis of the facts of Plaintiffs' loss.

144. Further illustrating the predetermined nature of Defendant's coverage decisions is the fact that Defendant, upon information and belief, created a generic policy language template which is a boilerplate analysis of the policy so that the disclaimer letters could be generated in a mass-produced, streamlined manner.

145. Upon information and belief, Defendant has received claims arising from or related to the Virus, CV-19, and the CA Orders from other insureds with policies that are the same as substantially similar to the Thunderhill and WNY Empire Policies.

146. Upon information and belief, Defendant issued other disclaimer letters that are the same as, or substantially similar to, the disclaimer letters that were issued to Plaintiffs in this case.

147. Defendant's conduct in pre-deciding its coverage position for all, or substantially all, claims from insureds in New York State stemming from the Virus, CV-19, and the CA Orders was materially misleading.

148. Defendant, by its agents and employees, has perpetuated and continued perpetuating a scheme by which its insureds are deprived of the full benefit of their policies, regardless of the fact that the Class's policies do not contain the Virus Exclusion or any exclusions referencing virus-related losses.

149. Upon information and belief, Defendant instituted a practice, policy, or procedure by which Defendant intends to deny all, or substantially all, claims stemming from the Virus, CV-19, and the CA Orders.

150. Defendant's practice, policy, or procedure was surreptitiously and purposefully made without notice or disclosure to Defendant's customers, potential customers, or the public at

large, and indeed made despite express representations to the public to the contrary.

151. Defendant's practice, policy, or procedure of not covering claims stemming from viruses is not disclosed within the subject insurance policies, because the policies do not contain the Virus Exclusion or a similar exclusion for viruses, despite the fact that Defendant is familiar with the Virus Exclusion. Therefore, Plaintiffs and the public at large have been misled in a material respect.

152. Defendant's practice of denying all, or substantially all, claims stemming from the Virus, CV-19, and the CA Orders was not disclosed to its policyholders until after they had submitted a claim under a policy. Therefore, Plaintiffs and the public at large who have obtained such policies from the Defendant have been misled in a material respect.

153. The aforementioned public-oriented conduct exercised by Defendant is a regular business practice, policy, or procedure.

154. Defendant's aforesaid practice, policy, or procedure is willful, intentional and malicious with the ultimate intent and effect of depriving its insureds of the scope and amount of coverage which they paid and bargained for.

155. The aforesaid actions of the Defendant constitute a violation of § 349 of the New York General Business Law for which Plaintiffs and the Class are entitled to treble damages up to the sum of \$1,000.00 per violation, plus reasonable attorneys' fees.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of the other Class members, respectfully requests that the Court:

a. Enter an Order certifying the proposed Class, as requested herein, designating Plaintiffs as Class representative, and appointing Plaintiffs' undersigned attorneys as Counsel for the Class;

b. Entering judgment on the First Cause of Action in favor of Plaintiffs and the Class members as follows:

1. Determining and declaring that the Virus causes, and the presence of the Virus constitutes, direct physical loss of or damage to property;
2. Determining and declaring that losses sustained by Plaintiffs and Class members arising from and relating to the Virus, CV-19 and/or the CA Orders are insured losses covered under the Policies issued by Defendant;
3. Determining and declaring that Defendant is obligated to pay the full amount of BI Losses, SL Losses, and other coverage benefits provided for under the Policies issued to Plaintiffs and the Class members with respect to losses arising from or relating to the Virus, CV-19, and/or the CA Orders; and
4. Determining liability in favor of Plaintiffs and Class members against Defendant for breach of contract and awarding damages for losses covered under the Policies in an amount to be determined at trial, plus interest.

c. Entering judgment on the Second Cause of Action in favor of Plaintiffs and Class members against Defendant in an amount to be determined at trial but not less than treble damages up to the sum of \$1,000.00 per violation, plus interest and reasonable attorneys' fees;

d. Ordering Defendant to pay the legal fees of attorneys' fees and costs of suit;

- e. Ordering Defendant to pay both pre- and post-judgment interest on any amounts awarded; and
- f. Ordering such other and further relief as may be just and proper.

Dated: Buffalo, New York
January 20, 2021

DUKE HOLZMAN PHOTIADIS & GRESENS LLP

/s/ Christopher M. Berloth

By: _____

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