

STATE OF RHODE ISLAND
PROVIDENCE COUNTY

SUPERIOR COURT
C.A. NO:

CLUTCH CITY SPORTS &
ENTERTAINMENT, L.P. (d/b/a TOYOTA
CENTER) and ROCKET BALL, LTD.,

Plaintiffs,

v.

AFFILIATED FM INSURANCE
COMPANY,

Defendant.

PLAINTIFFS' ORIGINAL COMPLAINT

Plaintiffs, by their counsel, file this Original Complaint for damages and declaratory judgment against Defendant, Affiliated FM Insurance Company, alleging the following:

I. INTRODUCTION

1. This action for breach of contract, declaratory judgment, and bad faith arises out of Plaintiffs' claim for insurance coverage under an "all risk" property insurance policy sold by AFM to Plaintiffs.

2. Despite agreeing to cover Plaintiffs' property against all risks of physical loss or damage (except as specifically excluded in the Policy), and Plaintiffs' resulting business interruption loss, AFM wrongfully denied coverage.

II. THE PARTIES

3. Clutch City Sports & Entertainment, L.P. (d/b/a Toyota Center) (“Toyota Center”) is a limited partnership, formed under the laws of the State of Texas, located at 1510 Polk Street, Houston, Texas 77002.

4. Rocket Ball, Ltd. (“Houston Rockets”) is a limited partnership, formed under the laws of the State of Texas, located at 1510 Polk Street, Houston, Texas 77002.

5. Affiliated FM Insurance Company (“AFM”) is incorporated under the laws of Rhode Island, with a principal place of business at 270 Central Avenue, Johnston, Rhode Island 02919. AFM is authorized to do business and issue insurance policies in the State of Texas.

III. JURISDICTION AND VENUE

6. This Court has jurisdiction over this action because AFM is incorporated under the laws of Rhode Island, with a principal place of business at 270 Central Avenue, Johnston, Rhode Island 02919, and under Rhode Island General Laws §8-2-14, because the amount in controversy exceeds the sum of ten thousand dollars (\$10,000).

7. Venue in this Court is proper under Rhode Island General Laws §9-4-4, because AFM is located in Providence County.

IV. FACTUAL BACKGROUND

8. Toyota Center spans six city blocks in downtown Houston, Texas and is home to the National Basketball Association’s (“NBA”) Houston Rockets. It also hosts some of the nation’s top-attended concerts and touring shows.

9. Toyota Center welcomed nearly 1.3 million fans last year while, this year, because of the forced closure of the arena, they hosted just over 340,000 fans.

10. AFM is an insurance company that sold an insurance policy providing coverage to Toyota Center and the Houston Rockets against “all risks of physical loss or damage, except as ... excluded.” *See* Policy attached as Exhibit A (“Policy”).

11. The Policy has an effective term of October 6, 2019, through October 6, 2020.

12. The Policy also provides coverage to Plaintiffs for business interruption losses occurring as a result of physical loss or damage. *See* Exhibit A, All Risk Coverage Form, at 19 of 44.

13. The Policy provides up to \$412 million in coverage for property damage, with a substantial portion of that amount in coverage for business interruption losses, *on a per occurrence basis*. *See* Exhibit A, Declarations, at 1 of 8.

14. The Policy also provides Civil Authority coverage for business interruption loss resulting from prohibited access to Toyota Center due to a civil authority order, provided that such an order was the direct result of physical damage of the type insured at Toyota Center or within five (5) statute miles of it. *See* Exhibit A, All Risk Coverage Form, at 24 of 44.

15. In addition, the Policy covers reasonable and necessary costs incurred for actions to temporarily protect or preserve the property, provided such actions are necessary to prevent insured physical loss or damage. *See* Exhibit A, All Risk Coverage Form, at 14 of 44. This Protection and Prevention of Property Damage coverage is for the full policy limit of \$412 million *per occurrence*.

16. In exchange for AFM’s agreement to take on Plaintiffs’ risk of loss, Plaintiffs dutifully paid AFM \$719,490 in annual premiums.

A. COVID-19 is a Deadly Communicable Disease

17. COVID-19 is a deadly communicable disease that has already infected over 3,000,000 people in the United States, resulting, to date, in more than 131,000 deaths.¹

18. The World Health Organization (“WHO”) has declared the COVID-19 outbreak a pandemic, and President Donald Trump has declared a nationwide emergency due to the public health crisis caused by the COVID-19 outbreak in the United States.

19. The time from exposure (infection) to the development of COVID-19 symptoms—the incubation period—can be up to fourteen days.²

20. During this period (the “pre-symptomatic” period), those infected can be contagious and transmit the disease before they show any symptoms or have any reason to believe they are sick.³

21. According to WHO: “People can catch COVID-19 from others who have the virus. The disease can spread from person to person through small droplets from the nose or mouth, which are spread when a person with COVID-19 coughs or simply exhales. These droplets land on objects and surfaces all around the person. Other people then catch COVID-19 by touching these objects or surfaces, then touching their eyes, nose, or mouth. People also catch

¹ See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last viewed July 9, 2020) (confirming 3,047,671 reported cases in the United States, resulting, to date, in 132,056 deaths).

² See https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_4#:~:text=The%20incubation%20period%20for%20COVID,occur%20before%20symptom%20onset (last viewed on July 9, 2020); see also <https://www.cdc.gov/coronavirus/2019-ncov/hcp/faq.html> (last viewed on July 9, 2020).

³ See https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_4#:~:text=The%20incubation%20period%20for%20COVID,occur%20before%20symptom%20onset (last viewed on July 9, 2020).

COVID-19 if they breathe in droplets from an infected person who coughs out or exhales droplets.”⁴

22. WHO has confirmed that COVID-19 can exist on objects or surfaces and that the transmission of COVID-19 can occur by indirect contact with surfaces in the immediate environment or with objects that were touched by an infected person hours before.⁵

23. Likewise, a study documented in *The New England Journal of Medicine* established that COVID-19 can remain present in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard, and up to three days on plastic and stainless steel.⁶

24. The study’s results further confirmed that individuals can become infected with COVID-19 through indirect contact with surfaces or objects contacted by an infected person, whether or not they were symptomatic.⁷

B. Civil Authority Orders Because of COVID-19 and Related Physical Loss or Damage to Property

25. In an effort to slow the spread of COVID-19, and as a consequence of physical damage caused by COVID-19, federal, state, and local governments imposed unprecedented civil orders and advisements. These measures included the restriction of travel to the United States, requiring certain businesses to close and requiring residents to remain in their homes unless performing “essential” activities, such as going to the grocery store or pharmacy, or seeking medical care (“Stay at Home Orders” or “Orders”).

⁴ See <https://www.who.int/news-room/q-a-detail/q-acoronaviruses> (last viewed on July 9, 2020).

⁵ See <https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations> (last viewed on July 9, 2020).

⁶ See <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last viewed July 9, 2020); see also <https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations> (last viewed July 9, 2020).

⁷ See Id.

26. The Stay at Home Orders typically required businesses deemed “non-essential” to close their doors and stop all in-person work.

27. However, even businesses classified as “essential” have been severely impacted by the pandemic and Stay at Home Orders.

28. Stay at Home Orders remain in effect as of the date of this filing and have caused the suspension and/or limiting of both non-essential and essential businesses.

29. As a business that relies on customers, vendors, and suppliers locally, from across the country, and around the world, Plaintiffs are directly affected by Stay at Home Orders, wherever issued.

30. Stay at Home Orders, the damage caused by COVID-19, the transmission of COVID-19, and Plaintiffs’ efforts to preserve and protect their property from COVID-19 have had a devastating impact on Plaintiffs’ business.

31. Simply stated, Toyota Center has lost its functionality and has been impaired by the existence of COVID-19.

32. One of the first publicized cases of COVID-19 in Houston was that of a visitor to the Houston Livestock Show and Rodeo World’s Championship Bar-B-Que Contest (“Cook-Off”).

33. On March 11, 2020, City officials confirmed that the attendee, who went to the Cook-Off on February 28, 2020, tested presumptively positive for COVID-19.

34. That same day, Houston Mayor Sylvester Turner and Harris County Judge Lina Hidalgo, to minimize the risk of exposure to COVID-19 and to promote the health and safety of

Harris County residents, issued a Declaration of Local Disaster for Public Health Emergency and cancelled the remainder of the Houston Livestock Show and Rodeo.⁸

35. Eventually, City and County officials revealed that not just one person, but at least four people who had attended the Cook-Off on February 28, 2020 later tested positive for COVID-19.

36. Also on March 11, 2020, the NBA indefinitely postponed the remainder of its 2019-2020 season after a Utah Jazz player tested positive for COVID-19.

37. Then, on March 12, 2020, the NCAA cancelled the 2020 basketball tournament, which was to be hosted in part at Toyota Center (South Regionals March 27-29, 2020), and the McDonald's All-American Game announced the cancellation of the 2020 games, which were scheduled for April 1, 2020 that were also to be held at Toyota Center.

38. Those cancellations were followed by AEG's and Live Nation's announcement which postponed all concerts and events nationwide beginning March 12, 2020.

39. By this time, *every event through April 1, 2020, scheduled at Toyota Center was suspended or cancelled due to COVID-19.*

40. Legal orders from government authorities in Texas swiftly followed, which severely restricted businesses throughout Harris County, Texas. The orders directly affecting the City of Houston are summarized below.

41. On March 13, 2020, the Governor of the State of Texas, Greg Abbott, issued a proclamation certifying that COVID-19 posed an imminent threat of disaster in the State of Texas and declared a state of disaster for all counties in the State of Texas.⁹

⁸ <https://www.houstontx.gov/mayor/press/2020/public-health-emergency-declared-covid-19.html> (last viewed on July 9, 2020).

42. On March 17, 2020, the Commissioners Court of Harris County extended the March 11, 2020 Declaration of Local Disaster for Public Health Emergency and mandated the closure of all bars and dine-in restaurants.¹⁰

43. On March 19, 2020 the Commissioner of the Department of State Health Services, John W. Hellerstedt, M.D., and Governor Abbott, issued a Declaration of a Public Health Disaster in the State of Texas, which among other things, prohibited Texans from gathering in groups of ten or more.¹¹

44. On March, 24, 2020, Judge Hidalgo, extended the Declaration of Local Disaster for Public Health Emergency to April 29, 2020 and issued a “Stay Home Work Safe” order, which prohibited public or private gatherings of any number of people and provided that all residents in the county remain at home other than to leave for Essential Activities as defined in the order. Further, the order required all businesses operating in Harris County to cease all activities at facilities located in the county, except Essential Businesses as defined in the order. As a result, Toyota Center was forced to close to the public, access was restricted to only essential personnel, and has been unable to host events.¹²

45. On March 31, 2020, Governor Abbott, issued Executive Order No. GA-14 relating to the continuity of essential services and activities in the State of Texas, while

⁹ https://gov.texas.gov/uploads/files/press/DISASTER_covid19_disaster_proclamation_IMAGE_03-13-2020.pdf (last viewed on July 9, 2020).

¹⁰ <https://agenda.harriscountytexas.gov/2020/DisasterDeclarationExtension.pdf> (last viewed on July 9, 2020).

¹¹

https://www.westutx.gov/DocumentCenter/View/5526/DECLARATION_of_public_health_disaster_Dr_Hellerstedt_03-19-2020 (last viewed on July 9, 2020); https://www.westutx.gov/DocumentCenter/View/5525/EO-GA_08_COVID-19_preparedness_and_mitigation_FINAL_03-19-2020_1 (last viewed on July 9, 2020).

¹² <https://agenda.harriscountytexas.gov/2020/ExtensionLocalDisasterMarch24.pdf> (last viewed on July 9, 2020); <https://agenda.harriscountytexas.gov/2020/03-24-20StayHomeWorkSafe.pdf> (last viewed on July 9, 2020).

restricting non-essential services during the COVID-19 disaster through at least April 30, 2020, with Harris County commensurately extending its Stay Home Work Safe Order.¹³

46. On April 17, 2020, Governor Abbott, issued Executive Order GA-16 relating to the safe, strategic reopening of select retail services that were not deemed as “essential services” as the first step to start opening businesses again in the State of Texas (“Open Texas”). These reopened services were limited to those businesses whose services could be provided through pickup, delivery by mail, or delivery to the customer’s doorstep.¹⁴

47. That same day, Governor Abbott, issued Executive Order GA-17, relating to the establishment of the Governor’s Strike Force to Open Texas to study and make recommendations on safely and strategically restarting the State of Texas work, entertainment, and culture.¹⁵

48. On April 27, 2020, Governor Abbott, issued Executive Order GA-18, effective through May, 15, 2020, which established new limited guidelines for certain types of businesses (that did not include Toyota Center) to reopen at twenty-five percent (25%) capacity.¹⁶

49. On April 28, 2020, the Commissioner’s Court of Harris County, issued an Order to Extend the Declaration of Local Disaster for Public Health Emergency to May 20, 2020.¹⁷

¹³ https://gov.texas.gov/uploads/files/press/EO-GA-14_Statewide_Essential_Service_and_Activity_COVID-19_IMAGE_03-31-2020.pdf (last viewed on July 9, 2020); <https://www.readyharris.org/Newsroom/News-Releases/All-News-Releases/harris-county-judge-lina-hidalgo-extends-stay-at-home-work-safe-order-to-april-30> (last viewed on July 9, 2020).

¹⁴ https://www.westutx.gov/DocumentCenter/View/5553/EO-GA-16_Opening_Texas_COVID-19_FINAL_04-17-2020 (last viewed on July 9, 2020).

¹⁵ https://gov.texas.gov/uploads/files/press/EO-GA-17_Open_Texas_Strike_Force_COVID-19_IMAGE_04-17-2020.pdf (last viewed on July 9, 2020).

¹⁶ https://gov.texas.gov/uploads/files/press/EO-GA-18_expanded_reopening_of_services_COVID-19.pdf (Last viewed on July 9, 2020).

¹⁷ <https://agenda.harriscountytexas.gov/2020/2020-04-28-22k2.pdf> (last viewed on July 9, 2020).

50. On May 1, 2020, Judge Hidalgo, issued Harris County's Second Amended Stay Home, Work Safe Order, effective through May 20, 2020, which required all non-essential businesses to remain closed or to cease all activities including among others, interactive amusement venues, indoor sports areas, and any facilities that are used or intended to be used for any type of sport or recreation.¹⁸

51. On May 5, 2020, Governor Abbott, issued Executive Order GA-21, relating to the expanded reopening of services as part of the safe, strategic plan to Open Texas and which continued to exclude Toyota Center.¹⁹

52. On May 18, 2020 Governor Abbott, issued Executive Order GA-23, relating to the expanded opening of Texas in response to the COVID-19 disaster, which provided that, starting on May 31, 2020, for all Texas counties, professional basketball and other sporting events with no spectators physically present on the premises of the venue, may be conducted as approved on a league-by-league basis by the Texas Department of State Health Services, in consultation with the Office of the Governor and any recommendations by the advisory Strike Force to Open Texas, subject to certain requirements, including but not limited to, whether the league has submitted a plan that applies to all events and meets the minimum health and safety standards.²⁰

53. To date, however, while the NBA has finalized a plan to resume its 2019-2020 season, its current proposal involves all games being played at a remote location, without spectators, at the ESPN Wide World of Sports Complex at Walt Disney World Resort ("NBA

¹⁸ <https://agenda.harriscountytexas.gov/2020/20200501Order.pdf> (last viewed on July 9, 2020).

¹⁹ https://www.westutx.gov/DocumentCenter/View/5671/EO-GA-21-Expanding-Reopening-of-Services_Final_05-05-2020 (last viewed on July 9, 2020).

²⁰ https://gov.texas.gov/uploads/files/press/EO-GA-23_phase_two_expanding_opening_COVID-19.pdf (last viewed on July 9, 2020).

Complex”), near Orlando, Florida. The NBA’s plan does not include any games being played at Toyota Center.²¹

54. On May 19, 2020, Harris County Commissioner’s Court extended Harris County’s Disaster Declaration through June 10, 2020.²²

55. On June 3, 2020, Governor Abbott, issued Executive Order GA-26, relating to the opening of Texas in response to COVID-19, providing that every businesses establishment in Texas shall operate at no more than fifty percent (50%) of the total listed occupancy of the establishment.²³

56. On June 19, 2020, Judge Hidalgo, issued an Executive Order Regarding Health and Safety Policy and Face Coverings, providing that the Harris County Commissioners Court’s Declaration of Local Disaster for Public Health Emergency was effective unless extended, modified, or terminated early by Judge Hidalgo, that all commercial entities develop, post, and implement a health and safety policy, and that face coverings must be worn in public.²⁴

57. On June 26, 2020, Governor Abbott, issued Executive Order GA-28, relating to the targeted response to the COVID-19 disaster as part of the reopening of Texas, providing that every business establishment in Texas shall operate at no more than fifty percent (50%) of the total listed occupancy of the establishment and that the order shall remain in effect until it is modified, amended, rescinded, or superseded by the governor.²⁵

²¹ <https://www.nba.com/nba-returns-2020-faq> (last visited on July 9, 2020).

²² <https://agenda.harriscountytexas.gov/2020/20200519-25g2.pdf> (last viewed on July 9, 2020).

²³ https://gov.texas.gov/uploads/files/press/EO-GA-26_expanded_opening_COVID-19.pdf (last viewed on July 9, 2020).

²⁴ https://www.westutx.gov/DocumentCenter/View/6018/06-19-20_Health_and_Safety_Policy_and_Mask_signed_order (last viewed on July 9, 2020).

²⁵ https://gov.texas.gov/uploads/files/press/EO-GA-28_targeted_response_to_reopening_COVID-19.pdf (last viewed on July 9, 2020).

58. On July 1, 2020, Judge Hidalgo, issued an Amended Order Regarding Health and Safety Policy and Face Coverings, providing that the Harris County Commissioner Court's Declaration of Local Disaster for Public Health Emergency was effective through August 26, 2020, unless extended, modified or terminated early by Judge Hidalgo and incorporated and adopted Governor Abbott's, Executive Order GA-28.²⁶

59. As a direct result of COVID-19 and these orders, issued directly because of physical damage to property, and to prevent further immediately impending physical damage to property, Toyota Center has been forced to close its doors indefinitely since March 24, 2020 resulting in, to date, at least 29 cancelled events, including: 20 third-party events (*i.e.*, concerts) and nine Houston Rockets regular-season home games, as well as an undetermined number of playoff games.

C. Plaintiffs' "All Risks" Policy

60. The Policy covers property located at 1510 Polk Street, Houston, Texas 77002 "against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded..." See Exhibit A, All Risk Coverage Form, at 1 of 44.

61. AFM drafted the Policy.

62. Pursuant to the "Communicable Disease – Property Damage" additional coverage, the Policy expressly covers, among other things, "the reasonable and necessary costs incurred ... for the: (a) Cleanup, removal and disposal of ... communicable disease from insured property."²⁷ See Exhibit A, All Risk Coverage Form, at 6 of 44.

²⁶ <https://www.westutx.gov/DocumentCenter/View/6038/Harris-County-2020-06-30-FINAL-Amended-Health-and-Safety-Policy-and-Mask-Order> (last viewed on July 9, 2020).

²⁷ Terms defined in the Policy are signified by the use of **bold** typeface. Unless otherwise stated, the use of **bold** typeface signifies the use of same in the Policy.

63. By providing for the “cleanup, removal and disposal of ... **communicable disease**,” the Policy explicitly recognizes that **communicable disease** physically damages property.

64. Accordingly, because the Policy specifically covers remediation of the damage caused by **communicable disease**, the physical damage to property caused by **communicable disease** is “physical damage of the type insured” under the Policy.

1. COVID-19 Triggered Coverage Under the “All Risks” Policy

65. The existence and actual presence of COVID-19 at Toyota Center has triggered coverage under the Policy.

66. In addition, the existence and presence of COVID-19 on property away from Toyota Center has triggered coverage under the Policy.

67. COVID-19 has caused (and continues to cause) physical loss and physical damage to property, including Toyota Center’s property. The property has been impaired. COVID-19 also has impaired many properties within and without a five-mile radius of Toyota Center.

68. The loss of functionality is no less physical than the impact of a property having lost its roof to a tornado or hurricane. Where once the property could carry on its business function, the property with a blown away and crumbling roof cannot operate in that way. Where once the property could seat patrons away from the elements, it can no longer do so. That is physical damage, as is the loss of function at Toyota Center caused by COVID-19.

69. COVID-19 has also caused (and continues to cause) Plaintiffs to experience covered business interruption.

70. Plaintiffs have submitted a claim pursuant to the Policy as a result of sustaining losses covered by the Policy. Notwithstanding that fact, AFM has denied and limited coverage for Plaintiffs' claim by contending that no physical loss has taken place and that various exclusions apply to Plaintiffs' loss. AFM has done so in bad faith, based on an apparent systematic company practice designed to minimize payments for covered COVID-19 claims.

2. Multiple Coverages are Triggered under the "All Risks" Policy

71. In addition to triggering the Policy's "all risks" coverage, Plaintiffs' claim also triggers multiple "Additional Coverages" and "Coverage Extensions" provided under the Policy including but not limited to the following.

i. COVID-19 Triggered the Policy's Communicable Disease – Property Damage and Communicable Disease – Business Interruption Coverage

72. The actual presence of COVID-19 at Toyota Center has caused physical damage to its property, resulting in the issuance of orders by authorized governmental agencies regulating communicable disease, thereby triggering coverage under the Policy's Communicable Disease – Property Damage coverage.

73. The business interruption losses sustained by Toyota Center as a result of such civil authority orders issued because of the actual presence of COVID-19 at Toyota Center triggers coverage under the Policy's Communicable Disease – Business Interruption coverage.

74. Plaintiffs sustained losses due to access limitations or restrictions or prohibitions caused by the actual presence of COVID-19 at Toyota Center.

75. AFM is liable under the Policy for such losses under the Policy's Communicable Disease – Property Damage and Communicable Disease – Business Interruption coverage.

ii. COVID-19 Triggered the Policy's Protection and Preservation of Property – Property Damage and Protection and Preservation of Property – Business Interruption Coverage

76. COVID-19 also has caused and continues to cause actual physical loss and damage to insured property. In addition, COVID-19 has threatened and continues to threaten to cause immediately impending physical loss and damage to property.

77. This actual and threatened physical loss and damage to insured property has prompted Plaintiffs to take action to temporarily protect or preserve its property, thereby triggering the Policy's Protection and Preservation of Property – Property Damage and Protection and Preservation of Property – Business Interruption Coverage.

iii. COVID-19 Triggered the Policy's Business Interruption Coverage

78. The Policy affords coverage for Plaintiffs' business interruption losses, subject to the Policy's terms and conditions.

79. COVID-19 has caused Plaintiffs to suffer business interruption loss as a direct result of physical loss and damage of the type insured under the Policy.

80. This loss triggers coverage under the Policy's Business Interruption provisions including, without limitation, coverage for up to 365 days of Gross Earnings loss, Gross Profits loss, and Rental Income Loss.

iv. COVID-19 Triggered the Policy's Extra Expense Coverage

81. COVID-19 has caused Plaintiffs to incur reasonable and necessary expenses to continue, as close to normal as possible, the conduct of Plaintiffs' business. Such expenses are beyond those that would have normally been incurred in conducting the business absent the presence of COVID-19.

82. The expense incurred by Plaintiffs beyond those necessary in the normal operation of its business solely as a result of the physical loss and damage caused by COVID-19 trigger coverage under the Policy's Extra Expense coverage.

v. COVID-19 Triggered the Policy's Attraction Property Coverage

83. COVID-19 has also caused, and is continuing to cause, physical loss and damage to property away from Toyota Center, including property within one statute mile of Toyota Center that attracts business to Toyota Center.

84. Plaintiffs have sustained, and will continue to sustain, a loss of business income directly resulting from physical loss and damage of the type insured to property of the type insured that attracts business to Toyota Center.

vi. COVID-19 Triggered the Policy's Civil Authority Coverage

85. The physical damage caused by the presence of COVID-19 at property located within five statute miles of Toyota Center has directly resulted in the issuance of orders and directives by Governor Abbott and other civil authorities prohibiting access to Toyota Center.

86. Plaintiffs have sustained, and will continue to sustain, business interruption losses because orders from civil authorities issued as a direct result of physical damage of the type insured at Toyota Center or within five statute miles of Toyota Center, have prohibited access to Toyota Center.

vii. COVID-19 Triggered the Policy's Ingress/Egress Coverage

87. COVID-19 and the physical loss and damage it has caused, and continues to cause, has resulted in the necessary interruption of Plaintiffs' business by totally or partially preventing ingress to or egress from Toyota Center as a direct result of physical loss and damage of the type insured to property of the type insured.

88. The business interruption losses sustained by Plaintiffs as a result of the necessary suspension of Plaintiffs' business as a result of the total or partial denial of access to Toyota Center triggers the coverage under the Policy's Ingress/Egress coverage.

viii. COVID-19 Triggered the Policy's Supply Chain Coverage

89. COVID-19 has caused, and continues to cause, physical loss and damage of the type insured to property of the type insured at the premises of Plaintiffs' direct customers and direct contract service providers, and the direct and indirect suppliers, customers, and contract service providers of Plaintiffs' direct customers and contract service providers.

90. The loss of business income sustained by Plaintiffs as a result of such supply chain interruption(s) triggers coverage under the Policy's Supply Chain coverage.

3. No Exclusion Impacts Coverage

91. No exclusion in the Policy applies to preclude or limit coverage for the actual presence of COVID-19 at or away from Toyota Center, the physical loss and damage to property at Toyota Center, and/or the business interruption losses that has and will continue to result from the physical loss and damage to property. To the extent that AFM contends any exclusion(s) apply, such exclusion(s) are unenforceable.

4. The Policy's Contamination Exclusion Does Not Apply

92. The Policy's "Communicable Disease – Property Damage" coverage provides coverage for, among other things, "the reasonable and necessary costs incurred...for the: (a) Cleanup, removal and disposal of ... **communicable disease** from insured property." See Exhibit A, All Risk Coverage Form, at 7 of 44.

93. AFM has stated, in writing, that COVID-19 meets the definition of **communicable disease** under the Policy.

94. The Policy also contain an exclusion that purports to preclude coverage for “**contamination**.” See Exhibit A, All Risk Coverage Form, at 5 of 44.

95. The Policy defines “**contamination**” as, “any condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen, or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold or mildew. See Exhibit A, All Risk Coverage Form, at 42 of 44.

96. The Policy’s “**contamination**” exclusion does not exclude coverage for loss caused by “communicable disease.”

97. The Policy’s “**contamination**” exclusion does not exclude coverage for immediate costs to protect or preserve insured property due impending physical loss or damage.”

98. The Policy’s “**contamination**” exclusion does not purport to exclude coverage for business interruption losses. The Policy has three types of exclusions: Group I, Group II, and Group III. The contamination exclusion is a Group III exclusion.

99. Group I exclusions specifically exclude coverage for business interruption losses caused by particular risk of loss, such as nuclear reaction, war, and rebellion. Group I exclusions do so by stating specifically in its prefatory phrase that “This Policy excludes *loss or damage directly or indirectly caused by or resulting from any of the following ...*”

100. Group II and III exclusions, however, do not exclude business interruption losses. The prefatory language to those two groups of exclusion does not state explicitly or otherwise that it is excluding loss. Instead, the two groups of exclusions exclude particular conditions of property, rather than seeking to exclude any loss or damage arising from a particular cause.

101. The contamination exclusion itself does not exclude losses from contamination, but, rather, the costs to remedy contamination and, in particular, the cost to decontaminate and the cost to use other non-contaminated space.

102. To the extent that AFM contends that the Policy’s “**contamination**” exclusion bars coverage for loss caused by “**communicable disease**,” cost incurred to preserve or protect insured property, business interruption loss, or some other aspect of Plaintiffs’ claim, the Policy is, at best, ambiguous, and therefore, must be construed in favor of coverage.

5. The Policy’s Communicable Disease Sublimit Does Not Cap Plaintiffs’ Losses

103. Under the Policy, AFM must cover Plaintiffs for the actual presence of “communicable disease” at Toyota Center, pursuant to two sections in the Policy, titled “Communicable Disease – Property Damage” and “Communicable Disease – Business Interruption” (collectively, “Communicable Disease Sublimits”).

104. These two Communicable Disease Coverages are denoted as Additional Coverages or Coverage Extensions and do not purport to reduce other coverages available under the Policy. They are additive. Other coverages under the Policy that might also apply to loss or damage from or caused by virus, the threat of virus, or communicable disease or the threat of communicable disease, are not impacted by the Communicable Disease Sublimits. Further, any sublimit applicable to the Communicable Disease Sublimits Coverages does not apply to limit the Policy’s other coverages that may apply to physical loss or damage to Toyota Center.

D. AFM’s Bad Faith Conduct

i. AFM Conducted an Inadequate and Improper Investigation of Plaintiffs’ Claim

105. AFM is subsidiary of FM Global and is under its control.

106. Based on information and belief, FM Global and AFM are, in fact, engaged in a calculated scheme to deny Plaintiffs’ and its other insureds’ similar COVID-19 related claims.

107. FM Global's and AFM's systemic practice and procedure is noted in FM Global's internal memo, entitled "Talking Points on the Novel 2019 Coronavirus." *See* Exhibit B, "Talking Points."

108. On information and belief, AFM follows FM Global's Talking Points.

109. The FM Global Talking Points incorrectly and summarily state that the Policy coverages for Civil or Military Authority, Contingent Time Element Extended, and Ingress/Egress do not apply because "[a] virus will typically not cause physical damage" and because "the presence of a communicable disease does not constitute physical damage and is not of the type insured against. . ." *See* Exhibit B, Talking Points.

110. FM Global's inclusion of only the Communicable Disease Sublimits in its Talking Points causes FM Global's and AFM's adjusters to request information tied only to Communicable Disease Sublimits.

111. Nothing in the Policy states that such specificity in a civil order is required, nor does the ingress/egress coverage require such specificity. *See* Exhibit A, Policy.

112. In the face of FM Global's and AFM's bad faith coverage position, Plaintiffs' Policy explicitly acknowledges that the presence of communicable disease causes physical damage to property because it provides coverage for the resulting "cleanup, removal and disposal of . . . communicable disease."

113. The FM Global Talking Points document is an effort to maneuver the investigation and impending decision on coverage to only the Communicable Disease Sublimits.

114. The FM Global Talking Points instruct claims adjusters, including AFM adjusters, to reach conclusions without considering the specific facts related to an insured's particular claim, and without considering the applicable law which controls the insurance policy's interpretation.

115. FM Global's and AFM's actions, including but not limited to the Talking Points, are in direct opposition to the accepted practices of good faith insurance claims handling.

116. FM Global's and AFM's explicit practice and procedure on COVID-19-related claims constitute an unfair or deceptive act or practice and bad faith.

117. FM Global's and AFM's actions in using the Talking Points demonstrates an intentional, conscious disregard of Plaintiffs' rights under the Policy.

118. FM Global and AFM intentionally continued to place arbitrary requirements on the coverage under Plaintiffs' Policy.

119. FM Global's and AFM's intentional imposition of arbitrary requirements in Plaintiffs' Policy are unreasonable and are done in bad faith.

120. FM Global and AFM have not only intentionally failed to apply their own Policy language in good faith, but have also intentionally conducted a pretextual investigation with a pre-determined decision based on the arbitrary conclusions in the Talking Points. FM Global and AFM have additionally intentionally failed to consider the relevant facts related to Plaintiffs' *entire* claim against the Policy language.

121. AFM has effectively denied Plaintiffs' claim on June 29, 2020 and in doing so has knowingly or recklessly failed to conduct a reasonable investigation of Plaintiffs' claim knowing their denial lacked any reasonable basis, and, therefore, the basis for AFM's denial is unreasonable.

122. Therefore, Plaintiffs have suffered and continue to suffer substantial damages due to FM Global's and AFM's wrongful denial and bad faith conduct.

CLAIMS ALLEGED

COUNT I

Declaratory Judgment

123. Plaintiffs repeat and reallege the allegations in Paragraphs 1-124, as if fully set forth herein.

124. Plaintiffs seek the Court's declaration of the parties' rights and duties under the Policy, pursuant to Rhode Island Superior Court Rules of Civil Procedure 57 and R.I.G.L. § 9-30-2. A justiciable controversy exists between Plaintiffs and AFM regarding the availability of coverage under the Policy for Plaintiffs' claims.

125. Accordingly, Plaintiffs seek a declaration from the Court that:

- a. The various coverage provisions identified herein are triggered by Plaintiffs' claim;
- b. No Policy exclusion applies to bar or limit coverage for Plaintiffs' claim; and
- c. The Policy covers Plaintiffs' claim.

COUNT II

Breach of Contract **(Property Damage)**

126. Plaintiffs repeat and reallege the allegations in Paragraphs 1-124, as if fully set forth herein.

127. The Policy is a valid and enforceable contract between Plaintiffs and AFM.

128. In the Policy, AFM agreed to cover property against all risks of physical loss or damage not otherwise excluded.

129. COVID-19 has caused and is continuing to cause physical loss and/or physical damage to Plaintiffs' property.

130. No exclusions apply to bar coverage.

131. Plaintiffs are entitled to coverage for the physical loss and/or damage up to the Policy's \$412 million per occurrence limit of liability of liability per occurrence or any applicable sublimits.

132. Plaintiffs complied with all applicable Policy provisions, including paying premiums and providing timely notice of its claim.

133. Nonetheless, AFM unjustifiably refuses to pay for Plaintiffs' physical loss or damage in breach of the Policy.

134. Plaintiffs have suffered and continue to suffer damages as a result of AFM's breach(es) of the Policy.

135. Plaintiffs are entitled to damages as a result of AFM's breach in an amount to be determined at trial, including pre- and post-judgment interest and any other costs and relief that this Court deems appropriate.

COUNT III

Breach of Contract **(Business Interruption)**

136. Plaintiffs repeat and reallege the allegations in Paragraphs 1-124, as if fully set forth herein.

137. The Policy is a valid and enforceable contract between Plaintiffs and AFM.

138. In the Policy, AFM agreed to cover Business Interruption loss and Incurred Extra Expense, as provided in the Business Interruption Coverage, as a direct result of physical loss or damage of the type insured under the Policy.

139. COVID-19 has caused and, upon information and belief, is continuing to cause, physical loss and/or physical damage to Plaintiffs' property and the property of others that has caused Plaintiffs to suffer business interruption losses and incur extra expenses.

140. No exclusions bar to apply coverage.

141. Plaintiffs are entitled to coverage for their business interruption losses and incurred extra expenses related to COVID-19 up to the Policy's per occurrence limits of liability for business interruption losses per occurrence or any applicable sublimits.

142. Plaintiffs complied with all applicable Policy provisions, including paying premiums and providing timely notice of its claim.

143. Nonetheless, AFM unjustifiably refuses to pay for these losses and expenses in breach of the Policy.

144. Plaintiffs have suffered and continue to suffer damages as a result of AFM's breach of the Policy.

145. Plaintiffs are entitled to damages as a result of AFM's breach in an amount to be determined at trial, including pre- and post-judgment interest and any other costs and relief that this Court deems appropriate.

COUNT IV

Breach of Contract **(Additional Coverages and Coverage Extensions)**

146. Plaintiffs repeat and reallege the allegations in Paragraphs 1-124, as if fully set forth herein.

147. The Policy is a valid enforceable contract between Plaintiffs and AFM.

148. In the Policy, AFM agreed to afford additional coverage as provided in the Policy's Additional Coverages and Coverage Extensions.

149. COVID-19 has caused and, upon information and belief, is continuing to cause, physical loss and/or physical damage to Plaintiffs' property and the property of others that has caused Plaintiffs to suffer losses under the Policy's Additional Coverages and Coverage Extensions.

150. No exclusions apply to bar coverage.

151. Plaintiffs are entitled to coverage for losses related to COVID-19 up to each Additional Coverage's and Coverage Extension's limit of liability or any applicable sublimits.

152. Plaintiffs complied with all applicable Policy provisions, including paying premiums and providing timely notice of its claim.

153. Nonetheless, AFM unjustifiably refuses to pay for these losses and expenses in breach of the Policy.

154. Plaintiffs have suffered and continue to suffer damages as a result of AFM's breach of the Policy.

155. Plaintiffs are entitled to damages as a result of AFM's breach in an amount to be determined at trial, including pre- and post-judgment interest and any other costs and relief that this Court deems appropriate.

COUNT V

Breach of the Covenant of Good Faith and Fair Dealing

156. Plaintiffs repeat and reallege the allegations in Paragraphs 1-124, as if fully set forth herein.

157. AFM has denied Plaintiffs' claim for coverage under the Policy relating to its losses from COVID-19.

158. AFM's denial of Plaintiffs' claim lacks any reasonable basis.

159. AFM has failed to conduct a reasonable investigation of Plaintiffs' claim under the Policy and, therefore, AFM's basis for its denial is unreasonable.

160. AFM employed a systematic "one-size-fits-all" approach to adjusting and denying coverage for all COVID-19 claims, including Plaintiffs' claim.

161. AFM knew or was actually or implicitly aware of the lack of any reasonable basis to deny coverage.

162. AFM acted with reckless disregard as to the unreasonableness of its denial.

163. AFM breached its duty of good faith and fair dealing by failing to reasonably investigate Plaintiffs' claim and provide coverage.

164. AFM's denial of coverage constitutes bad faith.

165. As a result of AFM's bad faith, Plaintiffs have suffered and are continuing to suffer damages.

166. Plaintiffs are entitled to an award of damages as a result of AFM's bad faith in an amount to be determined at trial, including attorney's fees, pre- and post-judgment interest and any other costs and relief that this Court deems appropriate.

COUNT VI

Violation of the Texas Unfair Claim Settlement Practices Act – Tex. Ins. Code §542.001 and Tex. Ins. Code § 541

167. Plaintiffs repeat and reallege the allegations in Paragraphs 1-124, as if fully set forth herein.

168. AFM's systemic practice of mischaracterizing the facts provided by policyholders in connection with claims for coverage for losses from COVID-19 constitutes an unfair or deceptive act or practice in the business of insurance, pursuant to Tex. Ins. Code §542.003(b)(1).

169. AFM's use of the AFM Talking Points with pre-determined conclusions regarding coverage for claims based on losses from COVID-19 without consideration of the particular facts or applicable law constitutes an unfair or deceptive act or practice in the business of insurance pursuant to Tex. Ins. Code §542.003(b)(1), (3) and §541.060(3).

170. AFM's systemic practice and policy of denying coverage for claims by policyholders for losses from COVID-19 without conducting an adequate investigation of the facts and applicable law constitutes an unfair or deceptive act or practice in the business of insurance, pursuant to Tex. Ins. Code §542.003(b)(1), (3) and §541.060(3).

171. AFM has failed to adopt and implement reasonable standards for the prompt investigation and processing of claims related to losses based on COVID-19, which constitutes a violation of Tex. Ins. Code §542.003(3) and §541.060(3).

172. AFM's systemic practices and procedures have compelled Plaintiffs to institute this litigation to recover amounts due under the Policy by attempting to restrict Plaintiffs' recovery to the limited coverage available for communicable disease, which constitutes a violation of Tex. Ins. Code §542.003(b)(5).

173. As a result of AFM's unfair or deceptive acts or practices, Plaintiffs have suffered and are continuing to suffer damages.

174. Plaintiffs are entitled to an award of damages as a result of AFM's unfair or deceptive acts or practices in an amount to be determined at trial, including attorney's fees, pre- and post-judgment interest and any other costs and relief that this Court deems appropriate.

COUNT VII

Bad Faith – R.I.G.L. § 9-1-33

175. Plaintiffs repeat and reallege the allegations in Paragraphs 1-124, as if fully set forth herein.

176. The acts and omissions of AFM as complained of in this Complaint, and also yet to be discovered in this matter, constitute bad faith under R.I.G.L. § 9-1-33.

177. Plaintiffs sustained damages due to the physical presence of COVID-19, the existence and ongoing threat of COVID-19, and the civil authority orders prohibiting large gatherings resulting from COVID-19, but AFM has failed to comply with its obligation and has failed to compensate Plaintiffs for their claim.

178. Plaintiffs are entitled to compensatory damages and punitive damages as a result of AFM's bad faith.

179. Plaintiffs have been required to retain the services of attorneys to commence this action and are further entitled to attorneys' fees and costs.

V. REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against AFM as follows:

- 1) A declaration from the Court that:
 - a. The various coverage provisions identified herein are triggered by Plaintiffs' claim;
 - b. No Policy exclusion applies to bar or limit coverage for Plaintiffs' claim;
and
 - c. The Policy covers Plaintiffs' claim.
- 2) For special and consequential damages against AFM in an amount to be proved at trial, in excess of \$10,000;
- 3) Pre- and post-judgment interest, as provided by law;
- 4) An award of attorney's fees and costs of suit incurred; and
- 5) For such other and further relief as the Court deems just and proper.

VI. JURY TRIAL DEMANDED

Plaintiffs demand a trial by jury on all issues so triable.

Date: July 15, 2020

Respectfully submitted,

/s/ Stephen M. Prignano

Stephen M. Prignano (#3649)

MCINTYRE TATE LLP

50 Park Row West, Suite 109

Providence, Rhode Island 02903

Telephone: 401-351-7700

Facsimile: 401-331-6095

SPrignano@McIntyreTate.com

W. Mark Lanier*

Alex J. Brown *

Ralph D. McBride*

Matthew D. Przywara *

THE LANIER LAW FIRM, P.C.

10940 W. Sam Houston Pkwy N, Suite 100

Houston, Texas 77064

Telephone: 713-659-5200

Mark.Lanier@lanierlawfirm.com

Alex.Brown@lanierlawfirm.com

Skip.McBride@lanierlawfirm.com

Matt.Przywara@lanierlawfirm.com

Denman H. Heard *

HEARD LAW FIRM, PLLC

2925 Richmond Avenue, Suite 1550

Houston, Texas 77098

Telephone: 877-317-2698

Denman@heardlawfirm.com

Adam J. Levitt*

DICELLO LEVITT GUTZLER LLC

Ten North Dearborn Street, Sixth Floor

Chicago, Illinois 60602

Telephone: 312-214-7900

alevitt@dicellolevitt.com

Mark A. DiCello*
Kenneth P. Abbarno*
DICELLO LEVITT GUTZLER LLC
7556 Mentor Avenue
Mentor, Ohio 44060
Telephone: 440-953-8888
madicello@dicellolevitt.com
kabbarno@dicellolevitt.com

Timothy W. Burns*
Jeff J. Bowen*
Jesse J. Bair*
Freya K. Bowen*
BURNS BOWEN BAIR LLP
One South Pinckney Street, Suite 930
Madison, Wisconsin 53703
Telephone: 608-286-2302
tburns@bbblawllp.com
jbowen@bbblawllp.com
jbair@bbblawllp.com
fbowen@bbblawllp.com

Douglas Daniels*
DANIELS & TREDENNICK
6363 Woodway, Suite 700
Houston, Texas 77057
Telephone: 713-917-0024
douglas.daniels@dtlawyers.com

***Counsel for Plaintiffs Clutch City Sports &
Entertainment, L.P. and Rocket Ball, Ltd.***

* Petition for Admission *Pro Hac Vice* to be filed