

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION

ECD-GREAT STREET DE, LLC AND  
ENVIRONMENTAL COMMUNITY  
DEVELOPMENT COMPANY, INC.,

Plaintiff,

v.

ZURICH AMERICAN INSURANCE  
COMPANY,

Defendant.

2021CH00419

JURY DEMANDED

**COMPLAINT**

Plaintiffs, ECD-Great Street DE, LLC (“ECD Great Street”) and Environmental Community Development Company, Inc. (“ECD Company”) (collectively, “ECD”), for their Complaint against Defendant Zurich American Insurance Company (“Zurich”), allege as follows:

**THE PARTIES**

1. Plaintiff ECD Great Street is a Delaware limited liability company with its principal place of business in Lincolnshire, Illinois. ECD Great Street is the sole owner of the Wit hotel and an affiliate of ECD Company.

2. Plaintiff ECD Company is a Colorado corporation with its principal place of business in Aurora, Colorado.

3. Defendant Zurich is a New York corporation with its principal place of business in Schaumburg, Illinois.

### **JURISDICTION AND VENUE**

4. Personal jurisdiction is proper against Zurich pursuant to 735 ILCS 5/2 209(a)(1) because it transacts business in Illinois and pursuant to 735 ILCS 5/2 209(a)(4) because it contracts to insure property and risks located within Illinois.

5. Venue is proper in this Court pursuant to 735 ILCS 5/2-101 because Zurich is a resident of Cook County, Illinois and the property that was damaged and is the subject of this litigation is located in Cook County, Illinois.

### **NATURE OF THE ACTION**

6. This is an action against Zurich for declaratory judgment, breach of contract and bad faith arising out of Zurich's failure and refusal to provide insurance coverage to ECD for catastrophic damage to its property, theWit hotel ("theWit" or the "Hotel"), caused by the events of civil unrest of May 30, 2020. That night, theWit, located at 201 North State Street in Chicago, became the epicenter of protests and vandalism that occurred across Chicago in reaction to the tragic death of George Floyd, resulting in severe damage to the Hotel. The damage forced ECD to close the entire Hotel – including its ground floor restaurant, State & Lake, and ROOF, the world famous rooftop lounge on the Hotel's 27th floor – for four months during its peak summer and fall seasons. ECD earned virtually no income from theWit during this time and still incurs significant income loss as renovation of the Hotel moves forward and the fall-out from the civil unrest and Hotel closure continues to be felt. Indeed, ECD is only just beginning to reestablish a pipeline of room, private event and small group celebration reservations at theWit, which virtually disappeared because of the Hotel's prolonged shut down.

7. Recognizing the dire impact prolonged closures would have on Illinois businesses (like theWit) damaged by the May 30, 2020 events of civil unrest, Illinois Gov. J.B. Pritzker stated

in a press conference on June 8, 2020 that “*insurance companies must do everything in their power and are obligated to give their customers the funds they need to rebuild and get back on their feet as soon as possible.*” (emphasis added) In accordance with Gov. Pritzker’s directive to Illinois insurers, that same day, the Illinois Department of Insurance (“IDOI”) issued Company Bulletin 2020-15 (the “Bulletin”) that, among other requirements, directed all insurers licensed to transact insurance business in the State of Illinois to “*apply claims best practices consistent with the categorization of [the May 30th civil unrest] event as a catastrophic event, including expedited claims handling, advance claim payments, and fair treatment of all policyholders.*” (emphasis added) Further, the Bulletin required insurers to “base payouts” of business interruption claims related to damage caused by the civil unrest “*on business activity levels that eliminate the impact of COVID-19.*” (emphasis added)

8. ECD is insured for property damage and lost income caused by a business interruption, including the damage and business interruption caused by the events of civil unrest, under an “all-risk” insurance policy issued by Zurich (the “Policy”). Incredibly, despite substantial premium paid by ECD for the Policy, and the clear directives issued by Gov. Pritzker and the IDOI, Zurich has largely ignored and acted counter to its obligations to ECD under the Policy and the Bulletin, including by failing to: (1) promptly respond to ECD’s communications and approve necessary work and expenditures to repair the Hotel; (2) acknowledge and pay significant undisputed amounts for property damage, business income loss and extra expense, such that ECD was forced to retain legal counsel to obtain such payment; (3) correctly determine ECD’s business income loss, including basing payment on unreliable data clearly skewed to reduce ECD’s loss by the very events of civil unrest for which ECD sought coverage; (4) include lost Food and Beverage income from ROOF, State & Lake and other outlets in its initial determination of business income

loss, and then only agreeing to pay a severely discounted portion of such loss for June and July and nothing thereafter based on the absurd theory that the Hotel should have circumvented multiple City fire and safety codes to allow guests into ROOF and State & Lake much earlier; and (5) provide coverage for business income loss incurred by ECD after September, even though renovations to the Hotel are ongoing and ECD continues to incur significant losses from the civil unrest damage and the Hotel's prolonged closure.

9. In addition, Zurich has blatantly disregarded the IDOI's directive to eliminate the impact of COVID-19 in making payment of lost business income. Zurich's position violates the terms of the Policy and runs afoul of Gov. Pritzker's directive, the requirements of the Bulletin and the Illinois Insurance Code. Zurich's conduct is even more appalling given that, on information and belief, it has almost universally denied its policyholders' claims for business interruption coverage related to COVID-19. In short, in the most cynical fashion, Zurich is using the pandemic as a shield and a sword by denying US businesses' coverage for their lost income resulting from COVID-19 while simultaneously leveraging the pandemic to wipe out coverage for other catastrophic losses and business closures, including those resulting from the May 30, 2020 events of civil unrest. If Zurich has its way, COVID-19 will turn out to be a serendipitous boon to its bottom line.

10. As addressed herein, at every turn, Zurich has exhibited a pattern of bad faith conduct in handling ECD's claim, including by asserting inconsistent positions and raising illogical arguments and defenses, with the apparent purpose of frustrating ECD's efforts to recover the insurance proceeds to which it is entitled under the Policy and significantly limiting the amount it owes ECD. Consequently, to date, Zurich only has paid ECD \$1,483,895 of the \$14,826,973.00

in business interruption loss incurred through December 31, 2020 – which is 10% of ECD’s business interruption loss submitted for coverage.

11. ECD, therefore, seeks: (1) a declaratory judgment that Zurich has a duty under the Policy to pay all loss and costs submitted or to be submitted by ECD in its Partial Proofs of Loss caused by the events of civil unrest, including but not limited to business interruption loss incurred through December 31, 2020 of no less than \$14,826,973.00 and depreciation hold-back of \$133,058 for personal property damage; (2) damages for Zurich’s breach of its obligations to ECD under the Policy; and (3) damages caused by Zurich’s vexatious, unreasonable and bad faith conduct.

## **FACTUAL BACKGROUND**

### **The Zurich Policy**

12. To protect against damage to its properties, including theWit, and the loss of business income resulting from prolonged closure of its properties due to physical loss or damage, ECD purchased the Policy from Zurich, specifically the “all-risk” Property Portfolio Protection Policy, No. CPO 0181388-04, for the period of July 31, 2019 – July 31, 2020. A copy of the Policy is attached as Exhibit A.<sup>1</sup>

13. “All risk” property insurance policies are comprehensive policies that broadly cover all risks directly resulting from physical loss of or damage to insured properties, unless particular risks are expressly and unambiguously excluded. Therefore, unless an insurance company specifically excludes the particular risk at issue, the policy is designed, intended and written to cover all loss and damage from that risk.

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<sup>1</sup> The Policy also includes general liability and business automobile coverage sections, which are not at issue in this action.

14. The Policy includes a “Schedule of Locations” that lists, among other properties, 201 N. State St., Chicago, IL 60601, which is the address of the Wit. (Ex. A, Schedule of Locations) The Policy includes a Commercial Property Coverage Part Declarations page, which identifies the ECD property located at 201 N. State St., Chicago, IL 60601, i.e., the Wit, as Premises #19. The Hotel thus is an insured “premises” under the Policy.

15. As the owner of the Wit, ECD Great Street is entitled to receive insurance proceeds for the Hotel under the Policy, which Zurich has accepted and acknowledged in making numerous prior payments of loss to ECD Great Street.

16. The Policy’s Declarations page states the Limit of Insurance for the “Real Property,” “Personal Property” and “Business Income And Extra Expense” coverages provided to the Wit are “Included In Blanket Limit Of Insurance.” (*Id.*, Commercial Property Coverage Part Declarations)

17. The Commercial Property Coverage Part Declarations page lists the “Business Income And Extra Expense Blanket Limit Of Insurance” as \$53,874,000 and states, “[t]he above Limit of Insurance is the most we will pay for all loss of ‘**business income**’ and ‘**extra expense**’ at ‘**premises**’ for which the Limit of Insurance is shown as Included in Blanket Limit of Insurance.” (*Id.*, Commercial Property Coverage Part Declarations)

18. The Commercial Property Conditions section of the Policy states, “[u]nder this Commercial Property Coverage Part: 1. We cover loss or damage which happens: a. During the policy period shown on the Declarations; and b. Within the coverage territory.” The Policy defines the “**coverage territory**” to include the United States of America. (*Id.*, Commercial Property Conditions, § N)

19. The Policy's "Business Income Coverage Form (Excluding Extra Expense)" states Zurich "will pay for the actual loss of **'business income'** you sustain due to the necessary **'suspension'** of your **'operations'** during the **'period of restoration'**. The **'suspension'** must be caused by direct physical loss of or damage to property at a **'premises'** at which a Limit of Insurance is shown on the Declarations for Business Income. The loss or damage must be directly caused by a **'covered cause of loss'**. We will not pay more than the applicable Limit of Insurance shown on the Declarations for Business Income at that **'premises'.**" (*Id.*, Business Income Coverage Form (Excluding Extra Expense), § A)

20. The Policy's "Business Income Coverage Form (Excluding Extra Expense)" further provides that, "[i]f the necessary **'suspension'** of your **'operations'** produces a **'business income'** loss payable under this Coverage Form, and you resume **'operations'** with reasonable speed, we will pay for the actual loss of **'business income'** you sustain during the **'extended period of indemnity'**. The most we will pay under this Additional Coverage is the Limit of Insurance shown on the Declarations for Business Income at the **'premises'** or **'reported unscheduled premises'** where the direct physical loss or damage occurred." (*Id.*, Business Income Coverage Form (Excluding Extra Expense), § B Additional Coverage, § 5)

21. The Policy defines "**covered cause of loss**" as "a fortuitous cause or event, not otherwise excluded, which actually occurs during this policy period." (*Id.*, Commercial Property Definitions, 14)

22. The Policy defines "**suspension**" as "a. The slowdown or cessation of your business activities; or b. That a part or all of the covered location is rendered untenable." (*Id.*, Commercial Property Definitions, 80)

23. The Policy defines “**operations**” as “a. Your business activities occurring at the covered location prior to the physical loss or damage; and b. The covered location is tenantable prior to the physical loss or damage.” (*Id.*, Commercial Property Definitions, 52)

24. The Policy defines “**business income**” as “Net income” plus “Continuing expenses.” (*Id.*, Commercial Property Definitions, 5)

25. The Policy defines “**continuing expenses**” as “[y]our continuing normal operating expenses including, but not limited to: 1) Payroll; 2) Rental payments as tenants; and 3) Factory overhead; and “Charges, which are the legal obligations of your tenants and have not been satisfied, and which are now your obligation.” (*Id.*, Commercial Property Definitions, 10)

26. The Policy defines “**net income**” as “the net profit or loss, including rental income from tenants, that would have been earned or incurred before taxes.” (*Id.*, Commercial Property Definitions, 48)

27. The Policy defines “**period of restoration**” as “the period of time that begins when: a. The direct physical loss or damage that causes ‘**suspension**’ of your ‘**operations**’ occurs; or b. The date ‘**operations**’ would have begun if the start of ‘**operations**’ is delayed because of loss of or damage to any of the following: 1) ‘**Real property**’, whether complete or under construction; 2) Alterations or additions to ‘**real property**’; or 3) ‘**Personal property**’: a) Used in such construction, alterations, or additions; b) Incidental to the occupancy of the area intended for construction, alteration or addition; or c) Incidental to the alteration of the occupancy of an existing building or structure. If you resume ‘**operations**’, with reasonable speed, the ‘**period of restoration**’ ends on the earlier of: a. The date when the location where the loss or damage occurred could have been physically capable of resuming the level of ‘**operations**’ which existed prior to the loss or damage, if the location had been restored to the physical size, construction,



configuration, location, and material specifications which would satisfy the minimum requirements necessary to obtain all required building permits, occupancy permits, operating licenses, or similar documents; or **b.** The date when a new permanent location is physically capable of resuming the level of **‘operations’** which existed prior to the loss or damage, if you resume **‘operations’** at a new permanent location.” (*Id.*, Commercial Property Definitions, 55)

28. The Policy defines **“extended period of indemnity”** as “the period of time that begins on the date the **‘period of restoration’** ends and ends on the earlier of: **a.** The date your gross sales, including rental income, are restored to the amount that would have existed if no direct physical loss or damage occurred; or **b.** The date calculated by adding the number of days shown on the Declarations for Extended Period of Indemnity--Business Income to the date the **‘period of restoration’** ended.” (*Id.*, Commercial Property Definitions, 23)

### **The Civil Unrest of May 30, 2020**

29. Located at the corner of State and Lake Streets in Chicago’s Loop, theWit opened in May 2009. At all times it has been a franchisee of Hilton Hotel’s DoubleTree hotel group.

30. The Hotel building contains approximately 250,000 square feet and is 27 stories high. It features 310 guest rooms and suites, the State & Lake restaurant and the world famous rooftop lounge, ROOF, which overlooks the Chicago River, the Chicago skyline and Millennium Park. The Hotel also offers 9,000 square feet of meeting and banquet space over its second, third, and fourth floors and a full service spa, among other services to guests and visitors.

31. Situated among Chicago’s top theaters, restaurants, museums and businesses, and next to the busiest “L” stop in the Loop, theWit is an anchor of Chicago’s revitalized theater and Loop business districts.

32. The Hotel's glass façade, distinguished by a chartreuse lightning bolt extending down the west side of the building from the top floor to street level, is a celebrated architectural symbol of Chicago's downtown. According to Blair Kamin, Pulitzer Prize-winning architectural critic formerly of The Chicago Tribune: "[t]here is something timeless—or at least fitting—about the Wit's design.... Few match this one for engaging and enlivening the urban scene."<sup>2</sup>

33. On May 30, 2020, the Wit's engaging glass façade and status as an anchor of Chicago's revitalized downtown turned into a liability as hundreds of people marched in the vicinity of the Hotel in connection with the protests and civil unrest resulting from the tragic death of George Floyd. At around 7 p.m. that night, as a wave of vandalism swept across the City, individuals among the crowds walking north up State Street through the Loop attacked the Hotel with pipes, baseball bats, stanchions and hammers. Unable to cross the Chicago River over the State Street bridge, which had been raised, scores of individuals directed their fury at the Hotel, including by destroying the ground floor glass panes in the custom-made, specially designed curtain wall encasing the Hotel's two-story street-level lobby.

34. For about an hour, approximately 100 looters ransacked the Hotel's lobby and adjacent State & Lake restaurant, damaging, destroying and stealing scores of fixtures, flooring, draperies, furniture, artwork, and equipment, among other items of property belonging to ECD.

35. Vandals set fire to a Chicago Police Department SUV parked in front of the State Street entrance to the Hotel's State & Lake restaurant. As the SUV burned and emitted smoke, the mass of people in front of the Hotel prevented the fire department from quickly putting the fire out, which resulted in the disintegration and melting of granite landscape planters, street lights and concrete sidewalks in front of the Hotel, and smoke damage to the Hotel.

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<sup>2</sup> Blair Kamin, [A Bolt of Urban Energy](#), The Chicago Tribune, May 28, 2009.

36. With the ground floor glass in the curtain wall destroyed, leaving no barrier between the Hotel lobby and the outside, management quickly arranged for added security at the building and for the damaged outer façade to be boarded up to protect guests, staff and the Hotel and its contents. The Hotel immediately ceased taking reservations for its guest rooms and other accommodations and soon closed completely.

**Zurich's Bad Faith Handling of ECD's Claim**

37. ECD immediately gave notice of its loss to Zurich under the Policy.

**A. The IDOI Bulletin**

38. On June 8, 2020, Illinois Gov. J.B. Pritzker held a press conference addressing the protests and civil unrest and related property damage incurred by Illinois residents and businesses. During the press conference, Gov. Pritzker stated that, “insurance companies must do everything in their power and are obligated to give their customers the funds they need to rebuild and get back on their feet as soon as possible.”

39. That same day, the IDOI issued the Bulletin, which directed all insurers licensed to transact insurance business in the State of Illinois to, among other things, “apply claims best practices consistent with the categorization of [the May 30th civil unrest] event as a catastrophic event, including expedited claims handling, advance claim payments, and fair treatment of all policyholders.”

40. The Bulletin also stated, with respect to coverage for the civil unrest: “To the extent business interruption provisions are included and operative under a policy, insurers should base payouts on business activity levels that eliminate the impact of COVID-19.”

**B. ECD's Efforts to Move Forward with Repairs and Zurich's Unnecessary Delays and Inadequate Advance Payment**

41. On June 11, 2020, Zurich sent an email informing ECD it would issue an advance payment of \$75,000 for damage to the Hotel building and \$25,000 for damage to the building's contents. Despite ECD's urgent need for a meaningful advance payment (Zurich's advance was far less than what ECD should have received in light of the scope of its loss and ongoing loss of income), Zurich did not send payment of the \$100,000 advance to the correct ECD address until July 8, 2020. Unlike several future checks issued by Zurich (addressed below), this check was issued to the correct payee.

42. On June 18, 2020, ECD submitted a proposal to Zurich's consultant to hire KOO LLC ("KOO"), the Hotel's architect and interior designer and an approved Hilton designer, to oversee the architectural and design aspects of the Hotel repairs. Having received no response, ECD reiterated its request on June 27, 2020.

43. On July 1, 2020, ECD received an estimated budget for repairs to the Hotel lobby and renovation schedule from General Contractor Landmark Construction Systems, Inc. ("Landmark"). ECD immediately requested Zurich's approval of this proposal. At Zurich's request, ECD obtained a more detailed proposal from Landmark and sent it to Zurich the following day. Among other information, the proposal put Zurich on notice that, after Landmark submitted its order, it likely would take 10-12 weeks and 12-14 weeks, respectively, before the curtain wall glass and mullion cover for the building would be delivered.

44. Having not heard from Zurich, on July 8, 2020, ECD followed up on its request for approval of Landmark's proposal – which was required before Landmark could place an order for the new curtain wall glass and other material. Zurich did not approve Landmark's proposal until July 14, 2020 – only after another follow-up request by ECD.

45. On July 14, 2020, ECD also followed up on its request that Zurich approve its proposal to hire KOO.

46. Despite Zurich's delays in allowing the building renovation to go forward, ECD pushed for the building repairs to move forward as quickly as possible. Indeed, on July 21, 2020, Landmark sent a letter to ECD Company President Scott Greenberg thanking ECD for retaining Landmark, but also noting: "I understand that you are extremely anxious to reopen, but your calls and texts in pursuit of this goal are not necessary. This horse will run hard to the finish line without a whip."

47. Landmark's letter further noted that it received a 12-16 week delivery schedule for the custom curtain wall glass. Zurich was put on notice of this schedule when it received a copy of the letter on July 23, 2020.

48. Over the next week, ECD continued to communicate with Zurich about multiple plans to repair and refurnish the Hotel with the goal of reopening as quickly as possible. These plans included moving furniture from ROOF to the lobby (in order to expedite the reopening of the Hotel and meet Hilton standards) and an estimate for repairs to the lobby's floor tile.

49. ECD also reminded Zurich of its obligation, as a Hilton franchisee, to adhere to certain interior design requirements for the Hotel and meet Hilton's design standards.

50. On July 29, 2020, KOO spoke at length with Zurich's consultant about its proposal to redesign the Hotel lobby and State & Lake restaurant, which Zurich received from ECD weeks earlier. At Zurich's request, KOO submitted an updated proposal to Zurich on July 30, 2020. The updated proposal called for execution of this redesign in two phases, with the first phase focused on making the Hotel "operational as quickly as possible." The second phase, which KOO expected to take as long as a year, would redesign the Hotel in accordance with Hilton standards.

51. Zurich did not approve the KOO proposal until the first week of August.

**C. ECD's Submission of Loss**

52. On July 14, 2020, ECD submitted its first Partial Proof of Loss with respect to loss incurred during June 2020. ECD's first Partial Proof of Loss totaled \$2,873,587, \$2,844,592 of which constituted lost business income. As with all of ECD's submissions of loss to Zurich since, ECD's first Partial Proof of Loss included a detailed breakdown of the loss and expenses included therein, along with relevant copies of invoices and/or other documentation of each listed cost, as applicable.

53. The determination of business income loss set forth in the first Partial Proof of Loss was prepared on ECD's behalf by BDO, a top forensic accounting firm with significant experience analyzing business interruption loss, including loss incurred by hotels in Chicago and around the world. BDO prepared all of ECD's subsequent submissions to Zurich of business income loss.

54. To help assist with and expedite Zurich's review of the first Partial Proof of Loss, BDO communicated extensively with Zurich's consultant, MDD Forensic Accountants, concerning the basis of its business income loss determination, including by responding to MDD's multiple requests for information.

55. On information and belief, MDD is regularly retained by insurance companies, including Zurich, to provide consultant services with respect to property insurance claims submitted by policyholders.

56. On August 7, 2020, ECD submitted its second Partial Proof of Loss with respect to loss incurred during July 2020. ECD's second Partial Proof of Loss totaled \$2,786,910, \$2,351,240 of which constituted lost business income.

**D. Zurich's Delayed and Faulty Determination of Business Interruption Loss**

57. Despite ECD's continued dire need for funds to support its business, Zurich did not substantively respond to ECD's business interruption claim until August 28, 2020, 47 days after ECD's submission of its first Partial Proof of Loss. That day, Zurich emailed ECD a document titled: "Preliminary Estimate of Business Interruption Loss." The Preliminary Estimate was comprised of a series of spreadsheets setting forth MDD's determination of ECD's business interruption loss for June and July. The Preliminary Estimate purportedly relied on two separate market data sets. The first, called "STR Market Scale," estimated ECD's business interruption loss for June and July as \$348,920. The second, called "STR Competitive Set," estimated this loss as \$469,461.

58. Even based on the higher "STR Competitive Set" estimate, MDD's Preliminary Estimate recognized coverage for less than 10% of ECD's business interruption loss for June and July.

59. MDD's Preliminary Estimate report was severely flawed for multiple reasons. First, MDD's reliance on market sales data just preceding and after the events of civil unrest contradicted the clear terms of the Policy's "Business Income Coverage Form," which identifies documents concerning the operations and financial performance of the business itself, primarily reflecting historical performance of the business over a year or more, as the "Sources of Information" on which a loss determination is to be made. The Policy makes no reference to the type of near-term market data exclusively relied on by MDD among the examples it provides of appropriate "Sources of Information."

60. Second, MDD's Preliminary Estimate reflected application of a massive discount to ECD's business interruption loss based on the impact of COVID-19. The "General Notes" to MDD's Preliminary Estimate stated that it was subject to "insurer approval" and that MDD

“deferred any refinement concerning the impacts of COVID-19” to Zurich. In his email to ECD attaching the Preliminary Estimate, Zurich’s claim adjuster Brad Baker stated: “COVID 19 had a large impact on the Delta between our (MDD’s) Schedule and BDO’s.”

61. The application of a massive discount for COVID-19 clearly contradicted and violated the express requirements of the Bulletin, which explicitly states that, with respect to business interruption claims related to the events of civil unrest, “*insurers should base payouts on business activity levels that eliminate the impact of COVID-19.*” (emphasis added) Indeed, far from eliminating the impact of COVID-19 in its determination of ECD’s business income loss, Zurich exaggerated the impact of the pandemic and simultaneously grossly undervalued loss caused by the events of civil unrest of May 30, 2020.

62. Third, the STR data on which MDD improperly relied was, itself, significantly depressed by the economic fallout caused by the civil unrest and thus provided an improper and unreliable basis for determining ECD’s business income loss. The Competitive Set data used by MDD was based on the revenue earned by hotels in downtown Chicago immediately after the events of civil unrest. Even if the Competitive Set hotels were not physically damaged like the Wit, they (like many businesses in downtown Chicago) undoubtedly incurred a significant downturn in business resulting from the events of civil unrest and, in some cases, even failed to report data to STR. The data on which MDD based its determination of business income loss, therefore, was badly flawed and unreasonably skewed to reduce the amount owed ECD.

63. Fourth, MDD also erred by using both the Competitive Set and Market Scale data to reduce the occupancy rates it projected the Hotel would have experienced had it not been closed. MDD based the Competitive Set data deduction on occupancy rates at the Hotel from 2019 and excluded consideration of the higher occupancy rates experienced in 2018. MDD’s massive



deduction based on the Market Scale data was even more flawed because it relied on an extremely small and unreliable sample size of data from just April and May 2020, during which time the entire hotel industry was in flux because of COVID-19.

64. MDD's reliance on the flawed STR data was particularly upsetting to ECD because ECD and BDO had made MDD aware of the flaws with the STR data weeks before Zurich's August 28, 2020 email, but MDD ignored these warnings and utilized the data anyway in determining ECD's business income loss.

65. Fifth, MDD's Preliminary Estimate *failed to account for approximately 34% of the Hotel's annual revenue* – specifically, Zurich completely ignored the Hotel's revenues generated by Food and Beverage sales at State & Lake, ROOF, and the second, third and fourth floor and ROOF event spaces, which historically have been significantly independent from revenue generated by room occupancy and are significantly greater in the summer and fall, when high-margin sales from private events and to high-margin customers are at their greatest.

66. It should have been obvious to MDD from relevant data and financial information provided by ECD that ROOF and State & Lake, like so many other Chicago bars and restaurants closed because of COVID-19, intended to reopen in June along with the other Hotel outlets with Food and Beverage revenue. Indeed, as one of the marquee outdoor lounges and bars in Chicago, ROOF was expected to experience a surge in sales during the summer and fall of 2020 from guests looking for a safe drinking and dining environment. Although ECD maintains that historical financial information is of primary importance to the determination of business income loss under the Policy, based on MDD and Zurich's reliance and focus on recent data impacted by COVID-19, this data clearly should have been taken into account in determining ECD's business interruption loss.

67. At the very least, MDD and Zurich could have and should have asked ECD about ROOF, State & Lake and the impact of Food and Beverage sales at the Hotel. Instead, they buried their head in the sand, apparently in an effort to significantly reduce the total amount Zurich would have to pay ECD for business income loss.

**E. Zurich Fails to Pay Undisputed Loss and Bungles Payments to ECD of Amounts Due**

68. Despite the Preliminary Estimates of ECD's business interruption loss for June and July, and ECD's urgent need for payment of lost business income, Zurich's August 28, 2020 email did not offer or indicate that Zurich intended to make any actual payment of ECD's business interruption loss.

69. On September 1, 2020, ECD and Zurich's consultant further discussed a proposal to replace the Hotel lobby's mud slab floor so that Landmark could move forward with removal of the damaged slab. Zurich's consultant did not approve this request until September 9, 2020.

70. On September 4, 2020, ECD submitted its third Partial Proof of Loss with respect to loss incurred during August 2020. ECD's third Partial Proof of Loss totaled \$2,307,196.35, \$2,152,808 of which constituted lost business income.

71. On September 8, 2020, Zurich acknowledged its obligation to issue payment for property damage to the Hotel building in the amount of \$197,808.73. This was Zurich's first acknowledgment of its obligation to pay itemized property damage loss. By this date, however, ECD already had submitted for payment to Zurich approximately \$620,000 in property damage and extra expense loss.

72. The next day, in response to queries from ECD, Zurich acknowledged that it had mistakenly sent a check in payment of the \$197,808.73 due for property damage loss to ECD's office on 1 E. Wacker Drive in Chicago (without a suite number, so it could not even be delivered

there), and not to its office in Lincolnshire, Illinois. (Zurich's mistakes in making payments to ECD would only continue to mount, as further addressed below.) ECD immediately informed Zurich that all checks should be sent to the attention of ECD President Scott Greenberg at ECD's office in Lincolnshire, Illinois, and not to ECD's Chicago office.

73. On October 1, 2020, because of swift action taken by ECD – and despite Zurich's manifold failures to promptly and clearly communicate with ECD and pay undisputed coverage amounts – the Wit reopened. Approximately one week later, ROOF reopened. Even then, the Hotel and ROOF's reopening was and continues to be gradual, as the Hotel was unable (after a total shutdown of business over the summer into the fall) to immediately bring on employees and attract guests and customers and recover the other high-margin and private event Food and Beverage sources of business.

74. On October 2, 2020, Zurich agreed to pay ECD for business personal property loss in the amount of \$135,275,13. This was Zurich's first acknowledgment of its obligation to pay personal property loss. Zurich's email said ECD would receive payment in 7 – 10 business days. Although Zurich purportedly sent the check on October 2, 2020, ECD discovered on October 21, 2020 that – contrary to the express instructions provided to Zurich in early September – Zurich again mailed the check to the wrong address.

75. ECD repeated to Zurich its precise instructions of where checks in payment of loss should be sent and to whom they should be issued. Despite this instruction, Zurich again sent the check for the business personal property loss to the wrong address, and to the wrong payee.

76. On October 8, 2020, ECD submitted its fourth Partial Proof of Loss with respect to loss incurred during September 2020. ECD's fourth Partial Proof of Loss totaled \$2,932,998.80, \$2,492,322 of which constituted lost business income.

F. **After ECD's Legal Counsel Sends Demand Letter, Zurich Finally Agrees to Issue Payment for Undisputed Business Interruption Loss and Other Amounts Due**

77. On October 9, 2020, counsel for ECD sent a letter to Zurich addressing, among other issues, the multiple flaws with MDD's Preliminary Estimate of ECD's business interruption loss and demanding that Zurich immediately pay the undisputed amount of ECD's claim. ECD's letter noted that Zurich had failed to pay or even acknowledge at least \$119,612.04 in covered loss with respect to personal property damage and extra expense submitted by ECD in its Partial Proofs of Loss.

78. Counsel's letter also requested a meeting with Zurich to discuss its handling and evaluation of ECD's claim, including MDD's erroneous and prejudicial reliance on the STR data and failure to consider the Hotel's Food and Beverage revenue.

79. On October 19, 2020 – *only after receiving counsel's letter* – Zurich finally informed ECD that it was prepared to pay undisputed amounts for business interruption loss for June and July in the amount of \$469,461.00. Ignoring ECD's precise instructions, Zurich twice issued this payment to the wrong payee.

80. In the same email, Zurich agreed to pay an additional \$47,906.31 for property damage to the building. Zurich also issued this payment to the wrong payee.

81. Zurich's numerous, inexplicable payment errors (whether merely negligent or purposeful) significantly delayed ECD's receipt of funds and unnecessarily strained ECD's financial condition.

82. On October 23, 2020, *with ECD still having not received Zurich's payment of any business interruption loss*, counsel for ECD informed Zurich's counsel that time was of the essence and that ECD was in urgent need of payment of covered loss under the Policy.

83. On October 26, 2020, counsel for ECD sent a letter to Zurich's counsel stating that, because of Zurich's failure to pay ECD's business interruption loss, ECD was in immediate need of additional funds to make payment of its mortgage debt service for the Hotel, which was due on November 1, 2020. Counsel's letter demanded that Zurich immediately issue the previously promised payment in the amount of \$469,461 for ECD's undisputed business interruption loss for August and September 2020, in addition to paying the same amount for June and July business interruption loss and amounts outstanding for property damage and extra expense.

**G. Zurich and MDD Wrongly Discount ECD's Business Interruption Loss for August and September 2020 and Raise Baseless Arguments In Support of Zurich's Position**

84. On October 28, 2020, counsel for Zurich informed ECD that Zurich finally was prepared to pay an additional \$487,222.00 for business interruption loss for August and September – *more than seven weeks after ECD submitted its Partial Proof of Loss for August revenue.*

85. Zurich again purportedly based its payment on MDD's determination of the Hotel's lost business income. Like its prior work, MDD's analysis was severely flawed. MDD again largely ignored ECD's historical financial information and instead based its projection of room occupancy at the Hotel for August and September 2020 on STR Market Scale and Competitive Set data for June through September 2020 – data that clearly was negatively impacted by the events of civil unrest and skewed to reduce the amount of income owed ECD.

86. On November 6, 2020, ECD submitted its fifth Partial Proof of Loss with respect to loss incurred during October 2020. ECD's fifth Partial Proof of Loss totaled \$2,203,261, all of which constituted lost business income.

87. On November 6, 2020, approximately 10 weeks after Zurich's August 28, 2020 email attaching MDD's initial Preliminary Estimate of business interruption loss and almost four months after ECD's submission of its first Partial Proof of Loss, for the first time Zurich provided

its coverage position with respect to ECD's business interruption claim, through a letter from its counsel.

88. Among other arguments, counsel's letter asserted that Zurich correctly applied the Policy's business interruption coverage in discounting for COVID-19 and that Zurich had no obligation to follow the Bulletin's directive to base payment of business interruption claims related to the events of civil unrest "on business activity levels that eliminate the impact of COVID-19."

89. Counsel's letter wrongly asserted that Zurich had "paid all amounts that are not contested for property damage and business interruption relating to the Claim." Indeed, at that time, Zurich had not disputed or even responded to multiple unpaid items of property damage and extra expense loss submitted for coverage, including costs for increased security, building washing expenses, BDO's professional fees, and other expenses.

90. On November 18, 2020, ECD's counsel sent a letter to counsel for Zurich further identifying multiple errors in MDD's determination of business interruption loss, and demanding payment of \$518,544.12 still owed for property damage to the building and \$478,110.09 still owed for personal property loss and extra expense loss, including an invoice in the amount of \$56,740 from KOO, which Zurich approved as "fair and reasonable" the first week of August. Counsel's letter repeated ECD's request for a meeting with Zurich.

91. On November 24, 2020, Zurich emailed ECD stating it had agreed to pay an additional \$280,697.03 for property damage to the Hotel building, much of which responded to loss submitted by ECD months earlier.

**H. After Putting Off Meeting with ECD for Almost Two Months, Zurich Finally Agrees to Meet With ECD to Discuss Its Claim**

92. Despite ECD's repeated requests for a meeting to explain the flaws with MDD's business interruption determination, and further address amounts due for property damage and

extra expense that Zurich continued to withhold, the earliest date Zurich would agree to meet with ECD was December 2, 2020. Even then, contrary to ECD's request, Zurich refused to discuss reconsideration of its deduction of ECD's business interruption claim based on COVID-19 and its ongoing violation of the Bulletin's directive to "eliminate the impact of COVID-19" in making payments for business interruption loss.

93. Notwithstanding Zurich's refusal to discuss reconsideration of its deduction for COVID-19, ECD immediately agreed to the meeting so that it could address Zurich's multiple other mistakes and claims handling failings.

94. At the meeting on December 2, 2020, ECD and BDO presented information to Zurich and MDD showing multiple errors in connection with MDD's determination of business interruption loss, including problems with the STR Competitive Set data and MDD's determination of Food and Beverage loss.

95. Although ECD continued to assert it was entitled under the Policy to payment of business interruption loss based on its long-term, historical performance, ECD explained to Zurich that – even with respect to recent data affected by COVID-19 (on which Zurich relied and insisted applied) – Zurich had failed to account for significant Food and Beverage revenue the Hotel would have earned from private events and high-margin customers during the summer and fall of 2020. ECD also noted that, as before, the Competitive Set data used by MDD also was impacted by the events of civil unrest and thus were skewed to reduce ECD's loss.

96. On December 8, 2020, ECD submitted its sixth Partial Proof of Loss with respect to loss incurred during November 2020. ECD's sixth Partial Proof of Loss totaled \$1,530,714, all of which constituted lost business income.

97. On December 9, 2020, ECD and BDO met again with MDD and presented additional information requested by Zurich concerning alternative Competitive Set data prepared by BDO and the Food and Beverage portion of ECD's claim and the revenue ECD would have earned at its various outlets, including ROOF and from private events at the Hotel. Although ECD continued to maintain its right under the Policy to payment of loss without any discount based on COVID-19, ECD showed that, based on data impacted by COVID-19 (which Zurich said applied to determining ECD's business interruption loss), ECD was entitled to significantly more business income related to Food and Beverage revenue. Specifically, ECD showed that, prior to the May 30, 2020 events of civil unrest, it had developed a strategy to market the Hotel, ROOF and the Hotel's private event spaces (including by leveraging its competitive advantage with ROOF's outdoor space) to increase bookings of profit-generating celebrations and attract high-margin customers during the summer and fall of 2020.

98. ECD provided documents and other information to Zurich showing that (notwithstanding the impacts of COVID-19) it had expected to earn approximately \$3.6 million in Food and Beverage revenue from June through September.

99. On December 11, 2020, a Friday, MDD sent an "updated accounting RFI" with multiple detailed requests for accounting information concerning ECD's business interruption loss. ECD responded to this request in two business days, along with a request that "MDD and Zurich ... review these documents quickly with an equal sense of URGENCY that the insured acted to respond to the MDD RFI, to allow Zurich to promptly payout the rightful and reasonable undisputed BI Loss."

#### **I. Zurich Continues to Delay Its Evaluation and Payment of ECD's Claim**

100. On December 18, 2020, Zurich sent a letter to ECD concerning ECD's sixth Partial Proof of Loss in connection with the Hotel's November operations and lost income. Zurich's letter



stated that Zurich “continues to evaluate” ECD’s fifth Partial Proof of Loss and that “Zurich is investigating the most recent Partial Proof of Loss [but that] the complexity of that analysis may result in the final determination of the amount of loss exceeding 30 days.”

101. Zurich’s letter also reserved Zurich’s rights (for the first time) with respect to ECD’s entitlement to payment of loss under the Policy in connection with the coverage for an “Extended Period of Indemnity.”

102. ECD emailed Zurich later that day expressing concern with the lack of urgency in its letter and reminding Zurich that, but for the initial failures of Zurich and MDD to correctly analyze and adjust ECD’s claim in the first instance, there would have been no need for ECD to provide the additional information requested by MDD.

103. ECD’s email also responded to Zurich’s reservation of rights with respect to the “Extended Period of Indemnity” coverage by noting that, during the Period of Restoration, it had been unable to implement marketing efforts, take reservations and book events for later in 2020 and in 2021. “Given that gross sales at the Hotel have not been restored to the amount that would have existed had ECD not incurred loss resulting from the events of civil unrest,” ECD’s email stated, “there can be no question that payments for an ‘Extended Period of Indemnity’ are required under the Policy.”

**J. Zurich Refuses to Pay Business Interruption Loss Incurred After September 2020 and Attempts to Avoid Payment of Food and Beverage Loss for August and September 2020**

104. On December 29, 2020, Zurich emailed ECD stating it would pay only an additional \$555,912.00 for ECD’s business interruption loss, which was limited to loss incurred from June through September, for a total payment of business interruption loss by Zurich to ECD of only \$1,483,895.

105. Zurich's determination of ECD's business interruption loss was severely flawed. It ignored the Hotel's business interruption loss incurred after September, despite ECD's substantial ongoing losses resulting from the catastrophic damage to the Hotel and its clear entitlement to coverage under the Policy for an "Extended Period of Indemnity" after the Hotel reopened.

106. Contrary to Zurich's position, since September 2020, ECD has continued to incur significant income losses resulting from the May 30, 2020 events of civil unrest and the Hotel's prolonged closure.

107. Zurich's business interruption determination also grossly underestimated the Hotel's Food and Beverage losses. First, Zurich failed to account for the significant revenue the Wit would have generated during its peak summer and fall season from hosting high-margin customers and private events at ROOF and other event spaces in the Hotel. Instead of taking this data into account (which would have been consistent with its insistence that only data impacted by COVID-19 – not historical financial data – could be considered in determining ECD's loss), Zurich turned its own position on its head and instead relied on historical revenue data from 2018 and 2019 – *the very type of historical revenue it earlier asserted was inappropriate for measuring ECD's business income loss* – to significantly undervalue ECD's claim. Even as to the historical revenue, Zurich relied on general sales data instead of data reflecting high-margin and private event sales, which was far more relevant.

108. Second, with the exception of room service, Zurich also refused to acknowledge any loss of income after July in connection with Food and Beverage sales at ROOF, State & Lake and the Hotel's other outlets.

109. On this latter issue, on December 29, 2020, Zurich sent a letter to ECD asserting that ECD was not entitled to business interruption loss incurred by ROOF and State & Lake during

August and September because ECD had failed to “mitigate its losses.” “At this point,” Zurich’s letter stated, “it appears that the ROOF and State & Lake could have opened well before August 1, 2020 and that the amounts included in ECD’s claim for those months did not result from direct physical loss of or damage to covered property caused by the May 30, 2020 incident of civil unrest.”

110. Zurich’s statement that ROOF and State & Lake could have opened well before August 1, 2020 was absurd (and shameless) for multiple reasons, *including because Zurich itself did not approve the Hotel’s proposal to replace the lobby’s mud slab floor until September 9, 2020.*

111. Zurich’s letter was the first time it had asserted, or even suggested, that ECD had failed to mitigate its losses.

112. Later that night, ECD emailed Zurich to remind it that access to State & Lake and ROOF (as well as guest rooms) requires customers to pass through the lobby of the Hotel, which was not possible until the lobby (and in particular, the lobby floor) was repaired. ECD also emailed Zurich photographs of the lobby in August and September that clearly showed the state of the demolition and lobby floor replacement, and unequivocally demonstrated the lobby had not been repaired and could not be reopened for use by customers of State & Lake and ROOF.

113. ECD’s email noted that ECD had kept Zurich and its construction consultants regularly apprised of the extraordinary efforts by ECD and its contractors over the summer to expedite repair of the Hotel lobby and State & Lake and that ECD notified Zurich early in the repair process of the timetable for completing repairs. ECD’s email further noted that customers could access State & Lake, ROOF and the other Hotel outlets only after the lobby had been repaired, and that – despite this information – Zurich never objected to the timetable for completing

repairs or asserted that ECD had failed to mitigate its loss in connection with State and Lake and ROOF.

114. ECD's email reminded Zurich that ECD, Zurich and its consultants extensively discussed the best approach to mitigate losses related to State and Lake and ROOF and they agreed to relocate certain lounge furniture from ROOF to the Hotel lobby so the Hotel could reopen more quickly. The furniture ordered to replace the damaged lobby furniture is not expected to arrive until the summer of 2021 at the earliest.

115. ECD demanded that Zurich immediately agree to pay business interruption loss for Food and Beverage for August and September.

116. On December 30, 2020, counsel for ECD emailed counsel for Zurich requesting that Zurich's counsel confirm Zurich "will reverse its position and immediately issue payment of these amounts."

117. Zurich's counsel promised to respond the following week, but never did so.

118. On January 7, 2021, Zurich called Mr. Greenberg proposing various ways ECD could have mitigated damages, including asking Mr. Greenberg if he had contacted the City of Chicago to determine if the Wit could obtain a waiver of code requirements (including the fire code requirement of two exits) that prevented the Hotel or its outlets (including ROOF) from opening earlier than it did. Mr. Greenberg responded by noting the impossibility of providing safe access to the Hotel's passenger elevators (which only can be accessed through the lobby) in order to reach ROOF and the Hotel's guest rooms and private event space, and the obvious public safety and liability concerns inherent in providing only one lobby exit to Hotel guests, visitors and employees.

119. On January 11, 2021, in response to the January 7, 2021 call from Zurich, ECD emailed Zurich letters from KOO and Landmark confirming that the Hotel, State & Lake and

ROOF could not have opened prior to completion of repairs to the lobby without violating law and exposing the public, Hotel employees and those working to repair the Hotel to significant safety risks, as well as exposing the Hotel to potential significant liability.

120. The next day, notwithstanding several prior visits, a Zurich consultant visited the lobby, which clearly showed that access to the passenger elevators to ROOF and other Hotel floors requires guests to travel through the lobby. Since that visit, Zurich has not withdrawn or revised its assertion that ECD failed to mitigate its Food and Beverage losses by reopening the Hotel on August 1, 2020, or agreed to pay the Hotel's Food and Beverage losses after July 2020.

121. On January 26, 2021, ECD submitted its seventh Partial Proof of Loss with respect to loss incurred during December 2020. ECD's seventh Partial Proof of Loss totaled \$1,387,906, all of which constituted lost business income.

**Zurich is Obligated to Provide Coverage to ECD Under the Policy**

122. The Hotel is an insured "premises" under the Policy.

123. The Hotel incurred direct physical loss and damage during the period of the policy within the Policy's "coverage territory" resulting from a "covered cause of loss," *i.e.*, the events of civil unrest of May 30, 2020.

124. Zurich is obligated, therefore, to pay ECD's full losses and expenses resulting from the direct physical loss of or damage to the Hotel, including all losses and expenses submitted or to be submitted for coverage by ECD under the Policy's Real and Personal Property Coverage, Business Income Coverage and Extra Expense Coverage.

**COUNT I  
(Declaratory Judgment Against Zurich)**

125. ECD repeats and incorporates the allegations set forth in paragraphs 1-124 above as if fully set forth herein.

126. The Policy provides coverage for the loss and costs submitted or to be submitted by ECD in its Partial Proofs of Loss.

127. All conditions precedent to recovery under the Policy have been satisfied, waived, or otherwise are inapplicable.

128. Zurich has a duty under the Policy to pay for loss and costs submitted or to be submitted by Zurich in its Partial Proofs of Loss, including for business interruption loss and extra expense.

129. To date, Zurich has failed and refused to fully pay ECD's loss and costs that it has submitted or will submit in its Partial Proofs of Loss, including by improperly deducting payment of significant business income loss and refusing to pay business income loss incurred by ECD after September 2020.

130. Zurich owes no less than \$14,826,973.00 in business interruption loss incurred through December 31, 2020 and depreciation hold-back of \$133,058 for personal property damage.

131. Actual controversies exist between ECD and Zurich as to whether Zurich is responsible to pay ECD's loss and costs submitted and to be submitted in its Partial Proofs of Loss.

132. Zurich has a duty to pay all of the loss and costs submitted and to be submitted by ECD in its Partial Proofs of Loss, and Zurich denies it has such a duty.

**COUNT II**  
**(Breach of Contract Against Zurich)**

133. ECD repeats and incorporates the allegations set forth in paragraphs 1-132 above as if fully set forth herein.

134. The Policy provides coverage for the loss and costs submitted by ECD in its Partial Proofs of Loss.

135. All conditions precedent to recovery under the Policy have been satisfied, waived, or are otherwise inapplicable.

136. Zurich has breached the Policy by failing to fully pay the loss and costs submitted by ECD in its Partial Proofs of Loss, including by improperly deducting payment of significant business income loss and refusing to pay business income loss incurred after September 2020.

137. As a direct result of Zurich's breach of the Policy, ECD has been deprived of the benefit of insurance coverage for which it paid substantial premiums.

**COUNT III**  
**(Bad Faith Against Zurich)**

138. ECD repeats and incorporates the allegations set forth in paragraphs 1-137 above as if fully set forth herein.

139. Zurich has acted vexatiously, unreasonably and in bad faith by ignoring and/or failing to promptly and clearly respond to ECD's communications concerning coverage for loss under the Policy.

140. Zurich has acted vexatiously, unreasonably and in bad faith by ignoring and/or delaying responding to ECD's requests for approval and consent concerning multiple projects required for the repair and reopening of the Hotel.

141. Zurich has acted vexatiously, unreasonably and in bad faith by delaying payment of undisputed amounts of property damage, business interruption and extra expense loss covered under the Policy, in violation of Ill. Admin. Code 50, § 919.50.

142. Zurich has acted vexatiously, unreasonably and in bad faith by failing to provide or delaying its provision of a reasonable written explanation of its coverage denials and/or settlement offers, in violation of Ill. Admin. Code 50, § 919.50.

143. Zurich has acted vexatiously, unreasonably and in bad faith by ignoring and failing to follow the Bulletin's directive to "apply claims best practices consistent with the categorization of [the May 30th civil unrest] event as a catastrophic event, including expedited claims handling, advance claim payments, and fair treatment of all policyholders."

144. Zurich has acted vexatiously, unreasonably and in bad faith by ignoring and failing to follow the Bulletin's directive to "base payouts" of business interruption claims related to damage caused by the civil unrest "on business activity levels that eliminate the impact of COVID-19." Instead, Zurich has brazenly used the pandemic to its own advantage by severely deducting business interruption loss owed to ECD on the basis of COVID-19.

145. Zurich has acted vexatiously, unreasonably and in bad faith by ignoring ECD's multiple, clear communications and directions regarding logistics for payment of amounts due (and urgently needed by ECD) under the Policy, including by repeatedly sending payments to the wrong payee and/or the wrong address. At best, Zurich's conduct in this regard has exemplified a cold indifference and reckless incompetence toward the rights of its policyholder. At worst, Zurich's actions suggest a purposeful intent to annoy, harass and harm ECD.

146. Zurich has acted vexatiously, unreasonably and in bad faith by completely ignoring in its initial determination of business interruption loss ECD's lost Food and Beverage income at the Hotel, to which ECD clearly was entitled under the Policy.

147. Zurich has acted vexatiously, unreasonably and in bad faith by basing its determination of business interruption loss on flawed and unreliable market data impacted by the May 30, 2020 events of civil unrest and skewed to reduce lost income owed ECD under the Policy.

148. Zurich has acted vexatiously, unreasonably and in bad faith by refusing to provide coverage for ECD's business interruption loss incurred after September 2020, even though it is



aware that repairs and replacements of furniture at the Hotel will not be completed until the summer of 2021, that ECD continues to incur substantial loss caused by its four-month closure during the summer and fall of 2020, and ECD is entitled to “Extended Period of Indemnity” coverage under the Policy.

149. Zurich has acted vexatiously, unreasonably and in bad faith by refusing to pay business income loss for the significant Food and Beverage revenue the Wit would have generated during its peak summer and fall season from hosting high-margin customers and private events at ROOF and other event spaces in the Hotel, and basing its position on the very type of historical revenue it earlier asserted was inappropriate for measuring ECD’s business income loss.

150. Zurich has acted vexatiously, unreasonably and in bad faith by consistently relying on data with the intended purpose of minimizing payment of loss to ECD, even where such reliance has resulted in Zurich’s assumption of contradictory positions and methods for determining ECD’s loss.

151. Zurich has acted vexatiously, unreasonably and in bad faith by refusing to provide coverage for lost income at the Hotel related to Food and Beverage and private event business during August and September 2020 on the basis that ECD failed to mitigate its losses by not opening the Hotel lobby earlier or providing access to the Hotel’s passenger elevators for access to ROOF and the Hotel’s guest rooms and private event spaces. Zurich’s bad faith includes its assertion that ECD should have sought a waiver of City public fire/safety codes to reopen the lobby earlier – even though doing so would unnecessarily have endangered the public, Hotel employees and contractors working at the building, and could have exposed ECD to substantial liability. Zurich’s mitigation position ignores the fact that ECD regularly has consulted with and kept Zurich informed of its plans to repair the lobby (including the significant disruption to the Hotel’s

operations caused by the nature of the repairs), and Zurich never previously asserted that ECD was failing to mitigate its losses by not repairing and reopening the Hotel lobby earlier.

152. Zurich's conduct has severely prejudiced ECD, including by forcing ECD to retain legal counsel and seek legal relief by bringing this action.

**PRAYER FOR RELIEF**

WHEREFORE, ECD respectfully requests this Court grant judgment in its favor and against defendants as follows:

(a) With respect to Count I, enter a judgment declaring that Zurich has a duty to pay all losses and expenses submitted or to be submitted by ECD in its Partial Proofs of Loss, including \$14,826,973.00 in business interruption loss incurred through December 31, 2020.

(b) With respect to Count II, enter a judgment against Zurich awarding:

- i. All direct and consequential money damages that ECD has suffered as a result of Zurich's breach of the Policy, including all losses and costs submitted by ECD in its Partial Proofs of Loss; and
- ii. Pre- and post- judgment interest.

(c) With respect to Count III, enter a judgment against Zurich finding that it has acted vexatiously, unreasonably and in bad faith in handling ECD's claim and award ECD its attorneys' fees, other costs and all other amounts allowed pursuant to 215 ILCS §5/155.

(d) Such other and further relief as the Court may determine to be just.

**ECD demands a jury for all issues triable by jury.**

DATED: January 27, 2021

/s/ John D. Shugrue

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