

**FLASTER/GREENBERG PC**

By: Lee M. Epstein (*pro hac vice application forthcoming*)  
John G. Koch (Attorney No.: 042572005)  
Matthew A. Goldstein (Attorney No.: 029212010)

1810 Chapel Avenue West  
Cherry Hill, New Jersey 08002

Tel: (856) 661-1900

Fax: (856) 661-1919

Email: lee.epstein@flastergreenberg.com  
john.koch@flastergreenberg.com  
matthew.goldstein@flastergreenberg.com

*Attorneys for Plaintiff Burlington Stores, Inc.*

BURLINGTON STORES, INC.,

Plaintiff,

v.

ZURICH AMERICAN INSURANCE  
COMPANY,

Defendant.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
BURLINGTON COUNTY

DOCKET NO.:

**COMPLAINT**

Plaintiff Burlington Stores, Inc. (“Burlington”), by its undersigned counsel, Flaster/Greenberg PC, hereby submits its Complaint against Defendant Zurich American Insurance Company (“Zurich”), and in support thereof, avers as follows:

**I. INTRODUCTION**

1. This action for declaratory judgment, and for related supplemental and further relief, arises out of an insurance coverage dispute between Burlington and Zurich.

2. Burlington is a nationally recognized off-price retailer with over 780 stores in 45 states and Puerto Rico. Burlington’s stores offer an extensive selection of in-season, fashion-focused merchandise, including women’s ready-to-wear apparel, menswear, youth apparel, baby, beauty, footwear, accessories, home, toys, and coats.

3. Further to its prudent business practices, and in recognition of its responsibilities to its associates (*i.e.*, employees), stockholders and customers, Burlington maintains various forms of insurance coverage.

4. Specifically, Burlington purchased “All Risks” commercial property insurance policies from Zurich (the “Zurich All Risks Policies,” as defined below) insuring against commonly occurring risks such as fire, as well as unanticipated and novel risks such as the SARS-CoV2 virus (“Coronavirus”) and the disease it causes, Coronavirus Disease 2019 (“COVID-19”).

5. On March 11, 2020, the World Health Organization (“WHO”) declared the COVID-19 outbreak a global pandemic.

6. To date, there have been over 163 million confirmed cases of COVID-19 (over 32.7 million of them in the United States alone) and over 3.3 million deaths worldwide.<sup>1</sup>

7. Burlington was not immune from the Coronavirus pandemic with many of its associates reporting cases of COVID-19.

8. To combat the rapid spread of COVID-19 and to protect its customers, associates, and property, Burlington began closing certain stores and, effective March 22, 2020, Burlington closed all of its stores, distribution centers (other than processing of received inventory), and corporate offices.

9. At the same time, state and local governments across the United States and governments around the world recognized the unprecedented and mushrooming outbreaks of COVID-19 and the Coronavirus’ catastrophic impact through the direct physical loss of or damage

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<sup>1</sup> *Coronavirus Disease 2019: COVID-19 Data Tracker*, CDC (updated May 17, 2021), <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last visited May 18, 2021); *WHO Coronavirus Disease (COVID-19) Dashboard*, WHO (updated May 18, 2021), <https://covid19.who.int/> (last visited May 18, 2021).

to property and lives. As a consequence, many states issued “State of Emergency” Declarations, beginning in March 2020.

10. Virtually every U.S. state where there was a Burlington store issued orders suspending or severely limiting business operations deemed to be “non-essential businesses” where people could potentially contract COVID-19 from others or from the property itself.

11. The suspension of Burlington’s business activities, consistent with the governmental mandates, precluded access to Burlington’s stores, all of which are insured “Locations” under the Zurich All Risks Policies.

12. As a result, Burlington sustained considerable business interruption and other losses and costs (currently calculated to be in excess of \$750 million), for which it made a claim for insurance under the Zurich All Risks Policies.

13. Zurich failed to honor its promise to insure Burlington under the Zurich All Risks Policies for the losses and costs that Burlington has sustained.

14. Burlington therefore seeks a judicial declaration for the purpose of resolving this insurance coverage dispute that is centered in this county, where Burlington maintains its headquarters, where the Zurich All Risks Policies were procured by and delivered to Burlington, and where Burlington managed its claim for insurance through its Legal and Risk Management Departments.

## **II. PARTIES**

15. Burlington is a Delaware corporation with its principal place of business in Burlington, New Jersey.

16. Based on information and belief, Zurich is a New York corporation with its principal place of business in Schaumburg, Illinois.

### **III. JURISDICTION AND VENUE**

17. This Court has jurisdiction pursuant to the New Jersey Declaratory Judgment Act, N.J.S.A. 2A:16-50 *et seq.*, to issue declaratory relief regarding the parties' respective rights and obligations under the Zurich All Risks Policies sold by Zurich to Burlington.

18. This Court has personal jurisdiction over Zurich as it is licensed to issue insurance policies in the State of New Jersey, regularly does business within the State of New Jersey, and issued the Zurich All Risks Policies to Burlington in New Jersey.

19. Venue in this Court is proper pursuant to New Jersey Court Rules 4:3-2(a) and 4:3-2(b) because Zurich does business by issuing insurance policies throughout the State of New Jersey, including in Burlington County, and may be served in Burlington County by service upon the Commissioner of Banking and Insurance. Venue is also proper pursuant to Rule 4:3-2(a)(3)-(b) because Burlington is a corporation that has a registered office, is doing business, and resides in Burlington County, New Jersey.

### **IV. FACTUAL BACKGROUND**

#### **A. The Zurich All Risks Policies**

##### **"All Risks" Insurance is "Special" and "Very Broad"**

20. In exchange for the payment of substantial premiums, Zurich sold Burlington two "All Risks" First Party Property and Time Element insurance policies: Policy Number XPP0239022-01, effective from April 1, 2019 to April 1, 2020 and Policy Number XPP0239022-02, effective from April 1, 2020 to April 1, 2021 (collectively, the "Zurich All Risks Policies").

21. The terms and conditions of the Zurich All Risks Policies are fully incorporated herein by reference.

22. “All Risks” insurance is a special type of insurance extending to risks not usually contemplated and covering all fortuitous losses unless expressly excluded.

23. The Zurich All Risks Policies incorporate the Zurich Edge Policy Form.

24. Zurich marketed the Zurich Edge Policy Form as offering uniquely “broader coverage and greater flexibility[.]”<sup>2</sup>

25. Zurich made the same promotional claims to insurance regulators. In an Explanatory Memorandum filed with the California Department of Insurance and the Oregon Insurance Division on January 11, 2008 and February 5, 2008, respectively, Zurich claimed that the Zurich Edge Policy Form offers “our Insured’s [sic] a very broad and flexible policy.”

***The Zurich All Risks Policies Insure Burlington Against Loss or Damage Caused by a “Covered Cause of Loss”***

26. The Insuring Agreement of the Zurich All Risks Policies provides: “This Policy Insures against direct physical loss of or damage caused by a **Covered Cause of Loss**<sup>3</sup> to Covered Property. . . .”

27. “**Covered Cause of Loss**” is defined in the Zurich All Risks Policies as: “All risks of direct physical loss of or damage from any cause unless excluded.”

28. The term “direct” is not defined in the Zurich All Risks Policies and may be defined reasonably as: “proceeding from one point to another in time or space without deviation or interruption: STRAIGHT.”<sup>4</sup>

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<sup>2</sup> Zurich introduces *The Zurich Edge*<sup>TM</sup> for highly protected risks and global property markets, Media Release Zurich (Apr. 22, 2008), [https://zsl.zurichna.com/zus/zna\\_config.nsf/pages/9123da88864cd81485257433006ed710!OpenDocument&Click=#:~:text=global%20property%20markets-](https://zsl.zurichna.com/zus/zna_config.nsf/pages/9123da88864cd81485257433006ed710!OpenDocument&Click=#:~:text=global%20property%20markets-) (last visited May 18, 2021).

<sup>3</sup> Unless otherwise noted, capitalized and bolded terms herein are capitalized and bolded in the Policies.

<sup>4</sup> *Direct*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/direct> (last visited May 18, 2021).

29. The term “physical” is not defined in the Zurich All Risks Policies and may be defined reasonably as: “[r]elating to things perceived through the senses as opposed to the mind; tangible or concrete.”<sup>5</sup>

30. The term “loss” is not defined in the Zurich All Risks Policies and may be defined reasonably as: “the act of losing possession: DEPRIVATION.”<sup>6</sup>

31. The term “damage” is not defined in the Zurich All Risks Policies and may be defined reasonably as: “[p]hysical harm caused to something in such a way as to impair its value, usefulness, or normal function.”<sup>7</sup>

32. Burlington’s losses resulted from “loss of or damage” to either Covered Property, or to Property of the type insurable under the Zurich All Risks Policies, when the Coronavirus and COVID-19 caused a loss of or a deprivation of insured property and otherwise impaired the functionality of such property.

33. The “loss of or damage” to Covered Property, or to other Property of the type insurable under the Zurich All Risks Policies, resulting from the Coronavirus and COVID-19 was “direct” in that it was without deviation or interruption.

34. The “loss of or damage” to Covered Property, or to other Property of the type insurable under the Zurich All Risks Policies, resulting from the Coronavirus and COVID-19 was “physical” in that it was tangible, concrete and capable of being perceived through the senses as opposed to the mind.

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<sup>5</sup> *Physical*, OXFORD ENGLISH DICTIONARY, <https://www.lexico.com/en/definition/physical> (last visited May 18, 2021).

<sup>6</sup> *Loss*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/loss> (last visited May 18, 2021).

<sup>7</sup> *Damage*, OXFORD ENGLISH DICTIONARY, <https://www.lexico.com/en/definition/damage> (last visited May 18, 2021).

35. The Zurich All Risks Policies insure Burlington against Property Damage and Time Element<sup>8</sup> Loss, and provide other Special Coverages.

36. With regard to Property Damage, the Zurich All Risks Policies insure Burlington's Covered Property, including Burlington's interest in real and personal property.

37. With regard to Time Element Loss, the Zurich All Risks Policies cover loss resulting from "the necessary **Suspension** of the Insured's business activities at an Insured Location."

38. The terms **Suspension (Suspended)** are defined in the Zurich All Risks Policies, in pertinent part, as: "The slowdown or cessation of the Insured's business activities."

39. The Time Element coverages of the Zurich All Risks Policies include, in pertinent part:

- **Gross Earnings:** as determined by the "Gross Earnings value that would have been earned during the Period of Liability, less charges and expenses that do not necessarily continue during the Period of Liability."
- **Extra Expense:** defined to mean "that amount spent to continue the Insured's business activities over and above the expenses the Insured would have normally incurred had there been no direct physical loss of or damage caused by a **Covered Cause of Loss** to Property of the type insurable under this policy at a **Location**."
- **Leasehold Interest:** pursuant to which, Zurich promised to pay Burlington "the present value of the actual rent payable for the unexpired term of the lease" if the building (or structure) becomes wholly untenable or unusable and "the present value of the proportionate amount of the actual rent payable for the unexpired term of the lease" if the building (or structure) becomes partially untenable or unusable.

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<sup>8</sup> "Time Element Insurance" is defined as "a property insurance term referring to coverage for loss resulting from the inability to put damaged property to its normal use. This type of coverage is called 'time element' insurance because the amount of loss depends on how long it takes to repair or replace the damaged property. The best-known types of time element insurance are business interruption and extra expense coverage." *Time Element Insurance*, INTERNAL RISK MANAGEMENT INSTITUTE, <https://www.irmi.com/term/insurance-definitions/time-element-insurance> (last visited May 18, 2021).

- **Extended Period of Liability:** pursuant to which Zurich agreed that upon termination of the coverage for Gross Earnings loss, the Zurich All Risks Policies “will continue to pay the actual Gross Earnings loss sustained by the Insured” for up to 365 days.

40. The Zurich All Risks Policies also include numerous Special Coverages that apply to Burlington’s losses, including the following:

- CIVIL OR MILITARY AUTHORITY coverage for “the actual Time Element loss sustained by the Insured, as provided by this Policy, resulting from the necessary **Suspension** of the Insured’s business activities at an Insured Location if the **Suspension** is caused by order of civil or military authority that prohibits access to the **Location**.”
- CONTINGENT TIME ELEMENT coverage for “the actual Time Element loss as provided by the Policy, sustained by the Insured during the Period of Liability directly resulting from the necessary **Suspension** of the Insured’s business activities at an Insured Location if the **Suspension** results from direct physical loss of or damage caused by a **Covered Cause of Loss** to Property (of the type insurable under this Policy) at **Direct Dependent Time Element Locations, Indirect Dependent Time Element Locations, and Attraction Properties** located worldwide[.]”
- DECONTAMINATION COSTS coverage, which provides in relevant part: “If Covered Property is **Contaminated** from direct physical loss of or damage caused by a **Covered Cause of Loss** to Covered Property and there is in force at the time of the loss any law or ordinance regulating **Contamination** due to the actual not suspected presence of **Contaminant(s)**, then this Policy covers, as a direct result of enforcement of such law or ordinance, the increased cost of decontamination and/or removal of such **Contaminated** Covered Property in a manner to satisfy such law or ordinance.”
- INGRESS/EGRESS coverage for “the actual Time Element loss sustained by the Insured, as provided by this Policy, resulting from the necessary **Suspension** of the Insured’s business activities at an Insured Location if ingress or egress to that Insured Location by the Insured’s suppliers, customers or employees is prevented by physical obstruction due to direct physical loss of or damage caused by a **Covered Cause of Loss** to property not owned, occupied, leased or rented by the Insured or insured under this Policy and located within the distance of the Insured Location as stated in the Declarations.”

**The Zurich All Risks Policies Obligated Burlington to Protect and Preserve its Property from Loss or Damage and Insured Burlington for the Associated Losses and Costs**

41. The Zurich All Risks Policies provide PROTECTION AND PRESERVATION OF PROPERTY coverage, for “[t]he reasonable and necessary costs incurred for actions to temporarily protect or preserve Covered Property; provided such actions are necessary due to actual or imminent physical loss or damage due to a **Covered Cause of Loss** to such Covered Property” and “[t]he Gross Earnings loss sustained by the Insured for a period of time not to exceed the hours listed in the Declarations prior to and after the Insured first taking reasonable action for the temporary protection and preservation of Covered Property.”

42. Separately, under a policy condition entitled, “DUTIES IN THE EVENT OF LOSS OR DAMAGE,” the Zurich All Risks Policies obligated Burlington to mitigate its loss to its property:

Take all reasonable steps to protect the Covered Property from further damage caused by a **Covered Cause of Loss**. If feasible, set the damaged property aside and in the best possible order for examination. Also, keep a record of expenses for emergency and temporary repairs for consideration in the settlement of the claim.

43. The suspension of Burlington’s business activities, including the closure of Burlington’s stores, distribution centers and other properties, and then reopening only with significant modifications, was necessary for the protection and preservation of Covered Property required under the Zurich All Risks Policies and the losses and costs resulting from that necessary suspension are insured.

**No Exclusion Applies**

44. The Zurich All Risks Policies also contain various exclusions, none of which apply in this case.

45. Specifically, the Zurich Edge Policy Form contains a so-called Contamination Exclusion that was deleted by endorsement to the Zurich All Risks Policies and is otherwise inapplicable.

46. The Contamination Exclusion set forth in the Zurich Edge Policy Form provides as follows: “**Contamination**, and any cost due to **Contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy, except as provided by the Radioactive Contamination Coverage of this Policy.”

47. The Contamination Exclusion set forth in the Zurich Edge Policy Form was deleted from the Zurich All Risks Policies by endorsement (the “Virus Deletion Endorsement”) and replaced with the following provision: “**Contamination** or asbestos, and any cost due to **Contamination** or asbestos including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy.” *See* Policy Endorsement, form EDGE-219-C (01/18).

48. The Zurich Edge Policy Form defines **Contamination(Contaminated)** as: “Any condition of property due to the actual 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.”

49. The definition of **Contamination(Contaminated)** set forth in the Zurich Edge Policy Form was deleted from the Zurich All Risks Policies by the Virus Deletion Endorsement and replaced with the following: “Any condition of property due to the actual presence of any **Contaminant(s)**.”

50. The definition of **Contaminant(s)** set forth in the Zurich Edge Policy Form in each of the Zurich All Risks Policies was also deleted from the Zurich All Risks Policies by the Virus Deletion Endorsement and replaced with the following: “Any solid, liquid, gaseous, thermal or

other irritant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste (including materials to be recycled, reconditioned or reclaimed), other hazardous substances, **Fungus or Spores.**”

51. The Zurich All Risks Policies, as amended by the Virus Deletion Endorsement, thereby delete the reference to, among other things, “virus” from the Contamination Exclusion.

52. The Virus Deletion Endorsement applies to all risks insured under the Zurich All Risks Policies without regard to the location of those risks.

53. The Virus Deletion Endorsement changes the Zurich All Risks Policies in their entirety, providing in bolded, all capitalized lettering: “**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**” (Emphasis in original.)

54. Other endorsements to the Zurich All Risks Policies, however, are expressly and unambiguously limited only to risks located in a specified state.

55. For example, the Zurich All Risks Policies contain a New York state-titled endorsement, entitled “Amendatory Endorsement – New York,” which provides: “**THIS ENDORSEMENT CHANGES THE POLICY AND APPLIES TO THOSE RISKS IN NEW YORK.**” (Emphasis in original.)

56. Similarly, the Zurich All Risks Policies contain a Connecticut state-titled endorsement, entitled “Amendatory Endorsement – Connecticut,” which provides: “**THIS ENDORSEMENT CHANGES THE POLICY AND APPLIES TO THOSE RISKS IN CONNECTICUT.**” (Emphasis in original.)

57. Upon information and belief, when Zurich sold the Zurich All Risks Policies to Burlington, Zurich knew that the Virus Deletion Endorsement applied policy wide and contained no geographical limitation.

58. Upon information and belief, Zurich knew that losses resulting from viruses and pandemics were covered under the Zurich Edge Policy Form in the absence of a clear and express exclusion for viruses.

59. Upon information and belief, in deleting the Contamination Exclusion and replacing it with the Virus Deletion Endorsement, Zurich knew that an exclusion addressed to “contamination” is not a proper method for barring coverage for losses resulting from viruses.

60. Knowing that an exclusion addressed to “contamination” was an improper method for excluding losses resulting from viruses, Zurich removed the reference to virus from the scope of the Contamination Exclusion when it issued the Zurich All Risks Policies to Burlington.

61. Specifically, in 2011, Zurich submitted a revised version of the Zurich Edge Policy Form to the Louisiana Insurance Department (the “Department”) for approval. The Department objected to several provisions in Zurich’s revised form, including the Contamination Exclusion, stating in an Explanatory Memorandum that by the inclusion of health hazards such as “pathogens . . . bacteria and virus” within the definition of “Contamination,” the base form’s version of the Contamination Exclusion went beyond the scope of what was appropriate for an exclusion for contamination.” A true and correct copy of the referenced filing is attached hereto as **Exhibit A** and is incorporated by reference.

62. The Explanatory Memorandum states:

This Department views pollutants as substances that damage the natural environment when accidentally spilled, leaked, or discharged. **Hence, the presence of products such as ... mold, mildew, and bacteria and virus that lead to disease or health hazards do not fit our definition of pollutants and should not be included in the text of a pollution exclusion or referred to as examples of pollutants.**

Exhibit A at 13 (emphasis added).

63. The Explanatory Memorandum states further that, if Zurich wished to exclude losses resulting from health hazards, it should create separate exclusions for such losses, because it is not appropriate to exclude them by way of a contamination/pollution exclusion:

Damages relating to these types of products and health hazards **MAY** be excluded from coverage, but they should not be included within a pollution exclusion. It is recommended to create separate exclusions and definitions for contaminants such as fungus, mold, asbestos, spores, bacteria, virus, biological substances, medical waste and products that may lead to disease [if Zurich wanted to exclude those risks].

Exhibit A at 13 (capitalization in original; emphasis added).

64. This approach is consistent with long standing precedent in New Jersey, holding that pollution exclusions should only be used to exclude “traditional pollutants” like industrial hazardous wastes. *See, e.g., Nav-Its Inc. v. Selective Ins. Co. of Am.*, 183 N.J. 110, 123-24 (2005); *Byrd ex rel. Byrd v. Blumenreich*, 317 N.J. Super. 496, 503 (App. Div. 1999).

65. Zurich did not create a separate exclusion for viruses and instead removed the reference to virus from the Contamination Exclusion by endorsing the Zurich All Risks Policies with the Virus Deletion Endorsement.

66. Upon information and belief, when Zurich sold the Zurich All Risks Policies to Burlington it knew that standard-form exclusions for pandemic risks were available in the insurance marketplace.

67. Upon information and belief, Zurich sold insurance policies to other insureds that included such exclusions.

68. Given the liability that insurers, including Zurich, faced for losses from pandemics, shortly after the outbreak of SARS in 2003, the insurance industry undertook to draft broad exclusions to bar coverage for losses from viruses and bacteria.

69. In 2006, the Insurance Services Office, Inc. (“ISO”),<sup>9</sup> the insurance industry’s insurance policy drafting organization, promulgated a specific exclusion for losses caused by a virus.

70. On July 6, 2006, ISO prepared a circular that included a standard exclusion of loss due to viruses and bacteria as part of its filing with state insurance regulators.<sup>10</sup> In that circular, ISO noted that examples of “viral and bacterial contaminants are rotavirus, SARS, [and] influenza,” observing, “[t]he universe of disease-causing organisms is always in evolution.”<sup>11</sup>

71. ISO recognized that viruses could cause property damage, including business interruption losses, stating:

Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. **When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses.**<sup>12</sup>

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<sup>9</sup> “ISO is a nonprofit trade association that provides rating, statistical, and actuarial policy forms and related drafting services to approximately 3,000 nationwide property or casualty insurers. Policy forms developed by ISO are approved by its constituent insurance carriers and then submitted to state agencies for review. Most carriers use the basic ISO forms, at least as the starting point for their general liability policies.” *Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 671 n.13 (1995) (citations omitted).

<sup>10</sup> ISO Circular, “*New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria*,” (July 6, 2006), <https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf> (last visited May 18, 2021).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (emphasis added); *see also* <https://www.propertyinsurancecoveragelaw.com/2021/05/articles/insurance/iso-internal-documents-are-important-regarding-covid-litigation/> (last visited May 18, 2021).

72. Upon information and belief, Zurich and the rest of the insurance industry have long known that the presence of a virus on or around property can constitute direct physical loss of or damage to property.

73. Zurich sold the Zurich All Risks Policies to Burlington without any exclusion applicable expressly to the loss or damage arising from pandemics generally, or from viruses specifically.

**B. The Coronavirus Pandemic and the Resulting Loss of or Damage to Property and the Necessary Suspension of Burlington’s Business Activities**

**The Coronavirus and COVID-19**

74. The Coronavirus causes serious systemic illness and death.

75. COVID-19 is a severe infectious disease caused by the Coronavirus.

76. According to the WHO, “[t]he disease spreads primarily from person to person through small droplets from the nose or mouth, which are expelled when a person with COVID-19 coughs, sneezes, or speaks . . . . People can catch COVID-19 if they breathe in these droplets from a person infected with the virus . . . . These droplets can land on objects and surfaces around the person such as tables, doorknobs and handrails. People can become infected-by touching these objects or surfaces, then touching their eyes, nose or mouth.”<sup>13</sup>

77. New Jersey experienced a reported COVID-19 outbreak beginning in March 2020 and became an epicenter of sickness, death, and property damage caused by the Coronavirus and COVID-19.<sup>14</sup>

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<sup>13</sup> *Q&A on coronaviruses (COVID-19)*, WHO (Apr. 17, 2020), <https://web.archive.org/web/20200506094904/https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses> (last visited May 18, 2021).

<sup>14</sup> *COVID-19 Vaccination Plan: New Jersey*, N.J. DEPT. HEALTH (Dec. 15, 2020),

**The Coronavirus Causes Direct Physical Loss of or Damage to Property**

78. The presence of the Coronavirus in and on property, including indoor air, surfaces, and objects, causes direct physical loss of or damage to property by altering property and rendering it incapable of being used for its intended purpose, untenable, and uninhabitable.

79. With regard to indoor spaces, the Centers for Disease Control (“CDC”) has recommended “ventilation interventions” to help reduce exposure to the airborne Coronavirus, including increasing airflow and air filtration (such as with high-efficiency particulate air (HEPA) fan/filtration systems).<sup>15</sup>

80. “Fomites” are physical objects or materials that carry and are capable of transmitting infectious agents, altering these objects to become vectors of disease.<sup>16</sup>

81. Fomite transmission has been demonstrated as highly efficient for viruses, both from object-to-hand and from hand-to-mouth.<sup>17</sup>

82. In addition, while fomite transmission may not be the primary route of transmission for COVID-19, fomite transmission is important and has been estimated to be responsible for up to 25% of all deaths due to COVID-19 since lockdowns were imposed.<sup>18</sup>

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<https://nj.gov/health/legal/covid19/NJ%20Interim%20COVID-19%20Vaccination%20Plan%20-%20Revised%2012-15-20.pdf> (last visited May 18, 2021).

<sup>15</sup> *Ventilation in Buildings*, CDC (updated Mar. 23, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html#:~:text=HEPA%20filters%20are%20even%20more,with%20SARS%2DCoV%2D2> (last visited May 18, 2021).

<sup>16</sup> See, e.g., *Fomite*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/fomite> (last visited May 18, 2021).

<sup>17</sup> Jing Cai et al., *Indirect Virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China, 2020*, 26 EMERGING INFECTIOUS DISEASES 6 (June 2020), [https://wwwnc.cdc.gov/eid/article/26/6/20-0412\\_article](https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article) (last visited May 18, 2021).

<sup>18</sup> A. Meiksin, *Dynamics of COVID-19 transmission including indirect transmission mechanisms: a mathematical analysis*, 148 EPIDEMIOLOGY & INFECTION e257, 1-7 (Oct. 20, 2020), <https://www.cambridge.org/core/journals/epidemiology-and-infection/article/dynamicsof->

83. The WHO has described fomite transmission as follows:

Respiratory secretions or droplets expelled by infected individuals can contaminate surfaces and objects, creating fomites (contaminated surfaces). **Viable SARS-CoV-2 virus and/or RNA detected by RT-PCR can be found on those surfaces for periods ranging from hours to days,** depending on the ambient environment (including temperature and humidity) and the type of surface, in particular at high concentration in health care facilities where COVID-19 patients were being treated. Therefore, transmission may also occur indirectly through touching surfaces in the immediate environment or objects contaminated with virus from an infected person[.]<sup>19</sup> (Emphasis added.)

84. Fomites transform the surface of property into a potentially deadly Coronavirus transmission device.

85. The WHO’s description of fomite transmission of COVID-19 expressly recognizes this physical alteration of property, describing viral droplets as “**creating** fomites (contaminated surfaces).”<sup>20</sup> (Emphasis added.)

86. “Creating” involves making or bringing into existence something new<sup>21</sup> – such as something that is in an altered state from what it was before the Coronavirus was present on, in, and around the property.

87. The presence of Coronavirus in and on property, including indoor air, surfaces, and objects, renders the property lost, unsafe and unfit for its normal usage and otherwise untenable and uninhabitable.

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covid19-transmission-including-indirect-transmission-mechanisms-a-mathematical-analysis/A134C5182FD44BEC9E2BA6581EF805D3 (last visited May 18, 2021).

<sup>19</sup> *Transmission of SARS-CoV-2: implications for infection prevention precautions*, WHO (July 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions> (last visited May 18, 2021).

<sup>20</sup> *Id.*

<sup>21</sup> *Create*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/create> (last visited May 18, 2021).

**The Governmental Emergency Declarations and Orders Recognized the Imminent Threat and the Actual Loss of or Damage to Property Posed by the Coronavirus**

88. In order to stop the spread of COVID-19, governmental bodies throughout the United States issued emergency declarations and orders.

89. Those emergency declarations and orders recognized that the Coronavirus harms property as well as people and cannot be easily wiped off surfaces.

90. For example, on March 16, 2020, Governor Jay Inslee issued an order closing fitness centers, theaters, and indoor dining (and certain other business) in Washington State.<sup>22</sup> That order cautioned that COVID-19 was a “public disaster affecting. . . property”; that state government agencies were working with local health officials “in alleviating the impacts to . . . property”; and that among its objectives was to “help preserve and maintain . . . property[.]”<sup>23</sup>

91. On the same day, New Orleans Mayor Latoya Cantrell issued an emergency order suspending large gatherings and closing certain categories of businesses, stating “there is reason to believe that COVID-19 may be spread amongst the population by various means of exposure, including the propensity to spread person to person and **the propensity to attach to surfaces for prolonged periods of time, thereby spreading from surface to person and causing property loss and damage** in certain circumstances[.]”<sup>24</sup> In addition, the emergency order provided that “imminent and emergency action must be taken to mitigate the effects of COVID-19 . . . and

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<sup>22</sup> *Proclamation by the Governor Amending Proclamation 20-05*, OFF. GOVERNOR, No. 20-13 (Mar. 16, 2020), <https://www.governor.wa.gov/sites/default/files/proclamations/20-13%20Coronavirus%20Restaurants-Bars%20%28tmp%29.pdf> (last visited May 18, 2021).

<sup>23</sup> *Id.*

<sup>24</sup> *Mayoral Proclamation to Promulgate Emergency Orders During the State of Emergency Due to COVID-19*, CITY DIST. CT. FOR THE PARISH OF ORLEANS, No. 2020-02602 (Mar. 16, 2020), <https://nola.gov/mayor/executive-orders/emergency-declarations/03162020-mayoral-proclamation-to-promulgate-emergency-orders-during-the-state-of-emergency-due-to-co/> (last visited May 18, 2021).

**preserve the lives and property of the people of the City of New Orleans[.]**<sup>25</sup> (Emphasis added.)

92. Also on March 16, 2020, New York City Mayor Bill de Blasio issued an emergency executive order closing non-essential businesses in the city and declaring, “this order is given because of the propensity of the virus to spread person to person and also **because the virus physically is causing property loss and damage[.]**”<sup>26</sup> (Emphasis added.)

93. On March 19, 2020, Los Angeles Mayor Eric Garcetti issued a shutdown order, explaining “[t]his Order is given because, among other reasons, the COVID-19 virus can spread easily from person to person and **it is physically causing property loss or damage due to its tendency to attach to surfaces for prolonged periods of time.**”<sup>27</sup> (Emphasis added.)

94. On March 22, 2020, Broward County, Florida issued Emergency Order 20-01 stating that the Order is “necessary because of the propensity of the virus to spread person to person and also because the **virus is physically causing property damage due to its proclivity to attach to surfaces for prolonged periods of time[.]**”<sup>28</sup> (Emphasis added.)

95. Also on March 22, 2020, Philadelphia Mayor Jim Kenney issued Emergency Order No. 2 stating, “COVID-19 may remain viable for hours to days on surfaces made from a variety

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<sup>25</sup> *Id.*

<sup>26</sup> *Emergency Executive Order No. 100*, OFF. MAYOR, (Mar. 16, 2020), <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-100.pdf> (last visited May 18, 2021).

<sup>27</sup> *Public Order Under City of Los Angeles Emergency Authority*, OFF. MAYOR (Mar. 19, 2020, revised May 27, 2020), <https://www.lamayor.org/sites/g/files/wph1781/files/page/file/20200527%20Mayor%20Public%20Order%20SAFER%20AT%20HOME%20ORDER%202020.03.19%20%28REV%202020.05.27%29.pdf> (last visited May 18, 2021).

<sup>28</sup> *Broward County Administrator’s Emergency Order 20-01* (Mar. 22, 2020), <https://www.broward.org/CoronaVirus/Documents/BerthaHenryExecutiveOrder20-01.pdf> (last visited May 18, 2021).

of materials located in businesses and other places, thus **contaminating certain property and places[.]**<sup>29</sup> (Emphasis added.)

96. Louisiana Governor John Bel Edwards issued Stay at Home and Closure Orders that were in effect from March 23, 2020 to May 15, 2020, requiring all individuals within the state to stay at home unless performing essential activities and requiring non-essential businesses to close to the public. In Proclamation No. 33 JBE 2020, Governor Edwards specifically acknowledged that “these measures relating to closure of certain businesses and to limit the operations of non-essential businesses are necessary because of the **propensity of the COVID-19 virus to spread . . . due to its ability to attach to surfaces for prolonged periods of time[.]**<sup>30</sup> (Emphasis added.)

97. On March 26, 2020, Colorado Governor Jared Polis’ Executive Order D 2020 017 and the Colorado Department of Public Health and Environment’s (“CDPHE”) Second Updated Public Health Order 20-24 became effective, requiring all residents to stay at home unless performing essential activities and requiring all non-critical businesses to close to the public. The CDPHE’s updated Order 20-24 specifically acknowledged that “COVID-19 also **physically contributes to property loss . . . and damage** due to its propensity to attach to surfaces for prolonged periods of time” and “[t]his [Order] **helps to reduce the property damage caused by**

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<sup>29</sup> *Emergency Order Temporarily Prohibiting Operation of Non-Essential Businesses and Congregation of Persons to Prevent the Spread of 2019 Novel Coronavirus (COVID-19)*, OFF. MAYOR, Order No. 2 (Mar. 22, 2020), <https://www.phila.gov/media/20200322130746/Order-2-Business-And-Congregation-Prohibition-Stay-At-Home.pdf> (last visited May 18, 2021).

<sup>30</sup> *Additional Measures for COVID-19 Stay at Home*, EXEC. DEPT., No. 33 JBE 2020 (Mar. 22, 2020), <https://gov.louisiana.gov/assets/Proclamations/2020/JBE-33-2020.pdf> (last visited May 18, 2021).

**COVID-19** and preserves the welfare of our residents by reducing the spread of the disease in our communities and our workplaces[.]”<sup>31</sup> (Emphasis added.)

98. On April 10, 2020, in a supplement to a mayoral proclamation, San Francisco Mayor London Breed extended coronavirus-related orders and stated, “[t]his order and the previous orders issued during this emergency have all been issued because of the propensity of the virus to spread person to person and also because **the virus physically is causing property loss or damage due to its proclivity to attach to surfaces for prolonged periods of time[.]**”<sup>32</sup> (Emphasis added.)

99. On April 23, 2020, Dallas County Judge Clay Jenkins issued an amended “Safer At Home Order” that states, “this Emergency Order is necessary because of the propensity of **the virus to spread person to person and also because the virus is physically causing property damage due to its proclivity to attach to surfaces for prolonged periods of time[.]**”<sup>33</sup> (Emphasis added.)

100. On April 29, 2020, Nevada Governor Steve Sisolak issued Emergency Directive 016 recognizing the threat SARS-CoV-2 poses to property, stating “the ability of the novel coronavirus that causes COVID-19 to survive on surfaces for indeterminate periods of time

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<sup>31</sup> *Updated Public Health Order 20-24 Implementing Stay at Home Requirements*, COLO. DEPT. OF PUB. HEALTH & ENV’T, (Mar. 26, 2020), <https://covid19.colorado.gov/sites/covid19/files/Updated%20Public%20Health%20Order%20-%20Authorized%20Business.32620.pdf> (last visited May 18, 2021).

<sup>32</sup> *Ninth Supplement to Mayoral Proclamation Declaring the Existence of a Local Emergency Dated February 25, 2020*, OFF. MAYOR (Apr. 10, 2020), <https://sfmayor.org/sites/default/files/NinthMayoralSupplement.pdf> (last visited May 18, 2021).

<sup>33</sup> *Amended Order of County Judge Clay Jenkins* (Apr. 23, 2020), <https://www.dallascounty.org/Assets/uploads/docs/covid-19/orders-media/2020/april/042320-DallasCountyOrder.pdf> (last visited May 18, 2021).

**renders some property unusable and contributes to . . . damage, and property loss[.]**<sup>34</sup>

(Emphasis added.)

101. On June 26, 2020 Governor Phil Murphy issued Executive Order 157 permitting the limited reopening of retail establishments subject to restrictions such as a capacity limit of “50% of the stated maximum store capacity” and other workplace safeguards.<sup>35</sup> These limitations were expressly issued, among other reasons, to protect against fomite transmission of the Coronavirus, and explicitly addressed the Coronavirus’ impacts upon property in numerous ways, including, but not limited to, requiring businesses to:

- conduct “frequent sanitization of high-touch areas”;
- “[c]lean and disinfect equipment that is rented in accordance with CDC and [Department of Health] guidelines” – that is, more arduous, extensive and stringent cleaning and disinfecting standards than those in the ordinary course of those activities;
- “[c]lean and disinfect the worksite in accordance with CDC guidelines when a worker at the site has been diagnosed with COVID-19 illness”; and
- “[r]outinely clean and disinfect all high-touch areas” including “common surfaces, safety equipment, and other frequently touched surfaces[.]”<sup>36</sup>

***The Coronavirus Cannot be Removed or Eliminated by Routine Cleaning***

102. An indoor space exposed to the Coronavirus cannot be made safe and fit for its intended use by routine surface cleaning.

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<sup>34</sup> *Declaration of Emergency Directive 016*, OFF. GOVERNOR (Apr. 29, 2020), [https://gov.nv.gov/News/Emergency\\_Orders/2020/2020-04-29\\_-\\_COVID-19\\_Declaration\\_of\\_Emergency\\_Directive\\_016\\_\(Attachments\)/](https://gov.nv.gov/News/Emergency_Orders/2020/2020-04-29_-_COVID-19_Declaration_of_Emergency_Directive_016_(Attachments)/) (last visited May 18, 2021).

<sup>35</sup> *Executive Order No. 157*, OFF. GOVERNOR (June 26, 2020), <https://www.nj.gov/infobank/eo/056murphy/pdf/EO-157.pdf> (last visited May 18, 2021).

<sup>36</sup> *Id.*

103. The CDC recently released guidance stating that there is little evidence to suggest that routine use of disinfectants can prevent the transmission of the Coronavirus from fomites in community settings.<sup>37</sup>

104. The CDC concluded that, according to a more quantitative microbial risk assessment study, “surface disinfection once- or twice-per-day had little impact on reducing estimated risks” of Coronavirus transmission.<sup>38</sup>

105. A number of other studies indicate that the Coronavirus is “much more resilient to the cleaning than most other respiratory viruses so tested.”<sup>39</sup>

106. With respect to textiles – a significant component of the merchandise sold at Burlington’s stores – studies have demonstrated that the virus can survive on fabrics and be transferred to skin and other surfaces, “suggesting it is biologically plausible that . . . infectious diseases can be transmitted directly through contact with contaminated textiles.”<sup>40</sup>

107. Aerosolized Coronavirus particles and virions cannot be eliminated by routine surface cleaning and in some cases cleaning contaminated surfaces (*i.e.*, floors) could reasonably result in re-aerosolization of the Coronavirus.

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<sup>37</sup> *Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, CDC (updated Apr. 5, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html> (last visited May 18, 2021).

<sup>38</sup> *Id.* (citing A. K. Pitol & T. R. Julian, *Community transmission of SARS-CoV-2 by fomites: Risks and risk reduction strategies*, ENVTL. SCI. & TECH. LETTERS (2020)).

<sup>39</sup> Nevio Cimolai, *Environmental and decontamination issues for human coronaviruses and their potential surrogates*, 92 J. MED. VIROLOGY 11, 2498-510 (June 10, 2020), <https://onlinelibrary.wiley.com/doi/10.1002/jmv.26170> (last visited May 18, 2021).

<sup>40</sup> Lucy Owen & Katie Laird, *The role of textiles as fomites in the healthcare environment: a review of the infection control risk*, 8 PEER J. LIFE & ENV’T e9790 (Aug. 25, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7453921/#:~:text=Results,through%20contact%20with%20contaminated%20textiles> (last visited May 18, 2021).

108. Given the ubiquity, pervasiveness and increasing transmission of the Coronavirus, including new and emerging variants, no amount of cleaning or ventilation intervention will prevent a person infected and contagious with the Coronavirus from entering an indoor space and exhaling millions of additional Coronavirus droplets and infectious aerosols into the air, further: (a) filling the air with the aerosolized Coronavirus that can be inhaled, sometimes with deadly consequences; and (b) depositing infectious Coronavirus droplets on the surfaces, physically altering and transforming those surfaces into disease-transmitting fomites.

***Burlington's Stores and Other Locations Reopened Under Severe Restrictions Designed to Protect Customers, Associates, and Property***

109. Beginning on May 11, 2020, Burlington started re-opening its stores following the March 2020 closures.

110. The reopening of Burlington's stores and distribution centers did not abate Burlington's losses arising from the loss of or damage to its property. To the contrary, in order to prevent further direct physical loss of or damage to its property and to stay open and continue operating its stores and distribution centers in a safe and compliant manner, Burlington has incurred significant costs and extra expenses and imposed restrictions on certain of its services. These costs/expenses/bans/restrictions include, but are not limited to:

- operating the Burlington stores at reduced hours of operation;
- providing Personal Protective Equipment (PPE) to its associates such as facemasks, face shields, and gloves;
- designing, engineering, and installing barriers (such as point of sale locations) to hamper direct and droplet transmission of the Coronavirus and COVID-19 and foster social distancing;
- closing and barricading of all fitting rooms;
- making hand sanitizer, disinfecting wipes, soap, and water readily available to customers and associates;

- purchasing and placing readily visible signage to encourage safe practices among associates and customers;
- regularly and frequently cleaning any high-touch and frequently touched surfaces according to heightened CDC and state department of health guidelines;
- dramatically increasing cleaning frequency at its stores;
- removing fixtures to widen aisles to allow for additional social distancing; and
- upgrading HVAC ventilation filters at certain stores.

### **C. Burlington Sustained Devastating Losses**

111. Burlington has suffered and continues to suffer catastrophic losses from the loss of and damage to its Covered Property and other Property of the type insured, and the necessary suspension of its business activities.

112. In particular, since the onset of the Coronavirus and COVID-19, Burlington's revenues have declined, disrupting its business as well as the jobs and livelihoods of the over 50,000 associates who were employed by Burlington when the pandemic began. The human toll this has caused is inestimable.

113. The financial toll on Burlington, however, is measurable and significant.

114. Burlington's insurable business interruption and other losses, arising in connection with Coronavirus and COVID-19, are currently calculated to be in excess of \$750 million.

### **D. Zurich Failed to Investigate or Cover Burlington's Claim for Insurance**

115. On December 28, 2020, Burlington presented a First Notice of Loss to Zurich in connection with Burlington's losses arising from the Coronavirus and COVID-19.

116. Zurich acknowledged that First Notice of Loss the following day, assigning it Claim Number: 5630061488.

117. On March 31, 2021, Burlington submitted its estimated claim for insurance to Zurich.

118. Zurich has failed to respond to Burlington's claim for insurance.

119. Zurich has not sent an adjuster – or anyone on its behalf – to visit, inspect or set foot in any Burlington stores or distribution centers or to otherwise investigate Burlington's claim for insurance.

120. Upon information and belief, Zurich has not conducted any investigation into Burlington's claim for insurance.

**FIRST COUNT**  
**DECLARATORY JUDGMENT**

121. Burlington repeats and realleges each and every allegation set forth above as though fully set forth herein.

122. Burlington seeks a declaration that Zurich is obligated, in accordance with the terms of the Zurich All Risks Policies, to provide insurance coverage for the losses sustained by Burlington as set forth herein.

123. An actual and justifiable controversy exists between the parties with respect to this issue because of Zurich's refusal to perform its obligations under the Zurich All Risks Policies.

124. A declaration of the parties' rights and obligations under the Zurich All Risks Policies will serve to resolve the dispute between them.

**WHEREFORE**, Burlington demands judgment in its favor and against Zurich as follows:

(a) declaring and adjudging the rights and obligations of the parties under the Zurich All Risks Policies;

- (b) granting Burlington money damages, including money damages available as supplemental and further relief under N.J.S.A. 2A:16-60, in an amount to be determined at trial, together with pre- and postjudgment interest;
- (c) requiring Zurich to pay Burlington's reasonable attorneys' fees in this action;
- (d) requiring Zurich to repay Burlington for the costs of suit incurred herein; and
- (e) providing for such other and further relief, including any appropriate equitable relief, as the Court may deem just and proper.

**JURY DEMAND**

Burlington hereby demands trial by jury on all issues so triable.

Respectfully submitted,

**FLASTER/GREENBERG PC**

Dated: May 18, 2021

By: /s/ John G. Koch  
Lee M. Epstein, Esquire  
John G. Koch, Esquire  
Matthew A. Goldstein, Esquire  
1810 Chapel Avenue West  
Cherry Hill, New Jersey 08002  
Tel: (856) 661-1900  
Fax: (856) 661-1919  
lee.epstein@flastergreenberg.com  
john.koch@flastergreenberg.com  
matthew.goldstein@flastergreenberg.com  
*Attorneys for Plaintiff Burlington Stores,  
Inc.*

**RULE 4:5-1 CERTIFICATION**

I certify, pursuant to Rule 4:5-1, that to the best of my knowledge, information and belief the matter in controversy is not the subject matter of any other action pending in any other court, nor of any pending arbitration proceeding, and no other action or arbitration is contemplated; further there are no other parties who should be joined in this action.

**FLASTER/GREENBERG PC**

By: /s/ John G. Koch  
John G. Koch

**RULE 1:38-7 CERTIFICATION**

I certify that confidential personal identifiers have been redacted from documents now submitted to the Court, and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).

**FLASTER/GREENBERG PC**

By: /s/ John G. Koch  
John G. Koch