

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

NBS FITNESS LLC,	:	
individually and on behalf of all	:	
others similarly situated,	:	
	:	CLASS ACTION
Plaintiff,	:	
	:	JURY TRIAL DEMANDED
v.	:	
	:	
PHILADELPHIA INDEMNITY	:	
INSURANCE COMPANY,	:	
	:	
Defendant.	:	

CLASS ACTION COMPLAINT

Plaintiff NBS Fitness, LLC (“NBS”), both individually and on behalf of all others similarly situated, files this Class Action Complaint against Defendant Philadelphia Indemnity Insurance Company (“Defendant” or “PIIC”), and in support, states the following on information and belief based on reasonable investigation and discovery, except where specifically identified as being based on personal knowledge:

INTRODUCTION

1. On personal knowledge, Plaintiff NBS Fitness LLC is a Tennessee limited liability company that operates a fitness center in Cordova, Tennessee.

2. On or about October 2, 2019, NBS purchased a commercial policy of insurance issued by PIIC bearing policy number PHPK2047266 (“Policy”). *See* Policy, attached as **Exhibit**

A. As part of the Policy, NBS paid for and received coverage under the *Elite Property Enhancement: Health & Fitness Clubs* Form (PI-EPE-HF).

3. The Policy is a bilateral contract: Plaintiff agreed to pay premiums to PIIC in exchange for PIIC's promises of coverage for all risks of loss except those specifically and unambiguously excluded.

4. Plaintiff reasonably expected that claims for loss of business income and extra expenses arising from the inability to physically use the insured premises would be paid unless specifically and unambiguously excluded.

5. Specifically, the *Elite Property Enhancement: Health & Fitness Clubs* Form (PI-EPE-HF) indemnifies Plaintiff against the actual loss of business income due to a suspension of Plaintiff's operations. Along with this business income coverage, Plaintiff also had in effect "Business Income and Extra Expense" coverage under which PIIC promised to pay necessary expenses to Plaintiff in addition to the actual loss of business income sustained during a period of restoration that it would not have otherwise incurred if there had been no direct physical loss of the property.

6. The *Elite Property Enhancement: Health & Fitness Clubs* Form (PI-EPE-HF) also provides "Civil Authority" coverage, under which PIIC promised to pay for loss of business income Plaintiff sustained, and necessary "Extra Expense" Plaintiff incurred, caused by actions of civil authorities "that prohibits access to the described premises."

7. NBS complied with its obligations under the Policy by timely paying all premiums required.

8. Effective March 23, 2020, pursuant to an Executive Order of the Governor of Tennessee, NBS was deprived the physical use of its insured fitness center located in Cordova, Tennessee. *See* March 22, 2020 Executive Order, attached as **Exhibit B**. The Order was issued to, among other things, address the global pandemic associated with the spread of COVID-19 and

acknowledged the government's authority to prohibit the entry, exit and occupancy of physical spaces. *See id.*

9. As a result of the Executive Order, Plaintiff suffered, and/or continues to suffer, significant and injurious losses and expenses directly related to the inability to physically use the premises covered by the Policy.

10. The Policy obligated PIIC to provide coverage for, and to pay, business income losses and extra expense losses resulting from the suspension of Plaintiff's operations, including suspensions resulting from actions of civil authorities.

11. However, PIIC reneged on these obligations and wrongfully failed to fulfill its contractual obligation to provide coverage for, and pay, NBS' business income losses and extra expense losses resulting from the suspension of its operations, including suspensions resulting from actions of civil authorities. It did so without performing a reasonable investigation into NBS' claimed loss and without communicating its final denial of coverage in writing. Rather, NBS was informed of PIIC's denial of its claim for coverage when NBS accessed PIIC's online claim summary and found a message stating only that the claim had been "Closed – No Payment." *See Denial of Claim Message*, attached as **Exhibit C**.

12. On information and belief, hundreds, if not thousands, of gyms, health clubs and fitness centers are insured by PIIC. On further information and belief, PIIC specifically targets small businesses such as NBS, and many other gyms, health clubs and fitness centers have the same or similar policies issued by PIIC providing the same or similar business income, extra expense and/or extended business income coverage. Plaintiff believes, and therefore alleges, that PIIC has also wrongfully, capriciously, and arbitrarily denied coverage and payments to these other small businesses.

THE PARTIES

13. On personal knowledge, Plaintiff NBS Fitness LLC is a limited liability company organized under the laws of and existing in the State of Tennessee with a principal place of business located at 556 Trinity Creek Cove, Suite A, Cordova, Tennessee 38018.

14. On personal knowledge, Defendant Philadelphia Indemnity Insurance Company is a corporation organized under the laws of and existing in the Commonwealth of Pennsylvania, with its principal place of business at One Bala Plaza, Suite 100, Bala Cynwyd, Pennsylvania 19004. PIIC is the issuer of the Policy. PIIC is authorized to write, sell, and issue insurance policies providing property and business interruption coverage. At all material times hereto, PIIC conducted and transacted business through the selling and issuing of insurance policies, including, but not limited to, selling and issuing commercial property and business interruption coverage to Plaintiff and all other Class members as defined *infra*.

JURISDICTION AND VENUE

15. This Court has subject matter jurisdiction over the claims asserted in this action under 28 U.S.C. § 1332 because there is complete diversity between Defendant and at least one member of each class; there are more than one hundred members of each class; and the amount in controversy exceeds \$5,000,000 exclusive of interest and costs. This Court also has subject matter jurisdiction under 28 U.S.C. §§ 2201 and 2202, and is authorized to grant declaratory relief under these statutes.

16. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2) because PIIC resides in this district.

17. This Court has personal jurisdiction over the Defendant because it is incorporated in the Commonwealth of Pennsylvania.

FACTUAL BACKGROUND

The Policy

18. The Policy was issued by PIIC to NBS with effective dates of October 31, 2019, to October 31, 2020, and insures property of the Plaintiff located at 556 Trinity Creek Cv., Cordova, Tennessee 38018.

19. The Policy, in the Building and Personal Property Coverage Form (CP 00 10 10 12), states:

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

20. The Policy contain both a "Specified Cause of Loss" category and "Covered Cause of Loss" category, the latter of which is an all-risk coverage form meaning that all risks are covered unless otherwise specifically excluded or limited. All risks coverage is defined by limitations and exclusions in the Policy and in the Policy, Defendant agreed: "when special is shown in the declarations, covered causes of loss means direct physical loss" unless the loss is excluded or limited in this policy.

21. Because "Special" was shown on the Declarations page of the Policy, Defendant promised to pay for losses of business income sustained as a result of Covered Causes of Loss not otherwise excluded or limited under the Policy.

22. The Policy also contains the *Property Enhancement: Health & Fitness Clubs* Form (PI-EPE-HF) endorsement, which modifies the Building and Personal Property Coverage Form to include Additional Coverages for Business Income and Extra Expense.

23. The Policy provides that if NBS sustained direct physical loss of its insured property, PIIC would:

... 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 premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.

24. The Policy does not define the terms "damage", "direct physical loss" or "damage to property." However, the Policy does define "suspension" as "the slowdown or cessation of your business activities" or "that a part or all of the described premises is rendered untenable."

25. The Policy also provides Extended Business Income coverage, as follows:

If the necessary "suspension" of your "operations" produces a Business Income loss payable under this policy, we will pay for the actual loss of Business Income you incur during the period that:

- (a) **Begins on the date property (except "finished stock") is actually repaired, rebuilt or replaced and "operations" are resumed; and**
- (b) **Ends on the earlier of:**
 - (i) **The date you could restore your "operations", with reasonable speed, to the level which would generate the business income amount that would have existed if no direct physical loss or damage had occurred; or**
 - (ii) **60 consecutive days after the date determined in (1)(a) above.**

26. In addition to promising to pay for loss of Business Income, PIIC also promised to pay for certain necessary "Extra Expense." Extra Expense means expenses that the policyholder incurs to, for example, minimize the suspension of business operations.

27. The Policy also provides additional "Civil Authority" coverage as follows:

In this Additional Coverage, Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations. When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra

Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and**
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.**

28. PIIC therefore promised to pay the Plaintiff for actions of civil authorities if a Covered Cause of Loss caused damage to property other than property at the Plaintiff's respective premises, as described in the respective policies Declarations page, and that NBS suffered actual loss due to civil authorities prohibiting access to Plaintiff's premises.

29. The Business Income and Extra Expense, as well as the Extended Business Income coverages are separate, independent and not mutually exclusive of the Policy's coverage for Civil Authority; thus, NBS could theoretically recover under any one of these coverages or all of these coverages at the same time.

History of COVID-19

30. On December 31, 2019, the World Health Organization reported people in China were becoming sick due to a mysterious form of pneumonia.

31. On January 11, 2020, China reported its first death from the mysterious form of pneumonia.

32. On January 21, 2020, the first confirmed case of the mysterious form of pneumonia was reported in the United States.

33. On January 30, 2020, for only the sixth time in its history, the World Health Organization ("WHO"), declared the outbreak of the mysterious form of pneumonia a Public Health Emergency of International Concern.

34. On February 11, 2020, the WHO announced COVID-19, also known as coronavirus disease, as the name for the new mysterious form of pneumonia.

35. On February 29, 2020, the first death caused by COVID-19 was reported in the United States.

36. On March 13, 2020, President Trump declares the outbreak of COVID-19 to be a national emergency.

37. As of March 17, 2020, COVID-19 was reported to be present in every state in the United States.

38. As of March 26, 2020, the United States had more confirmed cases of COVID-19 than any other country in the world.

Actions of Civil Authority by the State of Tennessee

39. On March 22, 2020, Governor Bill Lee issued an order to mitigate the spread of COVID-19 by limiting social gatherings, dine-in service, and gym use, and exposure at nursing and retirement homes. The order also provided flexibility for restaurants regarding the sale of alcohol. *See Exhibit B.* The order, effective March 23, 2020 at 12:01 a.m., expressly and directly prohibited the physical use of gyms, health clubs and fitness centers. Though the gym and fitness center restrictions were initially scheduled to end on April 6, 2020, they remained in effect until May 4, 2020. Further, since May 4, 2020, gyms and fitness centers have been expressly and directly limited from using all of their physical space by limiting occupancy to 25%, restricting

workouts to 45 minutes and the laying out equipment at least six (6) feet apart. *See* Back-to-Business Framework for Shelby County, attached as **Exhibit D**.

40. The actions of the State of Tennessee directly forced the NBS to cease, suspend and/or limit its physical use of the insured premises and corresponding business operations.

41. Plaintiff was forced to suspend or reduce business due to COVID 19 and the ensuing orders issued by civil authorities mandating the suspension of business for on-site services, as well as an order to take necessary steps to prevent further damage and minimize the suspension of business and continue operations.

42. As of the week of August 1, 2020, according to the Tennessee Department of Public Health, Shelby County, where NBS maintains its only location, had 20,797 COVID-19 cases and 275 total deaths.

Plaintiff's Covered Losses

43. Based on the State of Tennessee's Order, NBS's was directly forced to suspend physical use of its space on March 27, 2020.

44. NBS continued to suffer losses even as it was able to resume the physical use of its space on a limited basis after May 4, 2020.

45. Pursuant to the Back to Business Framework for Shelby County on May 4, 2020, NBS fitness reopened under severe limitations on the physical use of the properties. The plan was as follows:

- Limit occupancy to 25% building occupancy.
- Adjust equipment layout or close/restrict access to equipment as necessary to maintain at least six feet of separation between users.

- Conduct regular and thorough cleaning of all equipment, surfaces and areas of the facility using disinfectant cleaning supplies.
- Require customers to clean equipment with disinfecting wipes before and after use.
Provide hand sanitizing stations for use upon customer entry and exit.
- Limit workouts to 45 minutes.

46. There has been a direct physical loss of and/or damage to NBS' covered premise under the Policy by, among other things, contaminating the property, denying access to the property, preventing customers and employees from physically occupying the property, causing the property to be physically uninhabitable by customers and employees, causing its function to be nearly eliminated or destroyed, and/or causing a suspension of business operations on the premises.

47. Plaintiff has suffered a suspension of normal business operations and a cessation of all operations on its premises, sustained losses of business income, and incurred extra expenses.

48. These losses and expenses have continued through the date of filing of this action.

49. These losses and expenses are not excluded from coverage under the Policy. Further, because the Policy provides coverage for all-risks, and Plaintiff has complied with its contractual obligations, Plaintiff is entitled to payment for these losses and expenses.

50. Plaintiff has suffered a suspension and/or cessation of all normal business operations given the response to the global pandemic associated with the spread of COVID-19, including the actions of civil authority described herein.

51. These losses and expenses have continued through the date of filing of this action.

52. These losses and expenses are not excluded from coverage under the Policy. Further, because the Policy provides coverage for all-risks, and Plaintiff has complied with its contractual obligations, Plaintiff is entitled to payment for these losses and expenses.

53. Contrary to the plain language of the Policy, and to its corresponding promises and contractual obligations, PIIC has refused to pay for NBS' losses and expenses under the terms of the Policy. It did so without formally communicating the denial of coverage to NBS in writing, showing PIIC engaged in no meaningful investigation or consideration of the claim or review of the Policy.

CLASS ACTION ALLEGATIONS

54. The class claims all derive directly from a single course of conduct by Defendant: its systematic, uniform, capricious and arbitrary refusal to pay insureds for covered losses and the actions taken by civil authorities to suspend or limit the physical use of insured property.

55. Plaintiff brings this action pursuant to Rules 23(a), 23(b)(1), 23(b)(2), and/or 23(b)(3), as well as 23(c)(4), of the Federal Rules of Civil Procedure, individually and on behalf of all others similarly situated. This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of those provisions.

56. Plaintiff seeks to represent a nationwide class, as the Court may deem appropriate, defined as:

- a) All gyms, health clubs and fitness centers that purchased Business Income and Extra Expense coverage under a policy of insurance issued by the Defendant covering the period of March 2020 to the present and that suffered a suspension of business operations due to government prohibitions on the

use of insured property for which Defendant has either actually denied or stated it will deny a claim for the losses or has otherwise failed to acknowledge, accept as a covered cause of loss, or pay for the covered losses (“the Business Income Coverage Class”).

- b) All gyms, health clubs and fitness centers that purchased Extended Business Income coverage under a policy of insurance issued by the Defendant covering the period of March 2020 to the present and that incurred extra expenses to avoid or minimize the suspension of business operations due to government prohibitions on the use of insured property for which Defendant has either actually denied or stated it will deny a claim for the extra expenses or has otherwise failed to acknowledge, accept as a covered expense, or pay for the covered expenses (“the Extra Expense Coverage Class”).
- c) All gyms, health clubs and fitness centers that purchased Civil Authority coverage under a policy of insurance issued by the Defendant covering the period of March 2020 to the present and that suffered an actual loss of Business Income and/or Extra Expense caused by an action of a civil authority that prohibited access to the premises, and for which Defendant has either actually denied or stated it will deny a

claim for the losses or has otherwise failed to acknowledge, accept as a covered cause of loss, or pay for the covered losses (“the Civil Authority Coverage Class”).

57. Excluded from each defined proposed Class are the Defendant and any of their members, affiliates, parents, subsidiaries, officers, directors, employees, successors, or assigns; governmental entities; Class Counsel and their employees; and the judicial officers and Court staff assigned to this case and their immediate family members.

58. Plaintiff reserves the right to modify, expand, or amend the definitions of the proposed Classes, as appropriate, during the course of this litigation.

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

Numerosity and Ascertainability

60. This action satisfies the requirements of Fed. R. Civ. P. 23(a)(1). The members of each proposed Class are so numerous that individual joinder of all Class members is impracticable. There are, at a minimum, hundreds, if not thousands, of members of each proposed Class, and these individuals and entities are spread out across the State and the United States.

61. The identity of Class members is ascertainable, as the names and addresses of all Class members can be identified in Defendant’s or its agents’ books and records. Class members may be notified of the pendency of this action by recognized, Court-approved notice dissemination methods, which may include U.S. mail, electronic mail, internet postings, and/or published notice.

Predominance of Common Issues

62. This action satisfies the requirements of Fed. R. Civ. P. 23(a)(2) and 23(b)(3) because this action involves common questions of law and fact that predominate over any

questions affecting only individual Class members. Defendant issued all-risk policies to all the members of each proposed Class in exchange for payment of premiums by the Class members. The questions of law and fact affecting all Class members include, without limitation, the following:

- a) Whether Plaintiff and the Class members suffered a covered cause of loss under the policies issued to members of the Class;
- b) Whether Defendant wrongfully, capriciously, and arbitrarily denied all claims based on the facts set forth herein;
- c) Whether Defendant's Business Income coverage applies based on the facts set forth herein;
- d) Whether Defendant's Civil Authority coverage applies to a loss of Business Income based on the facts set forth herein;
- e) Whether Defendant's Extra Expense coverage applies to efforts to avoid or minimize a loss caused by the suspension of business based on the facts set forth herein;
- f) Whether Defendant has breached its contracts of insurance through a uniform and blanket denial of all claims for business losses based on the facts set forth herein;
- g) Whether the Defendant acted in bad faith breach of contract and the duty of good faith and fair dealing through a uniform and blanket denial of all claims for business losses based on the facts set forth herein; and

- h) Whether Plaintiff and the Class members suffered damages as a result of Defendant's actions; and
- i) Whether Plaintiff and the Class members are entitled to an award of reasonable attorneys' fees, interest, and costs.

Typicality

63. This action satisfies the requirements of Fed. R. Civ. P. 23(a)(3) because Plaintiff's claims are typical of the claims of the Class members and arise from the same course of conduct by Defendant. Plaintiff and the other Class members are all similarly affected by Defendant's refusal to pay under their property insurance policies. Plaintiff's claims are based upon the same legal theories as those of the other Class members. Plaintiff and the other Class members sustained damages as a direct and proximate result of the same wrongful practices in which Defendant engaged. The relief Plaintiff seeks is typical of the relief sought for the absent Class members.

Adequacy of Representation

64. This action satisfies the requirements of Fed. R. Civ. P. 23(a)(4) because Plaintiff will fairly and adequately represent and protect the interests of Class members. Plaintiff has retained counsel with substantial experience in prosecuting complex class action and insurance coverage litigation.

65. Plaintiff and their counsel are committed to vigorously prosecuting this action on behalf of the Class members and have the financial resources to do so. Neither Plaintiff nor its counsel has interests adverse to those of the Class members.

Inconsistent or Varying Adjudications and the Risk of Impediments to Other Class Members' Interests

66. This action satisfies the requirements of Fed. R. Civ. P. 23(b)(1). Plaintiff seeks class-wide adjudication as to the interpretation and scope of Defendant's insurance policies that

use the same language and terms as the Plaintiff's Policy. The prosecution of separate actions by individual members of the proposed Classes would create an imminent risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for Defendant.

Final Injunctive and/or Corresponding Declaratory Relief with respect to the Class is Appropriate

67. This action satisfies the requirements of Fed. R. Civ. P. 23(b)(2) because Defendant acted or refused to act on grounds generally applicable to Plaintiff and the members of the Classes, thereby making appropriate final injunctive and/or corresponding declaratory relief with respect to the Class members. The class claims all derive directly from Defendant's systematic, uniform, capricious and arbitrary refusal to pay insureds for losses suffered due to actions taken by civil authorities to suspend or limit the physical use of insured premises in response to the pandemic associated with the spread of COVID-19. Defendant's actions or refusal to act are grounded upon the same generally applicable legal theories.

Superiority

68. This action satisfies the requirements of Fed. R. Civ. P. 23(b)(3) because a class action is superior to other available methods for the fair and efficient group-wide adjudication of this controversy. The common questions of law and of fact regarding Defendant's conduct and the interpretation of the common language in their insurance policies predominate over any questions affecting only individual Class members.

69. Because the damages suffered by certain individual Class members may be relatively small, the expense and burden of individual litigation would make it very difficult for all individual Class members to redress the wrongs done to each of them individually, such that many Class members would have no rational economic interest in individually controlling the prosecution of specific actions, and the burden imposed on the judicial system by individual

litigation by even a small fraction of the Class would be enormous, making class adjudication the superior alternative under Fed. R. Civ. P. 23(b)(3)(A).

70. The conduct of this action as a class action presents far fewer management difficulties, far better conserves judicial resources and the parties' resources, and far more effectively protects the rights of each Class member than would piecemeal litigation. Compared to the expense, burdens, inconsistencies, economic infeasibility, and inefficiencies of individualized litigation, the challenges of managing this action as a class action are substantially outweighed by the benefits to the legitimate interests of the parties, the Court, and the public of class treatment in this Court, making class adjudication superior to other alternatives, under Fed. R. Civ. P. 23(b)(3)(D).

71. Plaintiff is not aware of any obstacles likely to be encountered in the management of this action that would preclude its maintenance as a class action. Rule 23 provides the Court with authority and flexibility to maximize the efficiencies and benefits of the class mechanism and reduce management challenges. The Court may, on motion of Plaintiff or on its own determination, certify nationwide, statewide and/or multistate classes for claims sharing common legal questions; utilize the provisions of Rule 23(c)(4) to certify any particular claims, issues, or common questions of fact or law for class-wide adjudication; certify and adjudicate bellwether class claims; and utilize Rule 23(c)(5) to divide any Class into subclasses.

CAUSES OF ACTION

COUNT I

DECLARATORY JUDGMENT

(On behalf of the Business Income Coverage Class)

72. Plaintiff incorporates by reference and re-alleges paragraphs 1 through 72, as though fully set forth herein.

73. Plaintiff brings this Count both individually and on behalf of the other members of the Business Income Coverage Class.

74. Under 28 U.S.C. §§ 2201 and 2202, this Court has jurisdiction to declare the rights and other legal relations of the parties in dispute.

75. Plaintiff's Policy, as well as the policies of other Business Income Coverage Class members, are insurance contracts under which Defendant was paid premiums in exchange for promises to pay Class members' losses for claims covered by the policies.

76. In the policies, Defendant promised to pay for losses of business income and extra expense sustained as a result of perils not excluded under the policies. Specifically, Defendant promised to pay for losses of business income and extra expense sustained as a result of a suspension of business operations during the period of restoration.

77. Plaintiff and Class members suffered direct physical loss of or damage to Plaintiff's locations and other Class members' insured premises, resulting in interruptions or suspensions of business operations at the locations. These suspensions and interruptions have caused Plaintiff and Class members to suffer losses of business income and extra expense.

78. These suspensions and interruptions, and the resulting losses, triggered business income and extra expense coverage under the Policy and the other Class members' policies.

79. Plaintiff and the other Class members have complied with all applicable provisions of their respective policies, including payment of premiums.

80. Defendant, without justification, denies that the Policy and the other Class members' policies provide coverage for these losses.

81. Plaintiff seeks a Declaratory Judgment that its Policy and the other Class members' policies provide coverage for the losses of business income and extra expense attributable to the facts set forth above.

82. An actual case or controversy exists regarding Plaintiff and the other Class members' rights and Defendant's obligations to reimburse Plaintiff and the other Class members for the full amount of these losses. Accordingly, the Declaratory Judgment sought is justiciable.

WHEREFORE, Plaintiff request that this Court enter a Declaratory Judgment declaring that the Policy and other Class members' policies provide coverage for Class members' losses of business income.

COUNT II
BREACH OF CONTRACT
(On behalf of the Business Income Coverage Class)

83. Plaintiff incorporates by reference and re-alleges paragraphs 1 through 72, as though fully set forth herein.

84. Plaintiff brings this Count both individually and on behalf of the other members of the Business Income Coverage Class.

85. Plaintiff's Policy, as well as the policies of other Business Income Coverage Class members, are insurance contracts under which Defendant was paid premiums in exchange for promises to pay Class members' losses for claims covered by the respective policies.

86. In the policies, Defendant promised to pay for losses of business income and extra expense incurred as a result of perils not excluded under the policies. Specifically, Defendant promised to pay for losses of business income and extra expense sustained as a result of a suspension of business operations during the period of restoration.

87. Plaintiff and Class members have suffered a direct physical loss of or damage to their insured locations as a result of prohibitions or limitations on the physical use of those insured locations. These prohibitions or limitations have caused Class members to suffer losses of business income and extra expense.

88. These losses triggered business income and extra expense coverage under both the Policy and other Class members' policies.

89. Plaintiff and the other Class members have complied with all applicable provisions of their respective policies, including payment of premiums.

90. Defendant has denied coverage and refused performance under the Policy and other Class members' policies by denying coverage for these losses and expenses. Accordingly, Defendant is in breach of the Policy and other Class members' policies.

91. As a result of Defendant's breaches of the Policy and other Class members' policies, Plaintiff and other Class members have suffered actual and substantial damages for which Defendant is liable.

WHEREFORE, Plaintiff, both individually and on behalf of other Class members, seeks compensatory damages resulting from Defendant's breaches of the Policy and other Class Members' policies and seek all other relief deemed appropriate by this Court.

COUNT III
BAD FAITH BREACH OF CONTRACT AND
THE DUTY OF GOOD FAITH AND FAIR DEALING
(On behalf of the Business Income Coverage Class)

92. Plaintiff incorporates by reference and re-alleges paragraphs 1 through 72, as though fully set forth herein.

93. Plaintiff brings this Count both individually and on behalf of the other members of the Business Income Coverage Class.

94. Plaintiff's Policy, as well as the policies of other Business Income Coverage Class members, are insurance contracts under which Defendant was paid premiums in exchange for promises to pay Class members' losses for claims covered by the policies.

95. In the policies, Defendant promised to pay for losses of business income and extra expense incurred as a result of perils not excluded under the policies. Specifically, Defendant promised to pay for losses of business income and extra expense sustained as a result of a suspension of business operations during the period of restoration.

96. Plaintiff and Class members suffered an actual loss of business income and extra expense to the necessary suspension of Plaintiff's commercial gyms and other Class members' business operations at insured premises and said suspension(s) were caused by direct physical loss of and damage to Plaintiff's commercial gym and other Class members' insured premises caused by or resulting from Covered Causes of Loss under the policies and other Class members' policies. These actual losses, therefore, triggered Business Income and Extra Expense coverage under both the policies and other Class members' policies.

97. These Covered Causes of Loss were direct, physical and foreseeable causes of loss under the policies and other Class members' policies and they each caused, and/or resulted in, dangerous physical conditions at, and physical injuries to, the Plaintiff's commercial gym, other Class members' insured premises and property immediately adjacent to each. The subject Covered Causes of Loss pose a serious risk to and endanger(ed) the public's health, safety and property and rendered the Plaintiff's commercial gym and other Class members' insured premises unusable and/or uninhabitable; thus, mandating a suspension of business operations.

98. These losses and expenses are not excluded from coverage under the policies. The policies are all-risk policies meaning Covered Causes of Loss are determined by exclusions and the subject Covered Causes of Loss were not excluded under the policies.

99. Furthermore, these Covered Causes of Loss caused direct physical loss and damage to the Plaintiff's business premises and the other Class Members' insured premises resulting in dangerous physical conditions, the nature of such loss and damage to property having been recognized by civil authorities in Orders addressing COVID-19.

100. Plaintiff and the other Class members have complied with all applicable provisions of their respective policies, including payment of premiums.

101. The actions of the Defendant give rise to a cause of action for bad faith breach of contract and the duty of good faith and fair dealing as Plaintiff and other Class members were covered under their respective policies, and the Defendant has breached the terms of said policies by denying business income and extra expense coverage to the Plaintiff and other Class members. Defendant's actions in breaching the terms of the Plaintiff's Policy and the other Class Members' policies, in bad faith, have proximately caused damages to Plaintiff and other Class members and the damages were reasonably foreseeable to the Defendant.

102. It appears that the Defendant's conduct was performed because it placed its own financial interests before the Plaintiff and other Class Members' financial interests.

103. Further, the actions of the Defendant in denying business income and extra expense coverage to the Plaintiff and other Class Members was done so without any legitimate basis or arguable reason and constitute intentional and/or malicious conduct or gross negligence and reckless disregard.

104. Implied in the Plaintiff's Policy and the other Class Members' policies is a duty of good faith and fair dealing with respect to conduct encompassed by contractual relations. Defendant's conduct as aforesaid breached the duty of good faith and fair dealing which further gives rise to the tort of bad faith for the breach of contract.

105. Defendant, at all times relevant hereto, owed Plaintiff and other Class Members a duty to exercise good faith and an obligation to deal fairly with them; however, the denial of business income and extra expense coverage by Defendant constituted a bad faith breach of contract and was totally made with only the Defendant's best interests in mind and in total disregard of the contractual rights of Plaintiff and other Class Members.

106. Defendant's bad faith material breach(es) of the Plaintiff's Policy, as well as other Class members' policies, has resulted in actual and substantial damages to the Plaintiff and Business Income Coverage Class members, depriving all of the benefit of their bargain, and represents, in addition to warranting contractual damages, incidental damages and consequential damages, an independent tort entitling Plaintiff and other Class Members to punitive damages in an amount which will punish the Defendant for its intentional, grossly negligent, and/or reckless conduct as well as to deter Defendant and others from similar misconduct in the future.

WHEREFORE, Plaintiff, both individually and on behalf of other Class members, seeks compensatory damages, contractual damages, incidental damages, consequential damages, and punitive damages, resulting from Defendant's bad faith breach(es) of the Plaintiff's Policy and other Class Members' policies and seek all other relief deemed appropriate by this Court.

COUNT IV
DECLARATORY JUDGMENT
(On behalf of the Extended Business Income Coverage Class)

107. Plaintiff incorporates by reference and re-alleges paragraphs 1 through 72, as though fully set forth herein.

108. Plaintiff brings this Count both individually and on behalf of the other members of the Extra Expense Coverage Class.

109. Under 28 U.S.C. §§ 2201 and 2202, this Court has jurisdiction to declare the rights and other legal relations of the parties in dispute.

110. Plaintiff's Policy, as well as the policies of other Extended Business Income Coverage Class members, are insurance contracts under which Defendant was paid premiums in exchange for promises to pay Class members' losses for claims covered by the policies.

111. Specifically, Defendant promised to pay for extended business income for losses incurred by Plaintiff and other Class members during the period of restoration that the insureds would not have incurred if there had been no loss or damage to the insured premises. Extended business income included income to avoid or minimize the suspension of business, continue operations, and to repair or replace property.

112. Plaintiff and Class members suffered direct physical loss of or damage to NBS' location and other Class members' insured premises, resulting in suspensions or interruptions of business operations at these premises. As a result, Plaintiff and other Class members have incurred losses, as defined in the Policy and other Class members' policies.

113. These losses triggered Extended Business Income coverage under the Policy and other Class members' policies.

114. Plaintiff and the other Class members have complied with all applicable provisions of their respective policies, including payment of premiums.

115. Defendant, without justification, denies that the Policy and other Class members' policies provide coverage for these Extended Business Income.

116. Plaintiff, both individually and on behalf of the other members of the Extended Business Income Coverage Class, seeks a Declaratory Judgment that its Policy, and those of other members of the Extended Business Income Coverage Class, provides coverage for these extended business income.

117. An actual case or controversy exists regarding Class members' rights and Defendant's obligations under Class members' policies to reimburse Class members for extended business income. Accordingly, the Declaratory Judgment sought is justiciable.

WHEREFORE, Plaintiff requests that this Court enter a Declaratory Judgment declaring that the Policy and other Class members' policies provide coverage for Class members' extended business income

COUNT V
BREACH OF CONTRACT
(On behalf of the Extended Business Income Coverage Class)

118. Plaintiff incorporates by reference and re-alleges paragraphs 1 through 72, as though fully set forth herein.

119. Plaintiff brings this Count individually and on behalf of the other members of the Extended Business Income Coverage Class.

120. Plaintiff's Policy, as well as the policies of other Extended Business Income Coverage Class members, are insurance contracts under which Defendant was paid premiums in exchange for promises to pay Class members' losses for claims covered by the Policy.

121. Specifically, Defendant promised to pay for extended business income for losses incurred by Plaintiff and other Class members during the period of restoration that the insureds would not have incurred if there had been no loss or damage to the insured premises. Extended business income losses included income to avoid or minimize the suspension of business, continue operations, and to repair or replace property.

122. Plaintiff and Class members suffered direct physical loss of or damage to the Plaintiff's locations and other Class members' insured premises, resulting in suspensions and interruptions of business operations at these premises. These suspensions and interruptions have caused Class members to incur Extra Expenses.

123. These expenses triggered extended business income coverage under the Policy and other Class members' policies.

124. Plaintiff and the other Class members have complied with all applicable provisions of the Policy, including payment of premiums.

125. Defendant has denied coverage and refused performance extended business income. Accordingly, Defendant is in breach of the Policy and other Class members' policies.

126. As a result of Defendant's breaches of the Policy and other Class members' policies, Plaintiff and other Class members have suffered actual and substantial damages for which Defendant is liable.

WHEREFORE, Plaintiff, individually and on behalf of other Class members, seeks compensatory damages resulting from Defendant's breaches of the Policy and other Class Members' policies and seek all other relief deemed appropriate by this Court.

COUNT VI
BAD FAITH BREACH OF CONTRACT AND
THE DUTY OF GOOD FAITH AND FAIR DEALING
(On behalf of the Extended Business Income Coverage Class)

127. Plaintiff incorporates by reference and re-alleges paragraphs 1 through 72, as though fully set forth herein.

128. Plaintiff brings this Count both individually and on behalf of the other members of the Extra Expense Coverage Class.

129. Plaintiff's Policy, as well as the policies of other Extended Business Income Coverage Class members, are insurance contracts under which Defendant was paid premiums in exchange for promises to pay Class members' losses for claims covered by the Policy.

130. In the Policy, Defendant promised to pay extended business income for losses, under the *Elite Property Enhancement: Health & Fitness Clubs* provision of the Plaintiff's Policy and other Class Members' policies, incurred as a result of perils not excluded under the Policy. Specifically, Defendant promised to pay for losses of Extended Business Income sustained as a result of a suspension of business operations during the period of restoration.

131. Plaintiff and Class members suffered an actual loss of business income due to the necessary Suspension of NBS' commercial gym and other Class members' business operations at insured premises and said suspension(s) were caused by direct physical loss of and damage to Plaintiff's commercial gym and other Class members' insured premises caused by or resulting from Covered Causes of Loss under the Policy and other Class members' policies. These actual losses, therefore, triggered *Elite Property Enhancement: Health & Fitness Clubs* Extended Business Income coverage under both the Policy and other Class members' policies.

132. These Covered Causes of Loss were direct, physical and foreseeable causes of loss under the Policy and other Class members' policies and they each caused, and/or resulted in,

dangerous physical conditions at, and physical injuries to, the Plaintiff's commercial gym, other Class members' insured premises and property immediately adjacent to each. The subject Covered Causes of Loss pose a serious risk to and endanger(ed) the public's health, safety and property and rendered the Plaintiff's commercial gym and other Class members' insured premises unusable and/or uninhabitable; thus, mandating a suspension of business operations.

133. These losses and expenses are not excluded from coverage under the Policy. The Policy is an all-risk policy meaning Covered Causes of Loss are determined by exclusions and the subject Covered Causes of Loss were not excluded under the Policy.

134. Furthermore, these Covered Causes of Loss caused direct physical loss and damage to the Plaintiff's business premises and the other Class Members' insured premises resulting in dangerous physical conditions, the nature of such loss and damage to property having been recognized by civil authorities in Orders addressing COVID-19.

135. The Plaintiff and the other Class members have complied with all applicable provisions of their respective policies, including payment of premiums.

136. The actions of the Defendant give rise to a cause of action for bad faith breach of contract and the duty of good faith and fair dealing as Plaintiff and other Class members were covered under the Policy, as well as the policies of other Class members, and the Defendant has breached the terms of said policies by denying extended business income coverage to the Plaintiff and other Class members. Defendant's actions in breaching the terms of the Policy and the other Class Members' policies, in bad faith, have proximately caused damages to Plaintiff and other Class members and the damages were reasonably foreseeable to the Defendant.

137. It appears that the Defendant's conduct was performed because it placed its own financial interests before the Plaintiff and other Class Members' financial interests.

138. Further, the actions of the Defendant in denying extended business income coverage to the Plaintiff and other Class Members was done so without any legitimate basis or arguable reason and constitute intentional and/or malicious conduct or gross negligence and reckless disregard.

139. Implied in the Policy and the other Class Members' policies is a duty of good faith and fair dealing with respect to conduct encompassed by contractual relations. Defendant's conduct as aforesaid breached the duty of good faith and fair dealing which further gives rise to the tort of bad faith for the breach of contract.

140. Defendant, at all times relevant hereto, owed Plaintiff and other Class Members a duty to exercise good faith and an obligation to deal fairly with them; however, the denial of extended business income coverage by Defendant constituted a bad faith breach of contract and was totally made with only the Defendant's best interests in mind and in total disregard of the contractual rights of Plaintiff and other Class Members.

141. Defendant's bad faith material breach(es) of the Policy, as well as other Class members' policies, has resulted in actual and substantial damages to the Plaintiff and Extended Business Income Coverage Class members, depriving all of the benefit of their bargain, and represents, in addition to warranting contractual damages, incidental damages, and consequential damages, an independent tort entitling Plaintiff and other Class Members to punitive damages in an amount which will punish the Defendant for its intentional, grossly negligent, and/or reckless conduct as well as to deter Defendant and others from similar misconduct in the future.

WHEREFORE, Plaintiff, both individually and on behalf of other Class members, seeks compensatory damages, contractual damages, incidental damages, consequential damages, and

punitive damages, resulting from Defendant's bad faith breach(es) of the Policy and other Class Members' policies and seek all other relief deemed appropriate by this Court.

COUNT VII
DECLARATORY JUDGMENT
(On behalf of the Civil Authority Coverage Class)

142. Plaintiff incorporates by reference and re-alleges paragraphs 1 through 72, as though fully set forth herein.

143. Plaintiff brings this Count both individually and on behalf of the other members of the Civil Authority Coverage Class.

144. Under 28 U.S.C. §§ 2201 and 2202, this Court has jurisdiction to declare the rights and other legal relations of the parties in dispute.

145. Plaintiff's Policy, as well as the policies of other Civil Authority Coverage Class members, are insurance contracts under which Defendant was paid premiums in exchange for promises to pay Class members' losses for claims covered by the policies.

146. In the Policy and other Class members' policies, Defendant promised to pay for losses of business income sustained and extra expenses incurred when, among other things, a covered cause of loss causes damage to property other than Plaintiff's properties prohibits access to Plaintiff's properties.

147. Plaintiff and other Class members have suffered losses and incurred expenses as a result of actions of civil authorities that prohibited access to insured premises under the Policy and Class members' policies.

148. These losses satisfied all requirements to trigger Civil Authority coverage under the Policy and other Class members' policies.

149. Plaintiff and the other Class members have complied with all applicable provisions of the policies, including payment of premiums.

150. Defendant, without justification, denies that the policies provide coverage for these losses.

151. Plaintiff seeks a Declaratory Judgment that its Policy and other Class members' policies provide coverage for the losses that Class members have sustained and extra expenses they have incurred caused by actions of civil authorities.

152. An actual case or controversy exists regarding Class members' rights and Defendant's obligations under Class members' policies to reimburse Class members for these losses and extra expenses. Accordingly, the Declaratory Judgment sought is justiciable.

WHEREFORE, Plaintiff, both individually and on behalf of other Class members, requests that this Court enter a Declaratory Judgment declaring that the policies provides Civil Authority coverage for the losses and extra expenses incurred by Plaintiff and the other Class members.

COUNT VIII
BREACH OF CONTRACT
(On behalf of the Civil Authority Coverage Class)

153. Plaintiff incorporates by reference and re-alleges paragraphs 1 through 72, as though fully set forth herein.

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

155. Plaintiff's Policy, as well as the policies of other Civil Authority Coverage Class members, are insurance contracts under which Defendant was paid premiums in exchange for promises to pay Class members' losses and expenses covered by the policies.

156. In the Policy and other Class members' policies, Defendant promised to pay for losses of business income sustained and extra expenses incurred when, among other things, a covered cause of loss causes damage to property other than Plaintiff's properties prohibits access to Plaintiff's properties.

157. Plaintiff and other Class members have suffered losses and incurred expenses as a result of actions of civil authorities that prohibited access to insured premises under the Policy and Class members' policies.

158. These losses satisfied all requirements to trigger Civil Authority coverage under the Policy and other Class members' policies.

159. Plaintiff and the other Class members have complied with all applicable provisions of the policies, including payment of premiums.

160. Defendant has refused performance under the Policy and other Class members' policies by denying coverage for these losses and expenses. Accordingly, Defendant is in breach of the Policy and other Class members' policies.

161. As a result of Defendant's breaches of the Policy and other Class members' policies, Plaintiff and other Class members have suffered actual and substantial damages for which Defendant is liable.

WHEREFORE, Plaintiff seek compensatory damages resulting from Defendant's breaches of the policies and other Class members' policies, and seeks all other relief deemed appropriate by this Court.

COUNT IX
BAD FAITH BREACH OF CONTRACT AND
THE DUTY OF GOOD FAITH AND FAIR DEALING
(On behalf of the Civil Authority Coverage Class)

162. Plaintiff incorporates by reference and re-alleges paragraphs 1 through 72, as though fully set forth herein.

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

164. Plaintiff's Policy, as well as the policies of other Civil Authority Coverage Class members, are insurance contracts under which Defendant was paid premiums in exchange for promises to pay Class members' losses and expenses covered by the policies.

165. In the Policy and other Class members' policies, Defendant promised to pay for actual loss of business income sustained and necessary extra expenses incurred when, among other things, a covered cause of loss causes damage to property other than Plaintiff's properties prohibits access to Plaintiff's properties prompting civil authorities to issue Orders prohibiting the public's access to the area immediately surrounding the damaged property, including the Plaintiff's respective business premises and other Class Members' insured premises.

166. These Covered Causes of Loss were direct, physical and foreseeable causes of loss under the Policy and other Class members' policies and they each caused, and/or resulted in, dangerous physical conditions at, and physical injuries to, the Plaintiff's commercial gym, other Class members' insured premises and property immediately adjacent to each. The subject Covered Causes of Loss pose a serious risk to and endanger(ed) the public's health, safety and property and rendered the Plaintiff's commercial gym, other Class members' insured premises and areas within one mile of the Plaintiff's business premises and other Class Members' insured premises, damaged,

unusable and/or uninhabitable; thus, prompting the Orders of civil authorities prohibiting access to the same.

167. These losses and expenses are not excluded from coverage under the policies. The policies are all-risk policies meaning Covered Causes of Loss are determined by exclusions and the subject Covered Causes of Loss were not excluded under the policies.

168. Furthermore, these Covered Causes of Loss caused damage to property in the area of Plaintiff's business premises, and the other Class Members' insured premises, resulting in dangerous physical conditions prompting civil authorities, such as, for example, the State of Tennessee, to issue Orders prohibiting the public's access to the area immediately surrounding the damaged property, including access to the Plaintiff's business premises and other Class Members' insured premises.

169. Accordingly, these losses satisfied all requirements to trigger Civil Authority coverage under the Policy and other Class members' policies.

170. Plaintiff and the other Class members have complied with all applicable provisions of the policies, including payment of premiums.

171. The actions of the Defendant give rise to a cause of action for bad faith breach of contract and the duty of good faith and fair dealing as Plaintiff and other Class members were covered under the Policy, as well as the policies of other Civil Authority Coverage Class members, and the Defendant has breached the terms of said policies by denying Civil Authority coverage to the Plaintiff and other Class members. Defendant's actions in breaching the terms of the Policy and the other Class Members' policies, in bad faith, have proximately caused damages to Plaintiff and other Class members and the damages were reasonably foreseeable to the Defendant.

172. It appears that the Defendant's conduct was performed because it placed its own financial interests before the Plaintiff and other Class Members' financial interests.

173. Further, the actions of the Defendant in denying Civil Authority coverage to the Plaintiff and other Class Members was done so without any legitimate basis or arguable reason and constitute intentional and/or malicious conduct or gross negligence and reckless disregard.

174. Implied in the Policy and the other Class Members' policies is a duty of good faith and fair dealing with respect to conduct encompassed by contractual relations. Defendant's conduct as aforesaid breached the duty of good faith and fair dealing which further gives rise to the tort of bad faith for the breach of contract.

175. Defendant, at all times relevant hereto, owed Plaintiff and other Class Members a duty to exercise good faith and an obligation to deal fairly with them; however, the denials of Civil Authority coverage by Defendant constituted a bad faith breach of contract and was totally made with only the Defendant's best interests in mind and in total disregard of the contractual rights of Plaintiff and other Class Members.

176. Defendant's bad faith material breach(es) of the Policy, as well as other Class members' policies, has resulted in actual and substantial damages to the Plaintiff and Civil Authority Coverage Class members, depriving all of the benefit of their bargain, and represents, in addition to warranting contractual damages, incidental damages, and consequential damages, an independent tort entitling Plaintiff and other Class Members to punitive damages in an amount which will punish the Defendant for its intentional, grossly negligent, and/or reckless conduct as well as to deter Defendant and others from similar misconduct in the future.

WHEREFORE, Plaintiff, both individually and on behalf of other Class members, seeks compensatory damages, contractual damages, incidental damages, consequential damages, and

punitive damages, resulting from Defendant's bad faith breach(es) of the Policy and other Class Members' policies and seek all other relief deemed appropriate by this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in its favor and against Defendant, as follows:

A. Entering an order certifying the proposed Classes, designating Plaintiff as Class representative for each of the Classes, and appointing Plaintiff's attorneys as Counsel for the Classes;

B. Entering declaratory judgments on Counts I, IV, and VII in favor of Plaintiff and the members of the Business Income Coverage Class, Extended Business Income Coverage Class and Civil Authority Coverage Class as follows:

- i. That all Business Income and Extra Expense, Civil Authority and Extended Business Income losses and expenses incurred and sustained based on the facts and circumstances set forth above are insured and covered losses and expenses under Plaintiff and Class members' policies; and
- ii. Defendant Philadelphia Indemnity Insurance Company is obligated to pay for the full amount of the Business Income and Extra Expense, Civil Authority and Extended Business Income losses and expenses sustained and incurred, and to be sustained and incurred, based on the facts and circumstances set forth above are insured and covered losses and expenses under Plaintiff and Class members' policies;

C. Entering judgments on counts II, V, and VIII in favor of Plaintiff and the members of the Business Income Coverage Class, Extended Business Income Coverage Class and Civil

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

D. Entering judgments on counts III, VI, IX in favor of the Plaintiff and the members of the Business Income Coverage Class, Extended Business Income Coverage Class and Civil Authority Coverage Class, and awarding compensatory damages, incidental damages, consequential damages, and punitive damages for the Defendant's bad faith material breach(es) in an amount to be determined at trial;

E. An order requiring Defendant to pay both pre- and post-judgment interest on any amounts awarded; and

F. Such other or further relief as may be appropriate.

DEMAND FOR JURY TRIAL

The undersigned hereby demands a trial by jury as to all issues so triable.

Respectfully submitted,

/s/ Adam J. Gomez

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***Pro Hac Vice Application to be filed
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Date: August 18, 2020