

CASE NO. 22A172

IN THE
Supreme Court of the United States

THE CORDISH COMPANIES, INC.,

Applicant,

vs.

AFFILIATED FM INSURANCE COMPANY,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO
FILE PETITION FOR CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

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APPLICATION FOR AN EXTENSION OF TIME

On August 29, 2022, the Court granted Applicant The Cordish Companies, Inc. (“Cordish”) an extension of time within which to file a petition for a writ of certiorari seeking review of decisions of the United States Court of Appeals for the Fourth Circuit until October 5, 2022 in light of a matter pending before the Maryland Court of Appeals that will establish controlling law on the exact issues disputed in this case. Pursuant to Rule 13.5 of the Rules of this Court, Cordish respectfully requests an extension of the remaining 29-days to file the petition. The extension, up to and including November 3, 2022, is needed to allow time for the Maryland Court of Appeals to decide that pending matter, which has been fully briefed and was argued on September 9, 2022.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgments for which review is sought are *The Cordish Companies, Inc. v. Affiliated FM Insurance Company*, No. 21-2055 (April 14, 2022) and *The Cordish Companies, Inc. v. Affiliated FM Insurance Company*, No. 21-2055 (June 6, 2022) (attached as Exhibits A and B, respectively). The United States Court of Appeals for the Fourth Circuit denied Applicant’s petition for rehearing and rehearing en banc and motion for stay of mandate on June 6, 2022.

JURISDICTION

This Court will have jurisdiction over any timely filed petition for certiorari in this case pursuant to 28 U.S.C. § 1254(1). Under Rules 13.1, 13.3, and 30.1 of the Rules of this Court, a petition for a writ of certiorari was due to be filed on or before

September 6, 2022. On August 29, 2022, the Court granted Cordish an extension of time of 31-days until October 5, 2022. In accordance with Rule 13.5, this application is being filed more than 10 days in advance of the filing date for the petition for a writ of certiorari.

REASONS JUSTIFYING AN EXTENSION OF TIME

Applicant respectfully requests the remaining 29-day extension of time within which to file a petition for a writ of certiorari seeking review of the decisions of the United States Court of Appeals for the Fourth Circuit in this case, up to and including November 3, 2022.

1. This is an insurance coverage dispute arising out of business interruption losses sustained because of physical loss of or damage to property due to SARS-CoV-2 and the resulting orders of civil authority. Petitioner The Cordish Companies Inc. (“Cordish”) is a Maryland business. Affiliates of Cordish own and operate commercial real estate properties, including resorts, casinos, entertainment and dining complexes, shopping centers, and various other commercial venues – all of which depend on large numbers of customers gathering and interacting with one another.

2. To protect its properties and revenue, Cordish paid nearly \$2 million in annual premiums to purchase an all-risk insurance policy from Affiliated FM Insurance Company (“FM”) with limits up to \$1 Billion (the “Policy”).

3. As a result of the widespread damage caused by the coronavirus pandemic, Cordish sustained substantial business interruption losses – precisely

the type of losses covered under the Policy. However, despite selling Cordish this sophisticated and expensive Policy with broad terms providing enhanced coverage that extends beyond that offered by most standardized property insurance policies, FM denied coverage of Cordish's the losses. Cordish was forced to bring suit against FM to recover the amounts owed under the Policy.

4. The District Court of Maryland dismissed Cordish's claims, and the U.S. Circuit Court of Appeals for the Fourth Circuit affirmed. In affirming, the Fourth Circuit failed to analyze Maryland law and, instead, referenced a single federal court decision decided under West Virginia law. *Cordish Companies, Inc. v. Affiliated FM Ins. Co.*, No. 21-2055, 2022 WL 1114373, at *1 (4th Cir. Apr. 14, 2022).

5. Pursuant to longstanding Supreme Court precedent, insurance law is established by each state.¹ This Court's precedent ensures that in diversity cases, the law of one state cannot be imposed on the citizens of another. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 822, 82 L. Ed. 1188 (1938). Under this established precedent, Maryland citizens are entitled to the application of Maryland law as declared by that state's legislature or highest court and their rights cannot be abrogated based on West Virginia Law.

6. Despite these cornerstone principles, however, the U.S. Circuit Court of Appeals for the Fourth Circuit applied West Virginia law, without citation to any

¹ *See Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 182-83 (1868) (establishing that “[i]ssuing a policy of insurance is not a transaction of commerce”, rather, insurance policies “are, then, local transactions and are governed by the local law. They do not constitute a part of the commerce between the States.”).

Maryland law, in clear violation of constitutional principles protecting each state's rights under *Erie* to fix its own laws regarding insurance. The court declined to even engage in an “Erie guess” under Maryland law. *Cordish*, 2022 WL 1114373, at *1-2.

7. As the District Court recognized, there is currently no Maryland authority on the key issue here: the application of the undefined term “physical loss or damage” to the impact of COVID-19 when present in the air or on surfaces at a property. See *Cordish Cos.*, 2021 WL 3883595, at * 13 (“the Policy does not define ‘physical loss or damage’ and, to my knowledge, no Maryland State Court has opined on the meaning of this precise phrase in a reported opinion.”).

8. This imminently will change. The Maryland Court of Appeals soon will decide this precise insurance law question under Maryland insurance law in *Tapestry, Inc. v. Factory Mut. Ins. Co.*, No. COA-MISC-00001-2022.² The Maryland Court of Appeals certified exactly the question implicated here: “When a first-party, all-risk property insurance policy covers ‘all risks of physical loss or damage’ to insured property from any cause unless excluded, is coverage triggered when a toxic, noxious, or hazardous substance – such as Coronavirus or COVID-19 - that is physically present in the indoor air of that property damages the property or causes loss, either in whole or in part, of the functional use of the property?” A copy of the Maryland Court of Appeals Certification Order is attached as Exhibit C.

² The District Court of Maryland in both this case and in *Tapestry* acknowledged that there is no controlling Maryland law on the issue to be decided. See *Cordish Cos.*, 2021 WL 3883595, at *13 (“no Maryland State court has opined on the meaning of this precise phrase in a reported opinion”); *Tapestry*, slip op. at p. 9 (“the Court finds that this case is appropriate for certification because ‘there is no controlling appellate decision, constitutional provision, or Maryland statute on point’”).

9. Importantly, both *Tapestry* and this case involve virtually the *same* broad insurance policy form sold by the *same* insurance company, and direct allegations of how COVID-19 causes physical loss or damage to property.

10. It has not been disputed that Maryland law applies to the claim Cordish asserts for insurance coverage. Accordingly, the controlling law will be established with respect to the identical legal issue, loss scenario and insurance policy language in a matter of weeks or months.

11. Due to this pending decision, Cordish asked the Fourth Circuit to reconsider and refrain from making a final determination until the issues in *Tapestry* are decided, but the Fourth Circuit refused and continued to flout *Erie* in deciding other cases under other states' law within the circuit. Ex. A; *see also Bel Air Auto Auction, Inc. v. Great N. Ins. Co.*, No. 21-1493, 2022 WL 212856, at *1 (4th Cir. June 14, 2022), *reh'g denied*, 2022 WL 3021909 (4th Cir. July 26, 2022).

12. The outcome of Cordish's case should be determined based on the forthcoming ruling of the Maryland Court of Appeals, not a federal court's interpretation of West Virginia law. Any decision to the contrary would risk a substantially unjust result.

13. The Maryland Court of Appeals heard oral argument in *Tapestry* on September 9, 2022. A video of the argument can be viewed at <https://www.courts.state.md.us/sites/default/files/import/coappeals/media/2022/coa20220909casemisc1.mp4>.

14. A decision on the certified questions has not yet been released.

15. While on average within this past year, the Maryland Court of Appeals has issued decisions in civil cases within 154 days from oral argument, in a number of civil cases, the Court has issued opinions within two months. *See e.g., Thornton Mellon v. Frederick Cnty. Sheriff*, No. 51 (Md. Sept. Term, 2021) (argued on June 1, 2022 and decided on July 12, 2022), available at <https://www.courts.state.md.us/data/opinions/coa/2022/51a21.pdf>; *Thornton Mellon LLC v. Adrienne Dennis Exempt Trust*, No. 28 (Md. Sept. Term, 2021) (argued on March 3, 2022 and decided on April 25, 2022), available at <https://www.courts.state.md.us/data/opinions/coa/2022/28a21.pdf>; *In re: T.K.*, No. 60 (Md. Sept. Term, 2021) (argued on June 2, 2022 and decided on July 28, 2022), available at <https://www.courts.state.md.us/data/opinions/coa/2022/60a21.pdf>; *Irwin Industrial Tool v. Pifer*, No. 49 (Md. Sept. Term, 2021) (argued on April 5, 2022 and decided on May 31, 2022), available at <https://www.courts.state.md.us/data/opinions/coa/2022/49a21.pdf>.

16. In light of this, Cordish anticipates a decision from the Maryland Court of Appeals within the next few weeks or months that will set the controlling law in this case.

17. Cordish respectfully requests this Court extend the time to file its petition for certiorari to allow time for the Maryland Court of Appeals to rule and to ensure that this case is adjudicated consistent with the law that applies to Cordish and all citizens of Maryland – not the law of West Virginia.

CONCLUSION

For the foregoing reasons, Applicant respectfully requests that this Court grant an extension of 29 days, up to and including November 3, 2022, within which to file a petition for a writ of certiorari in this case.

Dated: September 22, 2022

Respectfully submitted,

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Companies, Inc.*

EXHIBIT A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-2055

THE CORDISH COMPANIES, INC.,

Plaintiff – Appellant,

v.

AFFILIATED FM INSURANCE COMPANY,

Defendant – Appellee.

UNITED POLICYHOLDERS,

Amicus Supporting Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Ellen Lipton Hollander, Senior District Judge. (1:20-cv-02419-ELH)

Submitted: March 31, 2022

Decided: April 14, 2022

Before WYNN and QUATTLEBAUM, Circuit Judges, and SHEDD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Marshall N. Gilinsky, New York, New York, Daniel J. Healy, ANDERSON KILL, LLP, Washington, D.C., for Appellant. Craig D. Roswell, Bryant S. Green, NILES, BARTON & WILMER, LLP, Baltimore, Maryland, for Appellee. Jad Khazem,

Washington D.C., Rani Gupta, Palo Alto, California, David B. Goodwin, Sabrina McGraw,
COVINGTON & BURLING LLP, San Francisco, California, for Amicus Curiae.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

The Cordish Companies, Inc. (“Cordish”) appeals the district court’s order granting Affiliated FM Insurance Company’s (“Affiliated”) motions to strike Cordish’s Fed. R. App. P. 28(j) citation of supplemental authority and to dismiss Cordish’s complaint asserting claims for declaratory judgment and breach of contract. Cordish’s claims stemmed from Affiliated’s denial of insurance benefits Cordish asserts Affiliated owed Cordish to cover losses Cordish’s affiliates suffered as a result of the COVID-19 pandemic. We have reviewed the record and find no reversible error. Accordingly, we affirm the district court’s order. *See, Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926, 933-34 (4th Cir. 2022) (holding that insurance “policy’s coverage for business income loss and other expenses d[id] not apply to [plaintiff’s] claim for financial losses [caused by the COVID-19 pandemic] in the absence of any material destruction or material harm to its covered premises” and further “observ{ing} that our holding is consistent with the unanimous decisions by our sister circuits, which have applied various states’ laws to similar insurance claims and policy provisions”). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: April 14, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-2055
(1:20-cv-02419-ELH)

THE CORDISH COMPANIES, INC.

Plaintiff - Appellant

v.

AFFILIATED FM INSURANCE COMPANY

Defendant - Appellee

UNITED POLICYHOLDERS

Amicus Supporting Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: April 14, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-2055,

The Cordish Companies, Inc. v. Affiliated FM Insurance
Company

1:20-cv-02419-ELH

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: The time to file a petition for writ of certiorari runs from the date of entry of the judgment sought to be reviewed, and not from the date of issuance of the mandate. If a petition for rehearing is timely filed in the court of appeals, the time to file the petition for writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. See Rule 13 of the Rules of the Supreme Court of the United States; www.supremecourt.gov.

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL:

Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a [Bill of Costs](#) within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

PETITION FOR REHEARING AND PETITION FOR REHEARING EN

BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

U.S. COURT OF APPEAL FOR THE FOURTH CIRCUIT BILL OF COSTS FORM
(Civil Cases)

Directions: Under FRAP 39(a), the costs of appeal in a civil action are generally taxed against appellant if a judgment is affirmed or the appeal is dismissed. Costs are generally taxed against appellee if a judgment is reversed. If a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed as the court orders. A party who wants costs taxed must, within 14 days after entry of judgment, file an itemized and verified bill of costs, as follows:

- Itemize any fee paid for docketing the appeal. The fee for docketing a case in the court of appeals is \$500 (effective 12/1/2013). The \$5 fee for filing a notice of appeal is recoverable as a cost in the district court.
 - Itemize the costs (not to exceed \$.15 per page) for copying the necessary number of formal briefs and appendices. (Effective 10/1/2015, the court requires 1 copy when filed; 3 more copies when tentatively calendared; 0 copies for service unless brief/appendix is sealed.). The court bases the cost award on the page count of the electronic brief/appendix. Costs for briefs filed under an informal briefing order are not recoverable.
 - Cite the statutory authority for an award of costs if costs are sought for or against the United States. See 28 U.S.C. § 2412 (limiting costs to civil actions); 28 U.S.C. § 1915(f)(1) (prohibiting award of costs against the United States in cases proceeding without prepayment of fees).
- Any objections to the bill of costs must be filed within 14 days of service of the bill of costs. Costs are paid directly to the prevailing party or counsel, not to the clerk's office.

Case Number & Caption: _____

Prevailing Party Requesting Taxation of Costs: _____

Appellate Docketing Fee (prevailing appellants):			Amount Requested: _____			Amount Allowed: _____	
Document	No. of Pages		No. of Copies		Page Cost (≤\$.15)	Total Cost	
	Requested	Allowed (court use only)	Requested	Allowed (court use only)		Requested	Allowed (court use only)
TOTAL BILL OF COSTS:						\$0.00	\$0.00

1. If copying was done commercially, I have attached itemized bills. If copying was done in-house, I certify that my standard billing amount is not less than \$.15 per copy or, if less, I have reduced the amount charged to the lesser rate.
2. If costs are sought for or against the United States, I further certify that 28 U.S.C. § 2412 permits an award of costs.
3. I declare under penalty of perjury that these costs are true and correct and were necessarily incurred in this action.

Signature: _____ Date: _____

Certificate of Service

I certify that on this date I served this document as follows:

Signature: _____ Date: _____

EXHIBIT B

FILED: June 6, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-2055
(1:20-cv-02419-ELH)

THE CORDISH COMPANIES, INC.

Plaintiff - Appellant

v.

AFFILIATED FM INSURANCE COMPANY

Defendant - Appellee

UNITED POLICYHOLDERS

Amicus Supporting Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc and motion for stay of mandate. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wynn and Judge Quattlebaum acting as a quorum pursuant to 28 U.S.C. § 46(d).

For the Court

/s/ Patricia S. Connor, Clerk

EXHIBIT C

Filed

MAY 02 2022

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)**

**Suzanne C. Johnson, Clerk
Court of Appeals
of Maryland**

TAPESTRY, INC.,

Plaintiff,

v.

FACTORY MUTUAL INSURANCE COMPANY,

Defendant.

Case No.: 1:21-cv-01941-GLR

**Misc. No. 1,
September Term, 2022**

**CERTIFICATION ORDER CERTIFYING A QUESTION OF LAW
TO THE MARYLAND COURT OF APPEALS**

Question of Law to be Answered

Pursuant to the Maryland Uniform Certification of Questions of Law Act, Md. Code Ann., Cts. & Jud. Proc. §12-601, et seq., this Court respectfully requests that the Maryland Court of Appeals answer the following question of law:

When a first-party, all-risk property insurance policy covers “all risks of physical loss or damage” to insured property from any cause unless excluded, is coverage triggered when a toxic, noxious, or hazardous substance—such as Coronavirus or COVID-19—that is physically present in the indoor air of that property damages the property or causes loss, either in whole or in part, of the functional use of the property?

The Maryland Court of Appeals, acting as the receiving court, may reformulate the question of law presented herein.

Relevant Facts

Plaintiff, Tapestry, Inc. (“Tapestry”)—the owner of modern luxury accessory and lifestyle brands, Coach, kate spade new york, and Stuart Weitzman—filed suit against Factory

Mutual Insurance Company (“FM”) for its refusal to provide coverage (and its denial of coverage) for Tapestry’s losses arising from the SARS-CoV-2 virus (“Coronavirus”) and the disease that it causes, Coronavirus Disease 2019 (“COVID-19”), under the “all-risk” commercial property insurance policies FM sold to Tapestry for the policy periods April 4, 2019 to April 4, 2020 (“2019/2020 Policy”) and April 4, 2020 to April 4, 2021 (“2020/2021 Policy”) (each a “Policy”; collectively, the “Policies”). *See* Exhibit A, Plaintiff’s First Amended Complaint (“FAC”), ¶ 1; Exhibit B, 2019/2020 Policy; Exhibit C, 2020/2021 Policy.¹

A. Coronavirus and COVID-19

With the support of dozens of peer-reviewed studies, Tapestry alleges in its FAC that Coronavirus/COVID-19 are serious threats rendering objects, surfaces, and areas exposed to them dangerous and fatal. *See* Ex. A ¶¶ 26, 30, 162. Coronavirus spreads through indoor spaces via respiratory particles expelled by infected individuals (including those who are asymptomatic or pre-symptomatic). *Id.* ¶¶ 26-28, 32-33. The presence of Coronavirus in the air, through aerosols or droplets, is the virus’ primary transmission vector. *Id.* ¶¶ 40-41, 43-44. Coronavirus, just like ammonia, physically transforms the content of the air and can remain airborne in respiratory particles for indefinite periods. *Id.* ¶¶ 33, 35-36, 44. Ventilation systems are particularly significant transmission vectors as studies have found Coronavirus in ceiling vent openings, vent exhaust filters, and ventilation ducts up to 180 feet from an infected individual. *Id.* ¶¶ 40, 42. As a result, Tapestry alleges that Coronavirus causes the same physical loss or damage to property as that of ammonia, smoke, soot, radon gas, asbestos and other hazardous substances. *Id.* ¶ 35.

¹ The facts set forth herein are drawn primarily from the FAC and the Policies. Because the case is presently at the pleadings stage, the truth of the factual allegations of the Complaint is presumed. *See E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011).

Coronavirus particles can also settle on surfaces that themselves become carriers for the disease (“fomites”). *Id.* ¶¶ 32, 49, 51, 53, 56. These fomites remain infectious for days after exposure and do not readily dissipate. *Id.* ¶¶ 31, 51-52, 54-55. Tapestry’s various stores contain materials—like plastics, glass, metals, and fabrics—that have been documented as Coronavirus fomites. *Id.* ¶¶ 52 n.57, 59. Even disturbing a fomite—like shaking a contaminated textile such as clothing merchandise—can spread Coronavirus particles and create additional fomites. *Id.* ¶¶ 52, 59. Indeed, studies have demonstrated that “it is biologically plausible that . . . infectious disease [such as COVID-19] can be transmitted directly through contact with [Coronavirus] contaminated textiles.” *Id.* ¶ 69.

Removing Coronavirus from air is not possible as a practical matter, and no amount of cleaning will prevent reintroduction of the virus when an infected person enters the space—only shutting down the property prevents the repeated and continuous reintroduction of Coronavirus. *Id.* ¶¶ 63, 76, 78. Coronavirus cannot be removed from indoor air by surface cleaning, which actually causes virus particles to become airborne. *Id.* ¶¶ 70, 74-75.

Attempting to remove Coronavirus from surfaces requires unique protocols such as the use of “harsh chemicals” that are not routinely used and which themselves are alleged to have caused additional physical loss or damage to Tapestry’s stores. *Id.* ¶¶ 65-68, 71. Indeed, “Coronavirus is ‘much more resilient to cleaning than other respiratory viruses so tested.’” *Id.* ¶ 64. Moreover, it is “challenging to accurately determine the efficacy of decontaminating agents and . . . if surface disinfection [is] even effective” given the toxicity of the agents and the microscopic nature of Coronavirus particles. *Id.* ¶ 66.

Nonetheless, Tapestry asserts that it repaired and remediated its physical space, such as through the removal and disposal of porous materials like clothing, reconfiguring and

altering interior spaces of property, and installing physical barriers to create physical distancing. *Id.* ¶¶ 71-72, 150, 155, 227. Tapestry suffered massive losses, in the hundreds of millions of dollars, for extensive and costly health and safety protocols and modifications to its stores. *Id.* ¶¶ 152, 155, 227.

B. Tapestry's Allegations of Coronavirus at its Stores and the Government Closure Orders

Tapestry alleges that individuals infected with Coronavirus and COVID-19 were present on its insured properties where they spread the virus. *Id.* ¶¶ 79-80. Specifically, Tapestry claims that “at least 1,676 Tapestry employees (including 23 in Maryland) have confirmed that they contracted COVID-19, and virtually all . . . did so during periods when the Tapestry stores where they worked were open for business and they were back at work.” *Id.* ¶¶ 79-80, 151. This supports the allegation that Coronavirus/COVID-19 was present at Tapestry’s stores. *Id.* ¶¶ 80, 99.

Furthermore, Tapestry alleges that a detailed biostatistical analysis demonstrates that it is statistically certain that customers and other individuals who visited its stores contracted and carried Coronavirus before the stores were closed, and during the time when various stores’ operations were severely restricted. *Id.* ¶¶ 83-91, 94, 96-101.

Due to the presence of Coronavirus/COVID-19 and the effects it had on Tapestry’s stores (particularly the indoor air), Tapestry closed all of its North American stores beginning on March 18, 2020—prior to the issuance of government orders in many counties where Tapestry operates. *Id.* ¶¶ 56-60, 78, 119, 122, 127-128, 132, 137-38, 142.

C. The Policies

The FM Global Advantage policies FM sold to Tapestry are expensive, top-end policies with broad coverages and narrow exclusions. *See Ex. A.*, ¶¶ 3, 261-65. FM drafted the Policies,

and Tapestry had no role in drafting or negotiating the Policies' terms. (*Id.* ¶¶ 2, 166, 169, 247).

The Policies insure against "ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded." Ex. B, p.1;² Ex. A ¶ 170. Additionally, the Policies cover TIME ELEMENT loss (i.e., business interruption losses) "as provided in the TIME ELEMENT COVERAGES, directly resulting from physical loss or damage of the type insured." Ex. B, p.24; Ex. A ¶ 173.

The Policies' TIME ELEMENT coverages do not require complete closure or complete cessation of business. Indeed, one of the two alternative measures of TIME ELEMENT loss, GROSS EARNINGS (the other being GROSS PROFITS), provides "recovery [] to the extent that the Insured is: a) wholly or partially prevented from producing goods or continuing business operations or services." Ex. B, p.43, p.46; Ex. A ¶¶ 183, 185.

Numerous other coverages also turn on the "physical loss or damage" to Tapestry's properties, such as the Policies' ATTRACTION PROPERTY coverage (Ex. B, p. 69; Ex. A ¶¶ 221-23) and PROTECTION AND PRESERVATION OF PROPERTY and PROTECTION AND PRESERVATION OF PROPERTY TIME ELEMENT coverages (Ex. B, pp. 45, 72; Ex. A ¶¶ 226-27).

The Policy Limit for each Policy is \$1,000,000,000 per occurrence. Ex. A ¶ 171.

D. FM's Denial of Coverage and this Litigation

As a result of its alleged losses, Tapestry provided notice to FM of its claim under the 2019/2020 Policy on or about April 2, 2020. *Id.* ¶ 300. On April 14, 2020, FM's adjuster acknowledged receipt of Tapestry's claim via letter and reserved FM's rights. *Id.* ¶ 301. Then,

² All applicable provisions of the Policies are identical. For ease of reference, only the 2019/2020 Policy (Exhibit B) will be cited herein. Referenced page numbers refer to numbers at the bottom right corner of the Policies' pages.

on June 9, 2021, Tapestry provided notice to FM of its claim under the 2020/2021 Policy. *Id.* ¶ 310.

On June 22, 2021, FM issued a letter to Tapestry denying coverage for its claim under the 2020/2021 Policy under all coverages with the sole exception of the Communicable Disease Response and Interruption by Communicable Disease coverages. *Id.* ¶¶ 250, 311. In that June 22, 2021 letter, FM claimed that the Policy's provisions, other than the Communicable Disease Response and Interruption by Communicable Disease coverages, "require physical loss or damage . . . as one of the conditions of coverage and the presence of COVID-19 does not cause physical loss or damage so that condition cannot be met." *Id.* ¶ 250, 311. FM's June 22, 2021 letter also claimed that the 2020/2021 Policy's Contamination Exclusion applied to bar coverage. *Id.*

The same day, Tapestry provided FM with Tapestry's preliminary proof of loss in the gross amount of \$707,481,158. *Id.* ¶ 313. About a month later, on July 21, 2021, FM issued a second letter to Tapestry denying coverage for its claims under both Policies' under all coverages with the sole exception of the Communicable Disease Response and Interruption by Communicable Disease coverages. *Id.* ¶ 314. Just like its June 22, 2021 letter, FM's July 21, 2021 letter claimed that COVID-19 could not cause physical loss or damage to trigger various of the Policies' coverages. *Id.* None of the letters or emails FM issued to Tapestry set forth the rationale for FM's determination that "the presence of COVID-19 does not cause physical loss or damage," nor did FM provide any evidence or support for such a determination. *Id.* ¶ 325. As of the filing of the FAC, FM had not paid anything towards Tapestry's losses. *Id.* ¶ 7.

Based on these allegations, Tapestry filed its operative FAC on October 14, 2021, in which it seeks a declaratory judgment to determine the scope of the parties' rights and

obligations under the Policies. *Id.* ¶¶ 11, 327-33. Specifically, Tapestry seeks an order requiring FM to provide coverage to Tapestry under multiple coverages in the Policies. *Id.* Tapestry also seeks damages for breach of contract for FM's failure to pay its covered losses. *Id.* ¶¶ 334-38.

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Designation of Appellant

Pursuant to Md. Rule 8-305, Plaintiff Tapestry is designated as appellant, and Defendant FM is designated as appellee.

Conclusion

IT IS ORDERED this 25th day of April, 2022 that:

1. The following question is certified to the Maryland Court of Appeals:

When a first-party, all-risk property insurance policy covers “all risks of physical loss or damage” to insured property from any cause unless excluded, is coverage triggered when a toxic, noxious, or hazardous substance—such as Coronavirus or COVID-19—that is physically present in the indoor air of that property damages the property or causes loss, either in whole or in part, of the functional use of the property?

2. Pursuant to Md. Code Ann., Cts & Jud. Proc. § 12-604, the Maryland Court of Appeals, acting as the receiving court, may reformulate the certified question;

3. Plaintiff Tapestry shall be treated as Appellant and Defendant FM shall be treated as Appellee;

4. The Court hereby ADMINISTRATIVELY CLOSES this case while the certified question is pending in the Maryland Court of Appeals. Within ten (10) days of the Maryland Court of Appeals’ decision on the certified question, or its decision not to accept a certified question, the Parties shall file a status report with the Court that outlines a proposed schedule for further proceedings in this case.

5. The Clerk of the Court shall transmit copies of this Certification Order to counsel for the parties; and

6. Pursuant to Md. Rule 8-305(b), the Clerk of the Court shall transmit this Certification Order and seven certified copies to the Maryland Court of Appeals, together with the filing fee of \$61, payable to the Clerk of the Court of Appeals. Upon receipt of a written

