

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

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Benihana, Inc.,	:	
21500 Biscayne Boulevard, Suite 900	:	
Aventura, FL 33180	:	Index No.:
	:	
<i>Plaintiff,</i>	:	<u>SUMMONS</u>
	:	
v.	:	
	:	
Allied World Assurance Co., (U.S.) Inc.,	:	
199 Water Street, Floor 24	:	
New York, New York 10038	:	
	:	
and	:	
	:	
Axis Surplus Insurance Company	:	
111 South Wacker Drive, Suite 3500	:	
Chicago, IL 60606	:	
	:	
and	:	
	:	
James River Insurance Company	:	
6641 West Broad Street, Suite 300	:	
Richmond, VA 23230	:	
	:	
and	:	
	:	
Maxum Indemnity Company	:	
355 North Point Parkway, Suite 500	:	
Alpharetta, GA 30005	:	
	:	
<i>Defendants.</i>	:	
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TO THE ABOVE-NAMED DEFENDANTS:

PLEASE TAKE NOTICE THAT YOU ARE HEREBY SUMMONED to answer the complaint of the plaintiff herein and to serve a copy of your answer on the plaintiff at the address indicated below within 20 days after the service of this Summons (not counting the day of service itself), or within 30 days after service is complete if the Summons is not delivered personally to you within the State of New York.

YOU ARE HEREBY NOTIFIED THAT should you fail to answer, a judgment will be entered against you by default for the relief demanded in the complaint, along with costs and disbursements of this action.

Venue is proper in New York County, pursuant to New York C.P.L.R. § 503(a), because a substantial portion of the events or omissions giving rise to the claim occurred in this county. In addition, also pursuant to New York C.P.L.R. § 503(a) and (c), because at least one party, Allied World Assurance Co., (U.S.) Inc., resides in New York County.

Dated:
New York, New York
February 1, 2022

Defendants' Addresses:

Allied World Assurance Co., (U.S.) Inc.,
199 Water Street, Floor 24
New York, New York 10038

and

Axis Surplus Insurance Company
111 South Wacker Drive, Suite 3500
Chicago, IL 60606

and

James River Insurance Company
6641 West Broad Street, Suite 300
Richmond, VA 23230

and

Maxum Indemnity Company
355 North Point Parkway, Suite 500
Alpharetta, GA 30005

/s/ Greg G. Gutzler

DICELLO LEVITT GUTZLER LLC

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Plaintiff,

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Index No.:

COMPLAINT AND JURY DEMAND

Plaintiff, Benihana, Inc. (“Benihana”), as and for its complaint against Defendants Allied World Assurance Co., (U.S.) Inc. (“AWAC”), Axis Surplus Insurance Co. (“Axis”), James River Insurance Company (“James River”), and Maxum Indemnity Company (“Maxum”) (collectively “the Insurers”), alleges as follows:

NATURE OF THE LAWSUIT

1. This action arises out of Benihana’s pursuit of—and the failure of its commercial property insurers to provide—insurance coverage for Benihana’s significant losses incurred in the wake of the novel SARS-CoV-2¹ outbreak.

2. Benihana owns and operates leading sushi and Japanese steakhouse restaurant chains throughout the United States, the Caribbean and Central and South America.

3. Benihana owns 66 Benihana Japanese teppanyaki restaurants and franchises ten more. The company continues to own and operate the Benihana, Haru Sushi, RA Sushi and Samurai full-service restaurants among ninety locations within twenty-three states.

4. Benihana began in 1964 as a family business with a single restaurant in Manhattan, New York. It quickly grew to become recognized as a cultural icon and to acquire Kyoto, Samurai, Haru Sushi and RA Sushi restaurants. To date, Benihana Inc. employs nearly 6,200 employees.

5. Like virtually every other business across the country, Benihana’s business has been ravaged by SARS-CoV-2, sometimes called “Coronavirus” or by one of the names of the disease that it causes and that spreads it “COVID-19.” For ease of reference, SARS-CoV-2 will be referred to as COVID-19 herein.

6. Due to the physical presence of COVID-19 both in the air and on the surfaces of the insured property, the resulting pandemic and/or the related closure orders, Benihana has suffered “direct physical loss or damage”—under the plain and ordinary meaning of that term—because COVID-19 made the properties unusable in a way that they had been used before COVID-19.

¹ The terms for the virus (“SARS-CoV-2,” “Coronavirus, and the virus), and the term for the disease that it causes (COVID-19) are used interchangeably herein and should be read in context for reference to the virus, the disease, or both. For simplicity, COVID-19 is used as the predominant term.

7. Instead of being able to host a full house of guests for lunch and dinner, Benihana was left with no choice but to both discontinue and substantially reduce its operations due to the presence of COVID-19 at its covered locations and the resultant closure orders. For Benihana to do otherwise would lead to the continued emergence or re-emergence of COVID-19 at the insured properties. Until COVID-19 was brought a bit more under control, even such limited operations were not possible.

8. This loss is “direct”²—Benihana is not asking the Insurers to reimburse it after someone obtained a judgment against Benihana for getting them sick. That might be an indirect loss. Rather, Benihana is asking the Insurers to pay for its loss of business income occasioned directly by being unable to use its insured properties for their intended business function. Further, COVID-19 was not only a substantial factor in causing the loss, **it also was the predominant or immediate factor in causing the loss or damage:** COVID-19 was close in proximity to the loss or damage, such that any ordinary person would think that the loss or damage was in the zone of danger of COVID-19.

9. This loss is physical.³ COVID-19 structurally altered the surfaces of the covered properties and ambient air within the covered properties. The probability of illness prevents the use of the space in no less of a way than, on a rainy day, a crumbling and open roof from the aftermath of a tornado would make the interior space of a business unusable.⁴

² “Direct,” as an adjective, is often defined as something “characterized by close logical, causal or consequential relationship” or something “marked by absence of an intervening agency, instrumentality, or influence” or something “proceeding from one point to another in time or space without deviation or interruption.” <https://www.merriam-webster.com/dictionary/direct>.

³ Relevant definitions of “physical” make clear that the term describes something “having material existence” or something “perceptible especially through the senses.” <https://www.merriam-webster.com/dictionary/physical>.

⁴ Note, however, that Plaintiff is not seeking recovery for its loss of use. Plaintiff is seeking coverage for its loss of business income. Here is an example that drives home the difference: some law firms have been unable to use their

10. Civil authority closure orders throughout the country have imposed a physical limit on covered locations, *e.g.*, by limiting restaurant operations from using 100% of the physical space, even when Benihana' locations were not completely shut down. Benihana has been unable to fully use its physical spaces and has had to comply with federal safety guidelines and initiate losses and damage which are both expensive and necessary.

11. This loss is a loss.⁵ It is the loss of functionality of the space for business purposes. It is the diminishment of the physical spaces throughout the insured restaurants. What once could hold many people now can only safely hold only a few. It is injury and structural change to ambient air within Covered Property and the surfaces of Covered Property.

12. Given its roots and persistent presence in nearly half of the states within the U.S. country and other countries across the globe, Benihana purchased broad "all risk" property insurance from the Insurers to protect it in the event Benihana suddenly had to suspend operations for reasons outside of its control, including disasters such as a global pandemic and the presence of a communicable disease at the covered locations, or if it had to act to prevent further property damage.

13. Under the policies of insurance issued by the Insurers effective from June 30, 2019 to June 30, 2020 (collectively, "the 2019 Policies"), physical loss of property necessarily includes the lost physical space that Benihana can no longer fully utilize due to COVID-19 and the Closure Orders.

office space because of COVID-19, but nevertheless the law firms' business income has increased, and they thus have faced no loss of business income. A claim by such a law firm for not being able to use its office space would be a "loss of use" claim. The law firm would have no loss of business income claim. Here, Plaintiff's business has decreased because of the impairment of its properties, and Plaintiff is seeking the loss of business income under the business interruption coverage of its property insurance policies.

⁵ Definitions of "loss" include not only "destruction" and "ruin," but also "deprivation," and synonyms for "loss" include "deprivation," "dispossession," and "impairment."

14. The impairment of the business function is also damage to Benihana's businesses.⁶

15. Significantly, although many insurance policies issued in the United States that cover business interruption (though not the Policies) contain an exclusion identical or very similar to the Insurance Services Office ("ISO") Form CP 01 40 07 06, adopted in 2006 following the onset of the SARS Epidemic titled "Amendatory Endorsement – Exclusion of Loss Due to Virus or Bacteria," none of the 2019 Policies contain such an exclusion ("the 2019 Policies").

16. The ISO Form CP 01 40 07 06 ("the 2006 ISO exclusion") exclusion and those like it typically state: "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." When preparing this exclusion to be placed in some policies, but not others, the insurance industry drafting arm, ISO, circulated a submission, ISO Circular LI-CF-2006-175, to state insurance regulators. The ISO Circular is attached hereto as **Exhibit A**.

17. By virtue of the 2006 ISO exclusion, the Insurers unquestionably knew exactly how to exclude coverage for loss caused by or resulting from any virus yet *chose not to do so*. Indeed, *the Policies contain no such virus exclusion applicable to Benihana's covered losses*.

18. Simply put, Benihana is owed the full amount of coverage available under the 2019 Policies, which includes coverage for the losses suffered by Benihana as a result of the global COVID-19 pandemic and the actual presence and contamination of the insured locations by COVID-19.

19. Benihana turned to the Insurers for the promises they made and Benihana reasonably expected they would oblige. Instead, without conducting a reasonable investigation or considering supporting evidence, or even stepping foot on any one of the ninety plus insured

⁶ Damage is often defined simply as "loss or harm resulting from injury," but it is also defined as expense and cost. Synonyms for "damage" include "impairment," "deprivation," and "detriment." <https://www.merriam-webster.com/dictionary/damage> and <https://www.thesaurus.com/browse/damage?s=t>

properties, the Insurers have, by written communications to Benihana, refused to pay Benihana a single dollar of the 2019 Policies' coverage for its substantial losses. In so refusing, the Insurers have materially breached the parties' insurance contracts and are liable for the full amount of coverage afforded by the Policies. Upon information and belief, the Insurers have on a nationwide scale opted to protect their fiscal interests at the expense of their insured's interests and with conscious disregard for the rights, interests, and reasonable expectations of their insureds, including Benihana.

20. The Insurers have left Benihana with no choice but to file this action to recover the amounts owed to it for which it paid substantial premiums, to obtain a declaration of its right to coverage, and to recover other damages and amounts incurred because of the Insurers various breaches of the Policies, including its breach of the implied covenant of good faith and fair dealing.

THE PARTIES

21. Benihana is a foreign business corporation organized and existing under the laws of the state of Delaware with its principal place of business in Aventura, Florida.

22. Allied World is a foreign business corporation organized and existing under the laws of the state of Delaware with its principal place of business in New York, New York. For the period of June 30, 2019 to June 30, 2020 ("the 2019 Policy Period"), Allied World issued to Benihana, and its subsidiaries⁷ and related companies, Policy No. 0311-9099-1A.

⁷ The named insureds under the 2019 Policies include: Benihana National Corp., Benihana Chandler Corp., Benihana International Inc., RA Ahwatukee Restaurant Corp., RA Scottsdale Corp., RA Sushi Tuscan Corp., Benihana of Puente Hills Corp., Benihana Ontario Corp., Benihana Carlsbad Corp., Benihana Encino Corp., RA Sushi Tustin Corp., RA Sushi Chino Hills Corp., Benihana Sunrise Corp., RA Sushi Corona Corp., Benihana Santa Anita Corp., Benihana Broomfield Corp., The Samurai Inc., Benihana National of Florida, Big Splash Kendall Corp., Benihana Orlando Corp., Benihana Coral Springs Corp., RA Sushi Pembroke Pines Corp., RA Sushi Atlanta Midtown Corp., Benihana Lombard Corp., Benihana Schaumburg Corp., Benihana Wheeling Corp., RA sushi Lombard Corp., RA Sushi Leawood Corp., Benihana Bethesda Corp., RA Sushi Baltimore Corp., Maxwells International Inc., Benihana Bloomington Corp., RA Sushi Las Vegas Corp., Haru Wall Street Corp., Benihana New

23. Axis is a foreign business corporation organized and existing under the laws of the state of Illinois with its principal place of business in Alpharetta, Georgia. For the 2019 Policy Period, Axis issued to Benihana and its subsidiaries Policy No. EAF639417-19.

24. James River is a foreign business corporation organized and existing under the laws of the state of Ohio with its principal place of business in Richmond, Virginia. For the 2019 Policy Period, James River issued to Benihana and its subsidiaries Policy No. 0093055-0.

25. Maxum is a foreign business corporation organized and existing under the laws of the state of Delaware with its principal place of business in Alpharetta Georgia. For the 2019 Policy Period, Maxum issued to Benihana and its subsidiaries Policy No. MSP-6034798-01.

26. At all times material hereto, the Insurers conducted and transacted business through the selling and issuance of insurance policies within New York, including selling, and issuing commercial property coverage to Benihana and its subsidiaries.

JURISDICTION AND VENUE

27. This Court has jurisdiction over the claims asserted in the Complaint pursuant to Judiciary Law §140-b.

28. This Court has jurisdiction over the Insurers pursuant to CPLR §301 because the Insurers were, at all relevant times, authorized to transact business in the State of New York and/or contracted to supply services within the State of New York and this action arises from such transactions and/or contracts.

York Corp. F/K/A Benihana Frozen Food Corp., Haru Amsterdam Avenue Corp., Haru Food Corp., 1501 Broadway Restaurant Corp., Benihana Columbus Corp., Benihana National Corp., Teppan Restaurants Ltd., Benihana Plymouth Meeting, Benihana Las Colinas Corp., Banihana Woodlands Corp., RA Sushi Plano Corp., Benihana of Texas Inc., RA Houston Corp., Benihana of Texas Inc., Benihana Plano Corp., RA Sushi City Center Corp., Benihana of Texas Inc., RA Sushi Addison Corp., RA Sushi Southlake Corp., RA Sushi Austin Corp., Benihana Downey Corp., Benihana Las Vegas Corp., RA Sushi Town Square Corp., Haru Hells Kitchen Corp., Benihana Boca Raton Corp., and Benihana Chicago Corp.

29. This Court also has jurisdiction over the claims asserted in this matter because the Insurers functioned as co-venturers in providing insurance for the same risks and where jurisdiction over one defendant involved in a joint venture, jurisdiction over all co-ventures is proper.

30. Venue is proper in this county because AWAC, as the lead insurer, resides and has resided there at all relevant times hereto, including when the time the instant action was commenced. A substantial part of the events or omissions giving rise to the claim occurred there.

FACTUAL BACKGROUND

A. The “All-Risk” Commercial Property Policies and Applicable Grants of Coverage

31. In return for the payment of substantial premiums in excess of \$650,000, the Insurers sold to Benihana and its subsidiaries commercial property policies of insurance for the period of June 30, 2019 to June 30, 2020. The insurance is comprised of four policies issued to Benihana and its subsidiaries attached hereto as **Exhibits B-E**, respectively. Defendant AWAC is the primary “lead insurer.” Herein, Benihana cites to AWAC Policy No. 0311-9099-1A (**Exhibit B**) as the “2019 AWAC Policy” or the “Lead Policy” and intends references to the terms of the AWAC policy to equally apply to the terms of all of the policies issued by the Insurers during the 2019 Policy Period unless otherwise stated.

32. The 2019 Policies insure Benihana, Inc. and the above referenced named insured subsidiaries.

33. The Territory of the Lead Policy is the fifty states comprising the United States of America, the District of Columbia, and Canada.

34. Benihana has performed all of the obligations to the Insurers, including payment of premiums.

35. Each of the policies participates in a share of \$50 million in layered coverage.

36. The Lead Policy issued by AWAC provides limits of liability up to \$5 million per occurrence in primary coverage. Per the Schedule of Limits and Sublimits, Sublimits of the Lead Policy include but are not limited to: 1) \$50,000,000 Per Occurrence for all business interruption; \$25,000,000 Per Occurrence for Extra Expense, \$2,500,000 Per Occurrence, Contingent Time Element, \$5,000,000 Per Occurrence, Attraction Property, \$1,000,000 Per Occurrence, Decontamination Costs, 90 days/\$10 million Civil or Military Authority – within five statute miles; and 48 hours/\$5,000,0000 Preservation of Property.

37. Axis provides the first layer of excess coverage with liability limits of \$5 million per occurrence.

38. The 2019 James River policy provides up to \$20 million liability limits Per Occurrence as part of a \$40,000 excess layer of coverage.

39. The Maxum policy provides the remaining limits of up to \$20 million Per Occurrence as part of the \$40,000 excess layer of coverage.

40. The Axis, James River, and Maxum policies each have “following form” excess property coverage forms which follow the terms, definitions, conditions, and exclusions of the 2019 AWAC Policy. Therefore, where there is a conflict between the 2019 AWAC Policy and one of the excess policies, the terms of the 2019 AWAC Policy apply. Furthermore, to the extent the excess policies conflict with the statutes of the state where the Policy was issued, they are amended to conform to the minimum requirements of those statutes in force and effect where the Policy was issued. *See e.g.*, Axis Policy at § 10(e).

41. Under the heading “Perils Insured Against,” the Lead Policy insures against “all risks of direct physical loss or damage to property... except as hereinafter excluded.”

42. Covered Property includes the “interest of the Insured in all Real and/or Personal Property, including improvements and betterments and alterations owned or used by the Insured” and also includes the “[t]he interest of the Insured in Real and Personal Property of others in the Insured’s care, custody or control,” “Personal Property of the Insured’s officers and employees while on premises of the Insured,” and “Contractors’ interest in property covered to the extent of the Insured’s liability imposed by law or assumed by contract.” Coverage is also “automatically extended to cover additional property” “which may be purchased, leased or acquired during the policy period.”

43. Losses due to COVID-19 are “Perils Insured Against” under the 2019 Policies.

44. The Lead AWAC Policy agrees to pay for Business Interruption loss “resulting from necessary interruption of business conducted by the Insured and caused by direct physical loss or damage by any of the perils covered herein during the term of this policy to Real and/or Personal Property as covered herein.” Such loss shall be adjusted on the basis of the actual loss sustained by the Insured during the period of restoration.

45. “Interruption” is not defined by the Insurers, but that term reasonably means to Benihana a partial or complete slowdown or cessation of some or all of the business activities, services, and offerings of the Insured at Covered Property.

46. Under the AWAC Policy, Business Interruption losses consist of the net profit (or loss) which is prevented from being earned and of “all charges and expenses (excluding ordinary payroll), but only to the extent that they must necessarily continue during the interruption of the business, and only to the extent to which they would have been incurred had no loss occurred.”

47. Period of Restoration means the period of time that: (a) Begins with the date of direct physical loss or damage by any of the perils covered herein, at the described premises; and (b)

Ends on the date when the property at the described premises should be repaired, rebuilt, or replaced with reasonable speed and similar quality. The expiration date of the policy does not cut short the period of restoration.

48. The Insurers also agreed to pay reasonable and necessary Extra Expense, i.e., excess costs necessarily incurred to continue the operation of the Insured's business or facility that would not have been incurred had there been no loss or damage by any of the perils.

49. The Insurers also agreed to pay for an Insured's loss of rental value, i.e., the loss sustained by the Insured resulting from the necessary untenability, during the period of restoration caused by loss, damage, or destruction by any covered perils. In relevant part, rental value means the total anticipated gross rental income. The Insurers also agreed to provide coverage for Expense to Reduce Loss necessarily incurred for the purpose of reducing any covered Rental Value loss.

50. The Insurers also agreed to provide Contingent Business Interruption Coverage when direct physical loss of or damage to insured property causes an Insured to suffer loss or damage of the type insured to property at any locations of direct suppliers or customer.

51. The Insurers also agreed to provide Preservation of Property and "Sue and Labor" coverage for losses incurred when there is actual *or imminent* loss or damage by a peril insured and the Insured takes lawful and necessary measures to safeguard, recover, save, and preserve any part of the property.

52. The Insurers also provide an extension of coverage for the interruption of business conducted by the Insured resulting from loss or damage, by the perils insured against, during the term of the AWAC policy, to: (c) any property when access to the premises is prohibited by order of civil or military authority, for a period not exceeding two (2) weeks.

53. The Insurers also agreed to cover “expenses as are necessarily incurred” for the purpose of reducing any Business Interruption loss (“Expense to Reduce Loss”), such that coverage shall not exceed the amount by which the Business Interruption loss covered under the policy is reduced.

54. Losses caused by COVID-19 and the related orders issued by local and state authorities triggered, at minimum, coverage for Business Interruption, Extra Expense, Rental Value, Contingent Business Interruption and Civil Authority losses. Benihana also incurred losses for Sue and Labor, and Expense to Reduce Loss.

55. The Axis, James River and Maxum policies are follow-form excess commercial property policies under which liability attaches to each respective company after direct, physical loss or damage occurs to covered property; the loss exceeds the Limit of Liability of the Underlying Insurance (plus the applicable amount of the deductible(s) or self-insurance retention(s)); and the Company(ies) providing Underlying Insurance have paid the full amount of their respective liability. Each 2019 Policy was issued pursuant to Florida Surplus Lines Law.

56. The Lead 2019 Policy has a “CONTAMINANTS” or “ POLLUTANTS” exclusion which is inapplicable because COVID-19 is not a pollutant and is naturally occurring. The presence of COVID-19 is not the result of a release, discharge, escape, or dispersal. COVID-19 does not fall within this definition and is not identified within any of the legislation listed in the exclusion.

57. Benihana reasonably understood the pollution and contamination exclusion to apply to traditional environmental pollution and contamination, such as discharge or seepage of hazardous waste or other environmental pollution liability rather than communicable disease such as COVID-19. COVID-19 is not a material either. For similar reasons, coverage for

Benihana's loss is not precluded under the Pollutants or Contaminants exclusion within the 2019 Axis Policy.

58. Benihana had a coverage arrangement in place for the June 30, 2020 to June 30, 2021 period ("the 2020 policy period") similar to that in place over the 2019 Policy Period. Under the 2020 Policy Period, AWAC was again the lead insurer whose policy provided limits of \$5,000,000 in primary coverage per occurrence. Significantly, however, the AWAC policy added a brand new communicable disease exclusion to this renewal policy, which unlike the Lead 2019 Policy, makes clear the lead 2020 Policy "does not insure loss of any kind, including but not limited, any loss of income, loss of use, loss of access, extra expense or consequential loss, directly or indirectly caused by, resulting from, contributed to by, arising out of, attributable to or occurring concurrently or in any sequence with a 'communicable disease' or the fear or threat (whether actual or perceived) of a 'communicable disease.'" The Lead 2020 Policy is attached hereto as **Exhibit F**.

59. The next layer of coverage under the 2020 Policy Period was again issued by Axis and provided up to \$5,000,000 in first layer excess coverage per any one occurrence. This policy also added a brand-new exclusion that was not in the preceding 2019 Axis first layer excess policy—the EXCLUSION OF LOSS OR DAMAGE DUE TO VIRUS OR BACTERIA. In critical part, this exclusion provides: "We will not pay for loss or damage to covered property caused by or resulting from, contributed to, or made worse by, actual, alleged, or suspected presence of any virus, bacterium or microorganism that induces or is capable of inducing physical distress, illness or disease. ..." The 2020 Axis Policy is attached hereto as **Exhibit G**.

60. James River participated in a \$40 million layer of excess coverage contributing up to \$30,000,000 Per Occurrence of the \$40,000,000 layer under its 2020 Policy. Princeton Excess

and Surplus Lines Insurance Company participated in the same excess layer of coverage as James River with a policy extending liability limits of \$10,000,000 per occurrence (“the 2020 Princeton Policy”). While the only reference to “virus” under the Maxum policy at play over the 2019 policy was related to computer virus, the Princeton policy contains a virus or bacteria exclusion which closely resembles the 2006 ISO Exclusion. The 2020 Princeton Policy is attached hereto as **Exhibit H**.

B. The Risk Insured Against in the Policies

61. The coronavirus and coronavirus-containing respiratory droplets and nuclei are physical substances that are active on physical surfaces and are also emitted into the air. Such substances are not theoretical, intangible, or incorporeal, but have a material existence and are physically dangerous. Fomites, droplets, droplet nuclei, and aerosols containing the coronavirus are dangerous physical substances that have a tangible existence.

62. Severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) is a betacoronavirus that is genetically related to several other zoonotic coronaviruses, including SARS-CoV-1, the etiological agent of SARS. SARS-CoV-2 causes coronavirus disease 2019 (COVID-19) in humans. SARS-CoV-2 has glycoprotein “spikes” that can bind to human angiotensin converting enzyme 2 (ACE-2) receptors, which is present on human respiratory epithelial cells. After binding to ACE-2, the virus can enter the cells and make copies of itself, which are then released. These released infectious viral particles are then expelled in respiratory secretions as respiratory droplets into a multiphase, turbulent gas cloud during breathing, coughing, sneezing, talking, and singing. There are large and small respiratory droplets within the cloud. Large respiratory droplets can infect other people either directly, through direct contact with respiratory mucosal surfaces, or indirectly, by contaminating surfaces which are then touched by another person who

subsequently touches his or her mouth, nose, or eyes. The small droplets remain in the air as an aerosol, which can remain suspended in the air for hours, travel prolonged distances indoors along air currents induced by the heating and ventilation (“HVAC”) system, and travel from room to room, infecting people directly through contact with, and inhalation of, the aerosol. Particles from the aerosol can also contaminate surfaces.

63. According to the World Health Organization (“WHO”), the incubation period for COVID-19—*i.e.*, the time between exposure to the coronavirus and symptom onset—can be up to 14 days. Other studies suggest that the period may be up to 21 days. Before infected individuals exhibit symptoms, *i.e.*, the so-called “pre-symptomatic” period, they are most contagious, as their viral loads will likely be extremely high, and they may not know they have become carriers. In addition, studies from the CDC and others estimate that between 40% to 70% of infected individuals may never become symptomatic (referred to as “asymptomatic” carriers). Pre and asymptomatic carriers are unaware that they are spreading the coronavirus by merely touching objects and surfaces, or by expelling droplets into the air. The National Academy of Sciences has found that most of the transmission is attributable to people who are not showing symptoms, either because they are pre-symptomatic or asymptomatic.

64. The virus cannot be observed by the human eye without enhancement. No one can see the virus and this, of course, makes it difficult to eliminate the virus, or eradicate its transmission. The presence of the virus is only observed through the infection rate in a particular area.

65. The presence of the virus in a community, evidenced by infection rates, makes it more probably true than not, that the live virus has been transferred in the air and to objects and surfaces. SARS-Co-V-2 spread is logarithmic.

66. Aerosol, droplet, and fomite transmission are the basis for social distancing, hand washing, stay-at-home orders, home-shelter orders, distance learning, reduced capacity and/or occupancy limits, and other measures implemented in various executive orders, including the Closure Orders from the State of New York and New York City. The virus is physically present in the community, including in the air and on objects and surfaces. Aerosol and fomite transmission are real, and due to constant recontamination of air and surface areas, it is simply impossible to entirely eradicate the virus from indoor spaces and such surfaces if there continue to be unmasked people in the area.

67. COVID-19 causes physical loss and damage by, among other things, destroying, distorting, corrupting, attaching to, and physically altering property, including its surfaces, and by rendering property unusable, uninhabitable, unfit for intended function, dangerous (potentially deadly) and unsafe. COVID-19 has caused such physical loss and damage to Plaintiff's properties, as described further below.

68. *First*, respiratory droplets (*i.e.*, droplets larger than 5-10 μm) expelled from infected individuals land on, attach, and adhere to surfaces and objects. In doing so, they structurally change the property and its surface by becoming a part of that surface. This structural alteration makes physical contact with those previously safe, inert surfaces (*e.g.*, fixtures, handrails, furniture) unsafe.

69. According to the WHO, people can become infected with the coronavirus by touching such objects and surfaces, then touching their eyes, nose, or mouth. This mode of transmission—indirect transmission via objects and surfaces—is known as “fomite transmission.” As the WHO has noted, fomite transmission is “a likely mode of transmission for SARS-CoV-2” because studies have consistently confirmed the existence of virus-laden droplets on objects and surfaces

“in the vicinity of infected cases,” and because it is well known that other coronaviruses can be transmitted via fomite transmission.⁸

70. A study of a COVID-19 outbreak published in the CDC’s Emerging Infectious Diseases journal identified indirect transmission via objects such as elevator buttons and restroom taps as an important possible cause of a “rapid spread” of the coronavirus in a shopping mall in Wenzhou, China.⁹

71. Research has indicated that the coronavirus can be detected on certain surfaces even weeks after infected persons are present at a given location.

72. In a study by the U.S. National Institutes of Health, researchers found that the coronavirus was detectable for up to three hours in aerosols, four hours on copper, up to 24 hours on cardboard, and up to three days on stainless steel and plastic surfaces.¹⁰

73. Another study found that the coronavirus remains active and dangerous on plastics for at least three days, while another reported that the coronavirus remained stable and viable for seven days on a range of common surfaces, including stainless steel, plastic, glass, and wood.¹¹ Another study even detected viable coronavirus samples on stainless steel and glass for approximately one month if left at or around room temperature. All these materials are used at Benihana locations.

⁸ See <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions>

⁹ See https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article

¹⁰ See <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hourssurfaces>

¹¹ See <https://www.nejm.org/doi/full/10.1056/nejmc2004973>;
<https://www.medrxiv.org/content/10.1101/2020.05.07.20094805v1.full.pdf>;
<https://virologyj.biomedcentral.com/articles/10.1186/s12985-020-01418-7>

74. When the coronavirus and COVID-19 attach to and adhere on surfaces and materials, they become a part of those surfaces and materials, converting the surfaces and materials to fomites.¹² This represents a physical change in the affected surface or material, which constitutes physical loss and damage.

75. Merely cleaning surfaces may reduce but does not altogether eliminate the risk of transmission amongst people. There may be surfaces with residual infectious virus, and aerosolized infectious particles. In other words, disinfection is temporary at best; however, a space may remain contaminated if an aerosol is present, and immediately become contaminated thereafter if another infected person is present in the area. This contamination will provide a constant modality for infection to people.

76. When cleaning dust and debris, it is possible to verify their removal because they are visible to the naked eye. However, because COVID-19 is not detectable by the human eye, Plaintiff's staff and outside personnel were unable to verify the covered properties were free of virus.

77. **Second**, when individuals carrying the coronavirus breathe, talk, cough, or sneeze, they expel aerosolized droplet nuclei (*i.e.*, those smaller than 5 μm) that remain in the air and, like dangerous fumes, make the premises unsafe and affirmatively dangerous. This process alters the structural properties of air in buildings from safe and breathable to unsafe and dangerous.

78. Aerosol transmission is believed to be a common mode of transmission in many settings. Aerosols can be generated through simple breathing, as well as heavier breathing while, for example, exercising at a health club. According to research published in The Journal of the American Medical Association, a person who sneezes can release a cloud of pathogen-bearing

¹² See <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions>

droplets that can span as far as 23 to 27 feet.¹³ If a person is infected with SARS-CoV-2, whether symptomatic or asymptomatic, infectious viral particles will be aerosolized into the air through their breathing. Infection clusters suggest that aerosol, droplet, and fomite transmission explain SARS-CoV-2 transmission amongst humans.

79. Airborne viral particles are known to have spread into a building's HVAC system, leading to transmission of the coronavirus from person to person. One study found the presence of the coronavirus within the HVAC system servicing hospital ward rooms of COVID-19 patients. This study detected SARS-CoV-2 RNA in ceiling vent openings, vent exhaust filters, and central ducts that were located more than 50 meters from the patients' rooms.¹⁴

80. The Environmental Protection Agency ("EPA") has compiled several studies reflecting "epidemiological evidence suggestive of [coronavirus] transmission through aerosol."¹⁵ Based on these and other studies, the EPA has recommended that buildings make improvements to their HVAC systems by, for example, increasing ventilation with outdoor air and air filtration.¹⁶

81. The Center for Disease Control and Prevention ("CDC") has updated the guidance for fully vaccinated people. The guidance includes making improvements on HVAC systems to insure the maximization of ventilation. The CDC also recommends adding portable air cleaners that use high-efficiency particle air filters to enhance air cleaning and ultraviolet germicidal irradiation as a supplemental treatment to inactivate the virus.¹⁷

¹³ See <https://jamanetwork.com/journals/jama/fullarticle/2763852>.

¹⁴ See <https://www.researchsquare.com/article/rs-34643/v1>

¹⁵ See <https://www.epa.gov/coronavirus/indoor-air-and-covid-19-key-references-andpublications>

¹⁶ See <https://www.epa.gov/coronavirus/indoor-air-and-coronavirus-covid-19>

¹⁷ See <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/ventilation.html>

82. The scientific fact that SARS-CoV-2 alters the structure of property within a restaurant or office is shown in the preceding paragraphs, and is further proven from recent scientific studies that identify and measure the physical changes to property that occur when the virus encounters property, as follows:

- a. The “coronavirus” terminology stems from the spike protein that is stationed along the attack edge of the virus, where the spike protein is ready for chemical battle. Nature purpose-built the spike protein to chemically bond the virus to anything physical that the virus encounters, including property in an office or restaurant. The spike protein “represents a viral fusion protein with a club-like shape of approximately 25 nm in length, as confirmed by cryo-EM measurements.”¹⁸
- b. Nature equipped the spike protein with a positive charge that arms the spike protein to chemically attack any office or restaurant surface with a negative charge, including metal, wood, cotton, and glass. Opposites attract, and a chemical bond is made between virus and property whenever virus encounters property. The chemical bond that the spike protein causes between the virus and property is a structural alteration of property. Amino acids in the spike protein drive absorption onto “solid surfaces through double electrostatic interactions” between the ionized spike protein “and the oppositely charged surfaces.”¹⁹ In addition, there may also be “hydrogen bonding based on the surface

¹⁸ Adamczyk, *et al.*, SARS-CoV-2 virion physicochemical characteristics pertinent to abiotic substrate attachment Figure 1, Current Opinion in Colloid & Interface Science (Vol. 55 Jun 2, 2021), available at <https://tinyurl.com/2m6pf7e9>.

¹⁹ Joonaki, *et al.*, Surface Chemistry Can Unlock Drivers of Surface Stability of SARS-CoV-2 in a Variety of Environmental Conditions, at 2137, CHEM (Sept. 10, 2020), available at <https://tinyurl.com/2vpwdezX>.

characteristics.”²⁰ The hydrogen bonding that the spike protein causes between the virus and property is a structural alteration of property.

- c. The spike protein also increases the roughness of the surface of property when it chemically bonds to the surface of property in an office or restaurant. The increased roughness that the virus inflicts upon property is another structural alteration of property caused by the virus. “After spike protein adsorption, all the surfaces become rough with the obvious binding of spike protein.”²¹
- d. The spike protein also makes property more water repellent (*i.e.*, more hydrophobic) when it chemically bonds to the surface of property in an office or restaurant. The increased hydrophobic state of property is another structural alteration of property caused by the virus.

83. The scientific studies also further prove that the spike protein on the attack edge of the virus physically alters the air in an office or restaurant, which contains particulate matter. In particular, spike proteins bond to minerals, soot, and plastics found in particulate matter.²²

84. The spike protein of the virus caused the virus to structurally alter the Covered Property within Plaintiff’s headquarters and restaurants through chemical bonding, hydrogen bonding, increased roughness, and increased hydrophobic state.

85. In the same way that the spike protein of the virus caused the virus to structurally alter the property in Plaintiff’s headquarters and restaurants, it also caused the virus to

²⁰ *Id.*

²¹ Xie, *et al.*, A Nanochemical Study on Deciphering the Stickiness of SARS-CoV-2 on Inanimate Surfaces, ACS Appl Matter Interfaces (Dec. 30, 2020), available at <https://tinyurl.com/yy7x3x92>.

²² Duval, *et al.*, Chemodynamic features of nanoparticles: Application to understanding the dynamic life cycle of SARS-CoV-2 in aerosols and aqueous biointerfacial zones, Adv. Colloid Interface Sci. (Apr. 2021), available at <https://tinyurl.com/v3t9b36e>.

structurally alter the air and property in hospitals, movie theaters, colleges and universities, and other properties nearby Benihana headquarters and restaurants.

86. The presence of COVID-19 at a property further causes physical loss and damage by necessitating remedial measures to reduce or eliminate the presence of cases of COVID-19 and the coronavirus on-site.

87. The presence of the virus, whether circulating or stagnant, has changed the object, surface, or premises, in that it has become dangerous to handle and/or enter, and cannot be used without remedial measures. Its use can only be restored with remedial action and sufficient time for the contaminated air to be evacuated, as suggested by infectious disease experts.

88. The presence of cases of COVID-19 at a property causes physical loss and damage by rendering a property that is usable and safe for humans into a property that, absent remedial measures, is unsatisfactory for use, uninhabitable, unfit for its intended function, and extremely dangerous and potentially deadly for humans.

89. In addition, the presence of COVID-19 on property creates the imminent threat of further damage to that property or to nearby property. Individuals who come into contact, for example, with respiratory droplets at one location in a restaurant by touching a fixture, pressing an elevator button, or gripping a handrail, will carry those droplets on their hands and deposit them elsewhere in the restaurant, causing additional damage and loss.

90. The presence of COVID-19 has caused civil authorities throughout the country to issue orders requiring the whole or partial interruption of business at a wide range of establishments, including civil authorities with jurisdiction over the Covered Locations (the "Closure Orders").

91. There has been sustained transmission of COVID-19 throughout the United States. Many legislative and administrative bodies have found that the outbreak and presence of COVID-19 is property damage. *See, e.g.*, N.Y.C. Emergency Exec. Order No. 100, at 2 (Mar. 16, 2020)²³ (emphasizing the virulence of COVID-19 and that it “physically is causing property loss and damage”). *See also, e.g.*, Broward Cty. Fla. Administrator’s Emergency Order No. 20-01, at 2 (Mar. 22, 2020)²⁴ (noting that COVID-19 “constitutes a clear and present threat to the lives, health, welfare, and safety of the people of Broward County”); Harris Cty. Tex. Office of Homeland Security & Emergency Mgmt., Order of Cty. J. Lina Hidalgo, at 2 (Mar. 24, 2020)²⁵ (emphasizing that the COVID-19 virus can cause “property loss or damage” due to its contagious nature and transmission through “person-to-person contact, especially in group settings”); Napa Cty. Cal. Health & Human Service Agency, Order of the Napa Cty. Health Officer (Mar. 18, 2020)²⁶ (issuing restrictions based on evidence of the spread of COVID-19 within the Bay Area and Napa County “and the physical damage to property caused by the virus”); City of Key West Fla. State of Local Emergency Directive 2020-03, at 2 (Mar. 21, 2020)²⁷ (COVID-19 is “causing property damage due to its proclivity to attach to surfaces for prolonged periods of time”); City of Oakland Park Fla. Local Public Emergency Action Directive, at 2 (Mar. 19, 2020)²⁸ (COVID-19 is “physically causing property damage”); Panama City Fla. Resolution No. 20200318.1 (Mar. 18, 2020)²⁹ (stating that the resolution is necessary because of COVID-19’s propensity to

²³ <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-100.pdf>.

²⁴ <https://www.broward.org/CoronaVirus/Documents/BerthaHenryExecutiveOrder20-01.pdf>.

²⁵ https://www.taa.org/wp-content/uploads/2020/03/03-24-20-Stay-Home-Work-Safe-Order_Harris-County.pdf.

²⁶ <https://www.countyofnapa.org/DocumentCenter/View/16687/3-18-2020-Shelter-at-Home-Order>.

²⁷ https://www.cityofkeywest-fl.gov/egov/documents/1584822002_20507.pdf.

²⁸ <https://oaklandparkfl.gov/DocumentCenter/View/8408/Local-Public-Emergency-Action-Directive-19-March-2020-PDF>.

²⁹ <https://www.pcgov.org/AgendaCenter/ViewFile/Item/5711?fileID=16604>

spread person to person and because the “virus physically is causing property damage”); Exec. Order of the Hillsborough Cty. Fla. Emergency Policy Group, at 2 (Mar. 27, 2020)³⁰ (in addition to COVID-19’s creation of a “dangerous physical condition,” it also creates “property or business income loss and damage in certain circumstances”); Colorado Dep’t of Pub. Health & Env’t, Updated Public Health Order No. 20-24, at 1 (Mar. 26, 2020)³¹ (emphasizing the danger of “property loss, contamination, and damage” due to COVID-19’s “propensity to attach to surfaces for prolonged periods of time”); Sixth Supp. to San Francisco Mayoral Proclamation Declaring the Existence of a Local Emergency, 26 (Mar. 27, 2020)³² (“This order and the previous orders issued during this emergency have all been issued ... also because the virus physically is causing property loss or damage due to its proclivity to attach to surfaces for prolonged periods of time”); and City of Durham NC, Second Amendment to Declaration of State of Emergency, at 8 (effective Mar. 26, 2020)³³ (prohibiting entities that provide food services from allowing food to be eaten at the site where it is provided “due to the virus’s propensity to physically impact surfaces and personal property”); City of Los Angeles “Safer at Home” Order dated March 19, 2020 (Revised May 27, 2020).³⁴

92. Additionally, multiple courts have found that the presence of COVID-19 is property damage. *See, e.g., Pez Seafood DTLA, LLC v. Travelers Indemnity Company*, 514 F. Supp. 3d 1197, 1204-05 (C.D. Cal. Jan. 2021) (collecting cases); *see also Studio 417, Inc. v. Cincinnati Insurance Company*, 478 F. Supp. 3d 794 (W.D. Mo. Aug. 12, 2020); *cf. Mudpie, Inc. v.*

³⁰ <https://www.hillsboroughcounty.org/library/hillsborough/media-center/documents/administrator/epg/saferathomeorder.pdf>

³¹ <https://www.pueblo.us/DocumentCenter/View/26395/Updated-Public-Health-Order---032620>

³² https://sfgov.org/sunshine/sites/default/files/sotf_061020_item3.pdf

³³ https://durhamnc.gov/DocumentCenter/View/30043/City-of-Durham-Mayor-Emergency-Dec-Second-Amdmt-3-25-20_FINAL

³⁴ <https://www.lamayor.org/sites/g/files/wph1781/files/page/file/20200527%20Mayor%20Public%20Order%20SAFER%20AT%20HOME%20ORDER%202020.03.19%20%28REV%202020.05.27%29.pdf>

Travelers Casualty Insurance Company of America, 487 F.Supp.3d 834, 842 n. 7 (N.D. Cal. Sep. 14, 2020), *aff'd*, 15 F.4th 885 (9th Cir. Oct. 1, 2021) (“Had Mudpie alleged the presence of COVID-19 in its store, the Court's conclusion about an intervening physical force would be different. SARS-CoV-2 ... is no less a “physical force” than the “accumulation of gasoline” in *Western Fire* or the “ammonia release [which] physically transformed the air” in *Gregory Packaging*. See *Western Fire*, 437 P.2d at 55; *Gregory Packaging*, 2014 WL 6675934, at *6.”); *AECOM v. Zurich American Insurance Company*, No. 2:21-cv-00237-JAK-MRW, 1, 9 (C.D. Cal. Dec. 1, 2021) (adopting the conclusion that the presence of COVID-19 can cause physical loss or damage to an insured property.); *K.C. Hopps, Ltd. v. Cincinnati Insurance Company, Inc.*, No. 20-cv-00437-SRB, 2021 WL 4302834 *8 (W.D. Mo. Sep. 21, 2021) (recognizing that physical contamination can create physical loss or physical damage which can include physical contamination that renders the property unsafe); *Promotional Headwear Int'l v. The Cincinnati Insurance Company*, 504 F. Supp. 3d 1191, 1198 (D. Kan. 2020) (holding ““direct physical loss” requires some sort of intrusion or contamination on the property”).

93. Continuing into 2021, state and local governments took additional drastic actions in an effort to curb the spread of COVID-19. Several of the continued to restrict indoor dining, established curfews for bars and restaurants, and limit table seating. Each of the restaurants Benihana owns and operates have experienced significant reductions in gross revenues and have incurred additional extra expenses to refurbish, deep clean, sanitize, repair, alter, modify, or otherwise make the restaurants safe for occupancy by employees and customers alike. These additional expenses have become ongoing and recurring costs incurred due to the actual presence of COVID-19 at the covered locations as well as the imminent threat of additional direct physical loss or damage posed by the virus.

C. COVID-19 is not Eliminated by Routine Cleaning

94. Insurers throughout the country have taken the position that properties infested with COVID-19 can be made safe and fit for their intended business functions simply by the routine cleaning of surfaces.

95. In reality, to successfully eliminate the virus, remedial measures must account for the level of concentration of the virus, the type of surfaces at issue, the contact time between decontaminant and virus and extend beyond ordinary or routine cleaning.³⁵

96. Whereas dust and debris may be able to be easily removed by disinfectants, it is extremely difficult to determine whether lingering levels of virus remain following a cleaning. Studies verify that treated surfaces remain susceptible to lingering virus.³⁶

97. No amount of cleaning will prevent individuals from inhaling Coronavirus particles present in the ambient air.

98. Simply put, the continued emergence and reemergence of the virus is not eliminated by cleaning where the virus is prevalent within a community and the insured premises are open to guests that can bring the virus into the property and allow for it to spread within the ambient air and alter the material condition of the surfaces of the covered properties.

99. In fact, the CDC has recently released guidance stating that there is little evidence to suggest that routine use of disinfectants can prevent the transmission of Coronavirus from

³⁵ *Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, CDC (Updated Apr. 5, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html>

³⁶ Joon Young Song et al., *Viral Shedding and Environmental Cleaning in Middle East Respiratory Syndrome Coronavirus Infection*, 47 *INFECTION & CHEMOTHERAPY* 4, 252-55 (Dec. 2015), <https://www.icjournal.org/DOIx.php?id=10.3947/ic.2015.47.4.252>.

fomites in community settings.³⁷ The CDC concluded that according to a more quantitative microbial risk assessment study, “surface disinfection once- or twice-per-day had negligible impact on reducing estimated risks” of Coronavirus transmission.³⁸

100. Recent studies demonstrate that even extraordinary cleaning measures do not remove Coronavirus from surfaces. For example, a 2021 study by the largest hospital network in New York State demonstrated that even after trained hospital personnel used disinfection procedures in Coronavirus patient treatment areas, much of the virus survived in those areas – proving that even intense, non-routine surface cleaning does not remove it from surfaces – let alone from the air.³⁹

101. No reported studies have investigated or confirmed the efficacy of surface cleaning (with soap or detergent not containing a registered disinfectant) for reducing concentrations of Coronavirus on non-porous surfaces.⁴⁰

102. Moreover, courts have rejected the argument that the coronavirus does not alter the property because it can be removed by cleaning.⁴¹

³⁷ *Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, CDC (updated Apr. 5, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html> (last visited Dec. 7, 2021).

³⁸ *Id.* (citing A. K. Pitol & T. R. Julian, Community transmission of SARS-CoV-2 by fomites: Risks and risk reduction strategies, ENV'T SCI. & TECH. LETTERS (2020)).

³⁹ Zarina Brune et al., *Effectiveness of SARS-CoV-2 Decontamination and Containment in a COVID-19 ICU*, 18 INT'L J. ENV'T RSCH. & PUB. HEALTH 5, 2479 (Mar. 3, 2021), <https://www.mdpi.com/1660-4601/18/5/2479> (last visited Dec. 7, 2021).

⁴⁰ *Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, CDC (updated Apr. 5, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html> (last visited Dec. 7, 2021).

⁴¹ See e.g., *Derek Scott Williams PLLC et al. v. The Cincinnati Ins. Co.*, Case No. 20 C 2806, N.D. Ill. Feb. 28, 2021).

D. The Closure Orders and Their Impact

103. There has been sustained transmission of COVID-19 on six continents. The United States has reported the most cases and deaths, with cases in all fifty states.

104. Due to the highly-contagious nature of COVID-19, in an effort to slow the spread of COVID-19, and as a consequence of physical loss or damage caused by COVID-19, federal, state, and local governments issued orders limiting the amount of people who could congregate in a group, requiring many businesses to close, and ordering individuals to stay at home except to participate in “essential” activities like going to the grocery store or going to a doctor for a pressing medical issue (“the Closure Orders”).

105. Closure Orders were also issued by local, state, provincial or national jurisdictions throughout the United States including the following states and countries where Benihana has Covered Properties: Kansas, Missouri, Texas, Colorado, Arkansas, Tennessee, Minnesota, Illinois, Wisconsin, Indiana, Utah, Arizona, Alaska, Ohio, Georgia, Michigan, Nevada, Pennsylvania, California, Florida, Maryland, New Jersey, Oregon, New York, Virginia, Nevada, El Salvador, Panama, Aruba, Brazil.

106. By way of example, Executive Order 2020-09 issued by Arizona Governor Douglas Ducey on March 19, 2020, prohibited restaurants from offering dine-in services; Executive Order 20-68 issued by Florida Governor Ron DeSantis on March 17, 2020 restricted restaurants to limit their occupancy to 50% and his subsequent Executive Order 20-71 issued on March 20, 2020, prohibited restaurants from offering dine-in services; Executive Order 4.02.20.01 issued by Georgia Governor Brian Kemp on April 2, 2020, prohibited restaurants from offering dine-in services; Executive Order 20-10 issued by Indiana Governor Eric Holcomb on March 23, 2020 prohibited restaurants from offering dine-in services; and Executive Order

20-16 issued by Kansas Governor Laura Kelly on March 30, 2020 prohibited restaurants from offering dine-in services (this order was later affirmed on April 11, 2020 by Kansas's Emergency Management & Homeland Security Department).

107. The Closures Orders were issued, at least in part, because COVID-19 was present in the immediate area of the insured premises. In other words, property nearby Benihana's covered locations suffered physical loss or damage, which caused civil authorities to issue Closure Orders. This circumstance occurred nearby most or all of Benihana's locations, which are in high traffic areas in their respective communities.

108. The following are but a few examples of facilities near Benihana locations which suffered physical loss or damage due to the presence of COVID-19 and are only a small subset of all relevant locations that undoubtedly suffered physical loss or damage due to the presence of COVID-19 and other Civil Authority properties in this case. These examples establish and illustrate that the Insurers owe Civil Authority coverage:

- *Christus Health*, within 0.5 miles from Benihana, Irving, TX;
- *Northwestern Memorial Hospital*, within 0.9 miles from Benihana, Chicago;
- *Columbia University Medical Center*, within 1.0 miles from Benihana 47 W. 56th St., New York, New York;
- *Mercy Suburban Hospital*, within 3.1 miles of Benihana, Plymouth Meeting Pennsylvania; and
- *Aventura Hospital and Medical Center*, within 0.4 miles of Benihana, Aventura, Florida.

109. Individuals with COVID-19 or otherwise carrying the coronavirus have been physically present at Plaintiff's premises. Coronavirus-containing fomites (*i.e.*, inanimate

objects), respiratory droplets, and nuclei from those individuals came into contact with, adhered to, and attached to the surfaces of the property upon which they landed, including without limitation, the real property, furniture, fixtures, and personal property at the Covered Locations.

110. While some individuals carry the coronavirus with no symptoms; it cannot be visibly detected on surfaces and can remain on surfaces for weeks. The prolonged presence of COVID-19 in the areas encompassing Benihana's Covered Locations made it unavoidable that individuals with COVID-19 or otherwise carrying the coronavirus, including guests, employees, contractors, and other business visitors, would be physically present at the Covered Location on various dates since the earliest days of the pandemic. In fact, Benihana's employees and staff members as well as guests and patrons have reported COVID-19 positive tests and have had to quarantine due to direct exposure.

111. For instance, prior to the expiration of the 2019 Policy Period, well over one thousand Benihana managers and employees across the country tested positive for COVID-19. Those individuals self-quarantined or were removed from work.

112. Despite the vaccine roll out, new variant strains of COVID-19, such as the now-dominant Omicron variant, pose an ongoing risk to the physical integrity of the covered locations and by extension, the safety and welfare of employees, guests, and patrons.

113. The rise of the Omicron variant is fueling yet another separate and distinct wave of Coronavirus, causing yet more physical loss of or damage to Benihana.

114. Given the absence of commercially available tests for surface and aerosol presence of COVID-19 and the overall shortage of testing kits for humans, positive human test results are not and cannot be the only means of proving the presence of COVID-19.

115. The ubiquitous nature of the pandemic also confirms that COVID-19 has been present at the insured locations.

116. When individuals carrying the coronavirus breathe, talk, cough, or sneeze, they expel aerosolized droplet nuclei that remain in the air and, like dangerous fumes, make the premises unsafe and affirmatively dangerous. In addition, the coronavirus physically alters the air. Air inside buildings that was previously safe to breathe but can no longer safely be breathed due to coronavirus and COVID-19, has undergone a physical alteration.

117. Persons who tested positive for COVID-19 were present at insured property on various dates during 2020 and 2021.⁴² This includes 1,996 positive cases from March 2020 to December 2021 (1446 of which occurred between March 2020 to June 2021).

118. Persons who came into contact with persons diagnosed with COVID-19 were present at insured property on various dates during 2020 and 2021.

119. Coronavirus droplets have been conveyed from infected persons (whether symptomatic, pre-symptomatic, or asymptomatic) to solid surfaces including, but not limited to, furniture, doors, floors, bathroom facilities, equipment, and supplies, and into the air and HVAC system at the insured properties, causing damage and alteration to physical property and ambient air at the premises. Aerosolized coronavirus has entered the air in Plaintiff's properties.

120. The presence of the coronavirus and COVID-19, including, but not limited to, coronavirus droplets or nuclei on solid surfaces and in the air at the insured property, has caused and will continue to cause direct physical damage to physical property and ambient air at the premises. Coronavirus, a physical substance, has attached and adhered to Plaintiff's properties,

⁴² The identity of these Benihana employees and patrons and the specific dates of their diagnoses are not identified herein to protect their privacy interests.

and by doing so, altered that property. Such presence has also directly resulted in loss of functionality of that property.

121. The physical losses to Plaintiff's properties include without limitation the rendering of the insured property from a satisfactory state to a state dangerous and/or unsatisfactory for use because of the fortuitous presence and effect of the coronavirus, fomites, and respiratory droplets or nuclei directly upon the property.

122. The confirmed positive cases of COVID-19 at Benihana locations have required specific and costly actions to prevent the spread of the virus, threat to customers and employees, and additional damages to the locations.

123. Even after the initial Closure Orders, upon reopening, most locations operated at significantly reduced capacity and many locations were limited to off premises operations.

124. The professional-grade deep cleaning which has been performed within Benihana's insured premises following these confirmed cases constitutes a necessary repair or change to the properties without which Benihana would not have been able to continue to operate its businesses upon re-opening.

125. Benihana has incurred significant expenses in outfitting its' insured premises with Plexiglass, replacement of standard air filters to MERV-13 filters, and severe damage to furniture from professional grade cleaning chemicals.

126. Benihana has likewise incurred significant expenses in attempt to mitigate the interruption of its on and off premises operations by obtaining and installing hands-free sanitizing stations which are available for usage upon entry into the insured locations, as well as on various additional sanitizers, disinfectants, and disposable surgical masks, all of which were

designed to eliminate, mitigate, and/or prevent the reemergence of COVID-19 at the insured premises.

127. The physical loss or damage brought about by the actual presence of COVID-19 is also apparent from the markedly reduced capacity limitations and the significant reduction in furniture and functional space at Benihana locations.

128. Benihana has been forced to incur significant costs (nearly \$250,000) associated with tent rentals alone at numerous insured locations to salvage its business during the pandemic and to comply with local Closure Orders and health department guidelines.

129. Thus, there have been many obvious structural alterations, changes, and/or repairs made to the insured premises and Benihana internal operating procedures. Benihana has been left with no choice but to incur significant costs in implementing these safety measures, alterations, changes, and/or repairs caused by the actual presence and continued threat of COVID-19.

130. All the while, AWAC went out of its way to proactively add a Communicable Disease Exclusion to Plaintiff's *new* Policy, effective as of June 30, 2020 ("the 2020 Lead Policy"), because of its understanding that without such exclusionary language in force and effect, coverage could be found in the event that, as happened under the preceding policy period, direct physical loss or damage is caused by COVID-19, the Closure Orders, the Pandemic, or something similar in the future. Axis added the Exclusion of Loss Due to Virus or Bacteria under its 2020 Policy for the same reason.

131. By jumping to the faulty conclusion that Benihana has not suffered direct physical loss or damage and by ignoring the facts made known to them without visiting or investigating any of the Covered Locations, the Insurers have put their own interests before those of Benihana.

The Insurers have acted in direct contravention of the obligations of good faith and fair dealing they owe to their insureds.

E. The Subsequent Additions of Virus and Communicable Disease Exclusions

132. The 2019 Policies do not contain a virus exclusion which limits or bars coverage for the actual presence of communicable diseases such as COVID-19 or the threat created by its presence.

133. *Significantly, following* the issuance of the Policy and *after* COVID-19 spread rapidly throughout the world to such an extent that the World Health Organization declared the COVID-19 outbreak a pandemic, AWAC issued the Lead 2020 Policy with a communicable disease exclusion that was absent from the preceding 2019 AWAC Policy. This exclusion provides as follows:

COMMUNICABLE DISEASE EXCLUSION

Notwithstanding any other provision of this Policy to the contrary, this Policy does not insure loss of any kind, including but not limited to, any loss of income, loss of use, loss of access, extra expense or consequential loss, directly or indirectly caused by, resulting from, contributed to by, arising out of, attributable to or occurring concurrently or in any sequence with a "communicable disease" or the fear or threat (whether actual or perceived) of a "communicable disease," including but not limited to:

1. the cost to clean-up, detoxify, remove, monitor or test:
 - a. for a "communicable disease"; or
 - b. any tangible or intangible property insured hereunder that is affected by such "communicable disease";
2. damage, deterioration, loss of value, loss of access, loss of marketability, or loss of use of any tangible or intangible real or personal property directly or indirectly caused by, resulting from, contributed to by, arising out of or attributable to a "communicable disease"; or
3. any time element or business interruption losses, including any time element extensions of coverage such as interruption by civil or military authority directly or indirectly caused by, resulting from, contributed to by, arising out of or attributable to "communicable disease".

As used herein, "communicable disease" means any infectious or contagious agent or substance:

1. Including, but not limited to, a virus, bacterium, parasite or other organism or any mutation thereof, whether deemed living or not, and the diseases caused by such; and
 2. Regardless of the method of transmission,
- that can cause or threaten damage to human health or human welfare.

All other terms and conditions remain unchanged.

134. Likewise, and equally as significant, Axis included for the first time in its 2020 Policy a variation of the 2006 ISO exclusion entitled Exclusion of Loss or Damage Due to Virus or bacteria – Endorsement D – AXIS 1012682 0320, which provides as follows:

EXCLUSION OF LOSS OR DAMAGE DUE TO VIRUS OR BACTERIA

It is agreed that the following exclusion shall be added to the policy:

Virus or Bacteria Exclusion

We will not pay for loss or damage to covered property caused by or resulting from, contributed to or made worse by, actual, alleged or suspected presence of any virus, bacterium or microorganism that induces or is capable of inducing physical distress, illness or disease. Nor will we pay:

1. The expense or cost to extract or remove such a virus, bacterium or microorganism from covered property;
2. The costs associated with the enforcement of any ordinance or law which requires you or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to or assess the effects of such a virus, bacterium or microorganism;
3. Any cost to transport any property or debris to a site for storage or decontamination required because the property is infected by such a virus, bacterium or microorganism, whether or not such removal, transport or decontamination is required by law, regulation or any authority governing such matters; or
4. Any cost to store or otherwise dispose of any property because of the presence of such a virus, bacterium or microorganism in or on covered property.

This exclusion applies to all coverage under all forms and endorsements that comprise this coverage part or policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

With respect to loss or damage subject to this exclusion, the terms of this exclusion shall supersede any exclusion pertaining to pollutants.

As used in this endorsement:

The term "we" means the company providing this insurance.

The term "covered property" shall have the same meaning as set forth in the policy and shall have the same meaning as the term "insured property" (wherever such term is used in policy).

The terms of this exclusion, or the inapplicability of this exclusion to any particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this coverage part or policy.

All other provisions of the Policy remain unchanged.

135. The 2020 Policy issued to Benihana by Princeton Excess and Surplus Lines Insurance Company contains a similar Virus or Bacteria exclusion which, in pertinent part, provides:

- A. We will not pay for loss or damage caused directly or indirectly by the following:

VIRUS OR BACTERIA

Any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss:

However, this exclusion does not apply to loss or damage caused by or resulting from "fungi", wet rot or dry rot, or "fungal pathogens". Such loss or damage is addressed in a separate exclusion in this Policy.

136. The addition of the Communicable Disease Exclusion in the 2020 AWAC Policy and Virus or Bacteria exclusion in the 2020 Axis Policy demonstrates that the Insurers knew and appreciated that the 2019 policies do not effectively bar coverage for communicable diseases transmitted from person to property and person to person. The addition of these exclusions in the 2020 Lead and Axis policies further demonstrates that the Insurers were on notice of the 2006 ISO exclusion, had the opportunity to adopt and did not do so for the 2019 Policy period.

137. These conclusions are further supported by the inclusion of the Virus or Bacteria exclusion in the 2020 Princeton Policy.

138. Accordingly, at the onset of the 2019 Policy Period, when Benihana received the 2019 Policies, it was not put on notice that coverage was somehow excluded for losses, damages, costs, or expenses caused directly or indirectly by communicable disease. Benihana reasonably expected that such coverage would be afforded in the event they experienced physical loss or damage in the face of a global pandemic.

139. The additional of new communicable disease and virus or bacteria exclusions applying to business income losses is evidence that the Insurers appreciated the fact that the language of the 2019 Policies did not effectively exclude coverage for losses caused contagious "virus" or "communicable disease." It is anticipated that underwriting materials produced in

discovery will indicate just that and speak to the intent of the Insurers not only in issuing the 2020 Policies but also their intent in issuing the 2019 Policies as well.

140. Alternatively, and at an absolute minimum, the amendment of the 2020 AWAC Policy to a Communicable Disease Exclusion and Axis Policy to add the Exclusion of Loss Due to Virus or Bacteria demonstrates that the language of the 2019 Policies is ambiguous and capable of a reasonable interpretation in which losses caused by a virus were not excluded.

141. The fact that there are three new exclusions in the 2020 policies absent from the 2019 policies is telling and speaks directly to the intent of the Insurers and reasonable expectations of Benihana and its subsidiaries under the 2019 Policies.

CLAIMS FOR RELIEF

COUNT I

Declaratory Judgment

142. Plaintiff Benihana, Inc. incorporates by reference the allegations contained in Paragraphs 1-141 above, as if set out in full herein.

143. Pursuant to the terms of the 2019 Policies, the Insurers are obligated to pay, up to the limit of liability for each insured location, for business income, extra expense, rental value, contingent business interruption, civil authority, sue and labor and expense to reduce loss coverage, none of which are specifically, clearly, and unambiguously excluded.

144. The Insurers deny that they have contractual obligation to cover Benihana's losses.

145. An actual and justiciable controversy has arisen between Benihana and the Insurers as to their obligation to acknowledge Benihana's covered losses and pay Benihana under the 2019 Policies.

146. Benihana and the Insurers disagree over the meaning, scope and application of the key terms and provisions of the 2019 Policies.

147. Resolution of these controversies will establish Benihana's right to recover payments under the 2019 Policies.

148. The controversy between Benihana and the Insurers is ripe for judicial review. Accordingly, Benihana seeks a judicial declaration from this Court that:

- a. The various coverage provisions of the 2019 Policies identified in this Complaint are triggered by Benihana's claim;
- b. No exclusions apply to prohibit or limit coverage for Plaintiff's claims under the 2019 Policies; and
- c. The 2019 Policies cover Benihana's claim, and the Insurers are responsible for fully and timely paying Benihana's losses.

149. Such a declaration is necessary to resolve the parties' dispute and to allow for the parties to ascertain their prospective rights and obligations.

COUNT II **Breach of Contract**

150. Plaintiff Benihana, Inc. incorporates by reference the allegations contained in Paragraphs 1-149 above, as if set out in full herein.

151. The 2019 Policies constitute valid and existing contracts of insurance requiring the Insurers to properly compensate Benihana for its losses.

152. Any ambiguity in its terms or doubts as to the application of coverage is to be resolved in favor of Benihana and coverage granted in accordance with its reasonable expectations.

153. Benihana reasonably believed and relied on the terms of the 2019 Policies to afford coverage and benefits if its business was closed as result of loss or damage to the covered

locations and acts of civil authority in response to a communicable disease pandemic such as the subject pandemic.

154. Despite Benihana reasonably believing and relying on the terms of the 2019 Policies to confer coverage in the event that it was forced to cease and/or reduce operations as a result of the loss or damage of the covered location brought about by communicable disease such as COVID-19 and Closure Orders issued because of said loss or damage brought about by viruses such as COVID-19, the Insurers have breached the 2019 Policies by failing to pay Benihana for its business interruption losses.

155. Benihana sustained damages due to the actual physical presence of COVID-19, the existence and ongoing threat and spread of COVID-19, and the Closure Orders prohibiting large gatherings resulting from COVID-19, but the Insurers have failed to comply with their obligations and have failed to compensate Benihana for its claim.

156. Yet, as a direct and foreseeable result of the Insurers' breach of contract and duty of good faith and fair dealing, Plaintiff has been deprived of the benefits due to them because of their covered loss, including, but not limited to the Business Interruption, Extra Expense, Rental Value, Contingent Business Interruption Civil Authority, Sue and Labor, and Expense to Reduce Loss coverage.

157. Additionally, Benihana has suffered other consequential damages by reason of damage to its business operations for an amount in excess of the coverage set forth in the 2019 Policies, including but not limited to, damage to its business operations, reduction in value, and profitability of business operations and assets.

158. Consequential damages for breach of the 2019 Policies were reasonably contemplated by the parties at the time the Policies were issued.

PRAYER FOR RELIEF

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

- 1) A declaration from this Court that:
 - a. The various coverage provisions identified in this Complaint are triggered by Benihana's claims;
 - b. No exclusion in any one of the 2019 Policies applies to prohibit or limit coverage for Benihana's claims; and
 - c. Each of the 2019 Policies, respectively, covers Benihana's claims, and the Insurers are responsible for fully and timely paying Benihana's losses.
- 2) For actual, special, compensatory, and consequential damages against the Insurers in an amount to be proved at trial;
- 3) Pre- and post-judgment interest as provided by law;
- 4) An award of attorneys' fees and cost of suit incurred; and
- 5) For such other and further relief as the Court deems proper.

JURY DEMAND

Plaintiff respectfully request a trial by jury on all issues so triable in this action.

Dated: February 1, 2022

Respectfully submitted,

/s/ Greg G. Gutzler

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*Applications for admission *pro hac vice* to be filed.

Index No. *Year 20*
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Benihana, Inc.,

Plaintiff,

-against-

Allied World Assurance Co., (U.S.) Inc.,
Axis Surplus Insurance Company,
James River Insurance Company, and
Maxum Indemnity Company,

Defendants.

SUMMONS AND COMPLAINT

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Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: February 1, 2022

Signature: /s/ Greg G. Gutzler

Print Signer's Name Greg G. Gutzler

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