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Attorneys for Plaintiff Sky Zone San Marcos, Inc.

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO – HALL OF JUSTICE**

10 SKY ZONE SAN MARCOS INC., a) **Case No.: 37-2020-00041823-CU-IC-CTL**
11 corporation;)
12) **COMPLAINT FOR DECLARATORY**
13 Plaintiff,) **RELIEF**
14 vs.)
15)
16 LIBERTY MUTUAL INSURANCE)
COMPANY also known as LIBERTY)
MUTUAL INSURANCE, a California)
foreign Corporation, and; DOES 1 to 25,)
inclusive,)
Defendants.)

17
18 Plaintiff Sky Zone San Marcos Inc. d/b/a Sky Zone (“Sky Zone” or “Plaintiff”), brings this
19 Complaint, alleging against Defendants Liberty Mutual Insurance Company a/k/a Liberty Mutual
20 Insurance (“Liberty Mutual”) and DOES 1 through 25 (collectively as “Defendants”) as follows:

21 **PARTIES**

22 1. At all relevant times, Plaintiff Sky Zone is incorporated, organized and authorized to do
23 business and is doing business in the State of California. Plaintiff owns, operates, and/or manages
24 Sky Zone which is comprised of two businesses, which provides family entertainment gaming
25 activities including trampolines, located at 860 Los Vallecitos Boulevard, San Marcos, California
26 92069, and 6133 Innovation Way, Carlsbad, California 92009.

27 2. At all relevant times, Defendant Liberty Mutual Insurance Company a/k/a Liberty
28 Mutual Insurance (“Liberty Mutual”) is a corporation organized under the laws of Massachusetts,

1 and licensed by the State of Massachusetts to do business and doing business in the County of
2 Suffolk, Massachusetts, and also licensed and registered in the state of California subscribing
3 Policy Number 60325673 (the “Policy”) issued to Plaintiff for the period of October 4, 2019
4 through October 4, 2020. Liberty Mutual is transacting the business of insurance in the state of
5 California and the basis of this suit arises out of such conduct.

6 **JURISDICTION AND VENUE**

7 3. The Court has subject matter jurisdiction over the matter alleged herein.

8 4. Plaintiff is informed and believes, and thereon alleges, that this Court is the proper venue
9 for trial because the acts and/or omissions complained of took place, in whole or in part, within the
10 venue of this Court. Further, Defendants are located and conduct business here, and witnesses are
11 located here.

12 **FACTUAL BACKGROUND**

13 5. This action arises out of the Defendant’s failure to provide insurance coverage for the
14 losses sustained and expenses incurred by Plaintiff because of the ongoing Coronavirus (“COVID-
15 19” or “Coronavirus”) pandemic.

16 6. Plaintiff’s operations have been and continue to be suspended and threatened by the
17 novel coronavirus, SARS-COV-2, which causes the infectious disease COVID-19.

18 7. On or about October 4, 2019, Plaintiff to protect the businesses and income from the
19 operation of the same, in the event that it suddenly had to suspend operations for reasons outside
20 of its control, or in order to prevent further loss or damage, Plaintiff entered into a contract of
21 property insurance with Liberty Mutual, whereby Plaintiff purchased insurance coverage and
22 agreed to make payments to Liberty Mutual in exchange for Liberty Mutual’s promise to indemnify
23 Plaintiff for losses including, but not limited to, business income losses at its commercial business
24 retail space (hereinafter “Insured Property”) located at 860 Los Vallecitos Boulevard, San Marcos,
25 California 92069, and 6133 Innovation Way, Carlsbad, California 92009.

26 8. The Insured Property consists of two commercial businesses. The entire commercial
27 space is owned, managed, and/or controlled by Plaintiff. Persons infected with COVID-19 were
28 likely present at Sky Zone prior to March 17, 2020. In fact, during the period of January 1, 2020

1 to March 18, 2020, the Sky Zone locations had more than 35,000 guests from all over the world.

2 9. The Insured Property is covered under an insurance policy issued by the Liberty Mutual
3 bearing Policy Number 60325673 (the "Policy"). The Policy is a bilateral contract: Plaintiff agreed
4 to pay premiums to Defendants in the exchange for Defendant's promise to cover certain losses.

5 10. The Policy is currently in full effect, providing property, business personal property,
6 business income and extra expense, and additional coverages between the period of October 4,
7 2019 through October 4, 2020.

8 11. Plaintiff faithfully has satisfied all conditions precedent to coverage under the Policy
9 including the payment of all policy premiums to Liberty Mutual, specifically to provide additional
10 coverages for "Business Income and Extra Expense Coverage" in the event of business closures by
11 order of Civil Authority.

12 12. Defendant's "Business Income" coverage promises to pay for actual loss sustained and
13 necessary Extra Expense incurred due to the necessary "suspension" of operations caused by,
14 among other things, direct physical loss of or damage to "dependent property" caused by or
15 resulting from a covered cause of loss.

16 13. After careful consideration Plaintiff recognized the importance of adding the optional
17 coverage for "Business Interruption," and in so doing Plaintiff thoughtfully reviewed that option
18 and opted to pay the additional fees to do so. It was deemed to be important that Plaintiff had a
19 reasonable expectation that the such coverage would protect the business from interruption far in
20 advance of the government mandated closures.

21 14. "Business Income" is defined to mean net income (net profit or loss before income
22 taxes) that would have been earned or incurred including "rental value" and continuing normal
23 operating expenses incurred including payroll.

24 15. Defendant's coverage also provides "Extra Expense" coverage which promises to pay
25 the necessary expenses incurred to void or minimize the suspension of business and to continue
26 operations.

27 16. Plaintiff was unable to access their insured property and lost business income and
28 sustained extra costs as a result of the inability to ingress or egress Plaintiff's insured property and

1 such lack of access to the property is akin to a physical loss of or damage to the Sky Zone property.

2 17. Under the Policy, insurance is extended to apply to the actual loss of Business Income
3 sustained and the actual, necessary and reasonable extra expenses incurred when access to the
4 scheduled premises is specifically prohibited by order of civil authority as the direct result of a
5 covered cause of loss to property in the immediate area of Plaintiff's scheduled premises. This
6 additional coverage is identified as coverage under "Civil Authority" as part of the Policy's
7 "Additional Coverages" section.

8 18. The Policy is an all-risk policy, insofar as it provides that a covered cause of loss under
9 the policy means direct physical loss or direct physical damage unless the loss is specifically
10 excluded or limited in the Policy.

11 19. Under the Policy, "the coverage for Extra Expense will begin immediately after the time
12 of that action and will end: (1) 3 consecutive weeks after the time of the action; or (2) When
13 [insured's] Business Income coverage ends." The Policy's Civil Authority Coverage Section
14 extends coverage to "the actual loss of Business Income" sustained and "necessary Extra Expense
15 caused by action of civil authority that prohibits access to the described premises due to direct
16 physical loss or damage to property other than at the described premises caused by or that results
17 from any covered cause of loss." Sky Zone has incurred extra cost to maintain its business as a
18 result of physical loss and/or physical damage from a covered type of loss.

19 19. Based on information and belief, Liberty Mutual accepted the policy premiums, and
20 did so with no intention of providing any coverage under the Policy's Civil Authority Coverage
21 Section due to a loss and shutdown due to the global COVID-19 pandemic, as such, suspensions
22 and losses triggered the Policy's Business Income coverage.

23 20. Defendant agreed to cover a "loss" resulting from a "risk of direct physical loss of or
24 damage to the property," a global pandemic brought about by the infestation of the novel
25 coronavirus in San Diego is exactly such risk of direct physical loss and nothing in the policy says
26 otherwise.

27 21. The language in the Policy is ambiguous as it fails to define or distinguish between the
28

1 terms “loss” or “damage.” Since the Policy does not define the terms one must “rely on the plain
2 and ordinary meaning of the phrase.” “Physical” is defined as “having material existence:
3 perceptible especially through the senses and subject to the laws of nature.”¹ “Loss” is the “act of
4 losing possession” and “deprivation.”² Applying these definitions, Plaintiff has suffered a direct
5 physical loss since there is clearly a causal relationship between COVID-19 and Plaintiff’s losses
6 since COVID-19 “is a physical substance,” that it “live[s] on” and is “active on inert physical
7 surfaces,” and is also “emitted into the air.”.... COVID-19 allegedly attached to and deprived
8 Plaintiffs of their property, making it “unsafe and unusable, resulting in direct physical loss to the
9 premises and property.”

10 22. Despite agreeing to cover Sky Zone for all “direct physical loss of or damage” to
11 Covered Property at the premises caused by or resulting from any Covered Cause of loss and Sky
12 Zone’s resulting loss of business income and extra expense on March 25, 2020, Liberty Mutual
13 sent Sky Zone a written denial of its claim. Liberty Mutual refuses to stand by the insurance policy
14 that it wrote and sold and honor its contractual undertakings.

15 23. Instead, Liberty Mutual relies on sleight-of-hand, distortions of fact and contortions of
16 law to escape Sky Zone’s covered claim. But no illusion or death defying feat can alter the *plain*
17 *language* of Liberty Mutual’s policy and the broad all risks coverage that it provides. The Policy
18 promises to pay necessary expenses incurred by insured during the “period of restoration” is
19 defined by the Policy as “ (1) 72 hours after the time of direct physical loss or damage for Business
20 Income coverage; or (2) Immediately after the time of direct physical loss or damage for Extra
21 Expense coverage; caused by or resulting from any Covered Cause of Loss at the described
22 premise.”

23 24. As alleged in more detail below, Plaintiff suffered a direct physical loss of and/or
24 damage to their property and such loss and/or damage was a direct result of COVID-19 and the
25 orders of civil authorities.

27 _____
28 ¹ Merriam-Webster, [www.merriam-webster.com/dictionary /physical](http://www.merriam-webster.com/dictionary/physical) (last visited August 12, 2020).

² Merriam-Webster, www.merriam-webster.com/dictionary/loss (las visited August 12, 2020).

1 25. Further, courts around the country have repeatedly determined that “loss” need not mean
2 structural damage and a policy that “require[es] ‘physical loss or damage,’ does not require that the
3 physical loss or damage be tangible, structural, or even visible. The inability to inhabit a building
4 [is] a ‘direct, physical loss’ covered by insurance. Of noteworthy significance, the Policy does not
5 indicate otherwise.

6 26. The global COVID-19 pandemic has physically impacted both public and private
7 property and physical spaces around the world, as well as the right of the general public to gather
8 and utilize retail business locations. COVID-19 is a deadly communicable disease that has already
9 infected over 6 million people in the United States and has caused nearly 200,000 deaths.³ The
10 CDC estimates that infection rates for COVID-19 are likely at least ten times higher than reported.⁴
11 There is no publicly available vaccine for COVID-19 at this time. The World Health Organization
12 (“WHO”) has officially declared the COVID-19 outbreak a pandemic. The currently-raging
13 pandemic has been exacerbated by the fact that the deadly virus is a physical substance that
14 physically infects, lives on, stays on and is active on inert physical surfaces of objects or materials,
15 “fomites,” for up to twenty-eight days and is also emitted into the air. The scientific community in
16 the United States and indeed, across the world, including the World Health Organization, has
17 recognized that the Coronavirus is a cause of real physical loss and damage. The incubation period
18 for COVID-19- the time between onset- can be up to 14 days.⁵ During this pre-symptomatic period,
19 infected persons can be contagious and disease transmission can occur before the infected person
20 shows any symptoms or has any reason to believe they are infected.⁶

21 ³ See <https://www.cdc.gov/coronavirus/2019-ncov/casess-updates/cases-in-us.html> (last viewed
22 September 17, 2020).

23 ⁴ See [https://www.nbcnews.com/health/health-news/cdc-says-covid-19-cases-u-s-may-be-10-
n1232134](https://www.nbcnews.com/health/health-news/cdc-says-covid-19-cases-u-s-may-be-10-n1232134) ((last viewed September 17, 2020).

24 ⁵ See [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-
73-covid-19.pdf?sfvrsn=5ae25bc7_](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_) (last viewed September 17, 2020).

25 ⁶ See [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-
73-covid-
19.pdf?sfvrsn=5ae25bc7_2](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_2) (“In a small number of case reports and studies, pre-symptomatic
26 transmission has been documented through contact tracing efforts and enhanced investigation of
27 clusters of confirmed cases. This is supported by data suggesting that some people can test
28 positive for COVID-19 from 1-3 days before they develop symptoms. Thus, it is possible that
people infected with COVID-19 could transmit the virus before significant symptoms develop.”)
(last viewed September 17, 2020).

1 27. Indeed, a number of countries such as: China, Italy, France, and Spain have required the
2 fumigation of public areas prior to allowing them to re-open. Not only is COVID-19 spread by
3 human to human transfer, but the WHO has confirmed that COVID-19 can exist on contaminated
4 objects or surfaces.⁷ A recent scientific study printed in the *New England Journal of Medicine*
5 explains that the virus is detectable for up to three hours in aerosols, up to four hours on copper, up
6 to 24 hours on cardboard boxes, and up to three days on plastic and stainless steel⁸. All of these
7 materials are used by Sky Zone throughout its facilities and operations. The study’s results also
8 suggests that individuals could become infected with COVID-19 through the indirect contact with
9 surfaces or objects used by an infected person, whether they were symptomatic or not.⁹ Notably,
10 the most potent form of the virus is not airborne but rather present on physical surfaces. Thus
11 COVID-19 is “physical” as per the Webster definition herein since COVID-19 has a material
12 existence: perceptible especially through the senses and subject to the laws of nature.”

13 28. The presence of virus or disease can constitute physical loss or damage to property as
14 the insurance industry has recognized since at least 2006. When preparing so-called “virus”
15 exclusions to be placed in some policies but not others the insurance industry drafting arm—
16 Insurance Services Office, Inc. or “ISO”—circulated a statement to state insurance regulators that
17 included the following:

18 Disease-causing agents may render a product impure (change its quality or
19 substance), or enable the spread of disease by their presence on interior building
20 surfaces or the surfaces of personal property. When disease-causing viral or
21 bacterial contamination occurs, potential claims involve the cost of replacement
22 of property (for example, the milk), cost of decontamination (for example,
23 interior building surfaces), and business interruption (time element) losses.
24 Although building and personal property could arguably become contaminated
25 (often temporarily) by such viruses and bacteria, the nature of the property itself
26 would have a bearing on whether there is actual property damage. An allegation

23 ⁷ See <https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations> (“[T]ransmission of the COVID-19 virus can occur by direct contact with infected people and indirect contact with surfaces in the immediate environment or with objects used on the infected person”) (last viewed September 17, 2020).

26 ⁸ See Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1, *New England Journal of Medicine* (September 17, 2020), available at <https://www.nejm.org/doi/full/10.1056/nejmc2004973>

27 ⁹ See <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last viewed July 1, 2020); see also <https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations> (last viewed July 1, 2020).

1 of property damage may be a point of disagreement in a particular case.

2 29. The ISO also created a new “amendatory endorsement” to exclude loss due to virus or
3 bacteria from coverage afforded by certain insurance policies. The ISO amendatory endorsement
4 states that there is “no coverage for loss or damage caused by or resulting from any virus, bacterium
5 or other microorganism that induces or is capable of inducing physical distress, illness or disease”
6 (the “Virus Exclusion”).

7 30. Some insurers added the Virus Exclusion to their policies that provide Business
8 Income (also referred to as “business interruption”) coverage. Defendant’s Property Coverage Form
9 and Business Income (And Extra Expense) Coverage Form, however, do not include, and are not
10 subject to, any exclusion for losses caused by a viral pandemic or viruses or specifically
11 communicable diseases. To the extent Liberty Mutual contends any exclusion(s) for pollutants,
12 virus or bacteria apply, such exclusion(s) are ambiguous and/or unenforceable. Unlike pollutants,
13 virus or bacteria defined by the Policy, as alleged COVID-19 is a global pandemic of unknown
14 origin and a communicable disease for which there is not vaccine.

15 31. The Policy definition of pollutants, virus or bacteria does not include communicable
16 disease.

17 32. However, Liberty Mutual could have added an exclusion to the Policy for loss caused
18 by or resulting from communicable disease, it failed to do so.

19 33. Liberty Mutual likewise could have added an exclusion to the Policy for loss caused by
20 or resulting from pandemic, it failed to do so.

21 34. Indeed, Plaintiffs are informed and believe, and thereon allege that exclusions for both
22 communicable disease and pandemic were in use in the insurance industry when Liberty Mutual
23 sold the Policy to Sky Zone but Liberty Mutual did not out such exclusion in use here.

24 35. The COVID-19 pandemic is a public health crisis that has profoundly impacted
25 American society, the presence of COVID-19 has caused civil authorities throughout the country
26 to issue orders requiring the suspension of businesses at a wide range of establishments including
27 civil authorities with jurisdiction over Plaintiff’s business. In an effort to slow the spread of
28 COVID-19 and as a direct result of a Covered Cause of Loss to property, federal, state and local

1 governments imposed unprecedented directives, referred to as “Stay at Home Orders, ” prohibiting
2 travel into the United States, requiring certain businesses to close and requiring residents to remain
3 in their homes unless performing “essential: activities.” The Stay at Home Orders required
4 businesses deemed “non-essential” to be closed. In-person work was not permitted.

5 36. The Stay at Home Orders also severely affected businesses classified as “essential.”
6 On March 16, 2020, the San Diego, Mayor Faulconer, issued an Executive Order (No. 2020-1) “to
7 protect members of the public and City Employees from an undue risk of contracting COVID-19
8 virus including the closure of [...] recreation centers” directing businesses to be closed in San
9 Diego. Mayor Faulconer’s Order came on the heels of Governor Gavin Newsom’s similar state-
10 wide order issued earlier that day. Mayor Faulconer’s Order specifically declared the order to be
11 necessary for the protection of life and property referenced that it was being issued based on the
12 “undue risks of contracting the COVID-19 virus” and evidence of physical damage to property.
13 Shortly thereafter, Governor Newsom issued a state-wide “Stay-at-Home Order” for all residents
14 of California. In this case, the property that is damaged is in the immediate area of the Insured
15 Property. These Stay at Home Orders or civil authority orders issued by the Governor of the State
16 of California and Mayor of San Diego in response to the outbreak of COVID-19 in California and
17 the San Diego area prohibited complete access to and occupancy of the businesses as well as
18 business transactions from the same. Although some of these orders have recently been relaxed,
19 Stay at Home Orders remain in effect as of the date of filing and have caused and continue to cause
20 the partial or total prohibition of access to Sky Zone and the necessary partial or total interruption
21 of Sky Zone’s business operations.

22 37. Sky Zone is and was subject to these various Stay at Home Orders.

23 38. As a direct and proximate result of this Order, Plaintiff was forced to suspend business
24 operations and as a result of the COVID-19 pandemic and the ensuing orders issued by civil
25 authorities mandating the suspension of business on-site services and since access to Plaintiff’s
26 Insured Property (including to both of its underlying businesses) was and has been specifically
27 prohibited.

28 39. Since the Policy fails to define the term “loss” yet the term is referenced multiple times

1 throughout the Policy, as mentioned above “loss” shall be defined and referred to as the Webster
2 definition above as the “act of losing possession” and “deprivation.”

3 40. The various suspension orders and restriction of access to insured’s property have
4 caused Plaintiff to suffer significant losses applying the Webster definition Plaintiff has lost
5 possession of and has been deprived of its insured premises and incurred significant expenses. Sky
6 Zone lost business income and incurred extra cost because of restricted access to its property that
7 is a direct result of covered loss the properties. Subsequent orders re-affirmed the suspension of
8 Plaintiff’s businesses and suspension of access to the businesses.

9 41. As of the date of this Complaint, the suspension of Plaintiff’s operations is ongoing.

10 42. As a further direct and proximate result of the Order, Plaintiff has been forced to deal
11 with unpaid rent and other related issues stemming from its tenants’ cessation of use with respect
12 to the Insured Premises.

13 43. The State of California is a civil authority contemplated by Defendant’s policy.

14 44. The City of San Diego/Carlsbad is a civil authority contemplated by Defendant’s policy.

15 45. The Governor of the State of California is a civil authority contemplated by Defendant’s
16 policy.

17 46. The Mayor of San Diego, California is a civil authority contemplated by upon
18 information and belief, Defendant has, on a widescale and uniform basis, refused to pay its
19 insureds under its Business Income, Extra Expense and Civil Authority coverages for losses
20 suffered due to COVID-10, any executive orders by civil authorities that have required necessary
21 suspension of business, and any efforts to prevent further property damage or to minimize the
22 suspension of business and continue operations.

23 47. According to the Policy “Suspension” is defined as “the slowdown or cessation of
24 [insured’s] business activities; or that a part of all of the described premises is rendered
25 untenable.”

26 48. The presence of COVID-19 caused Sky Zone to experience “direct physical loss” or
27 damage to the covered property or “premises” from one or more Covered Causes of Loss rendering
28 the premises “untenable” commencing at midnight on March 17, 2020 and continuing to the

1 present. Sky Zone also may have experienced “physical damage” to its property because of
2 COVID-19. COVID-19 causes physical damage to property because it contaminates objects and
3 surfaces as described herein. COVID-19 may have attached to and deprived Plaintiffs of their
4 property, making it “unsafe and unusable” and denying use of and damaging the covered property,
5 and by causing a necessary suspension of operations during a period of restoration. Sky Zone
6 therefore experienced direct “physical damage” to its property from a Covered Cause of Loss
7 rendering it “untenantable” commencing on or about March 17, 2020 and continuing to present.

8 49. The physical loss and/or damage caused by COVID-19 and the threat of further physical
9 loss or damage by COVID-19 has had a devastating effect on Sky Zone’s business.

10 50. Likewise, the State at Home Orders and the physical loss of Insured Property caused by
11 these Orders has had devastating effect on Sky Zone’s business.

12 51. The Orders prohibited access to and use of Plaintiff’s Covered Property, and the area
13 immediately surrounding damaged property, in response to dangerous physical conditions resulting
14 from the damage or continuation of the Covered Cause of Loss that caused the damage.

15 52. The State of California and the City of San Diego through the Governor and Mayor,
16 have issued and continue to issue authoritative orders governing California and San Diego
17 businesses, including the Plaintiff’s business, in response to COVID-19 and the pandemic, the
18 effect of which have required and continue to require Plaintiff to cease operations at, and that have
19 prohibited and continue to prohibit access to, the premises described in the policy.

20 53. As a direct result of COVID-19 and these Orders, Sky Zone closed its doors on March
21 19th, 2020.

22 54. Persons infected with COVID-19 were likely present at Sky Zone prior to March 17,
23 2020. In fact, during the period of January 1, 2020 to March 18, 2020, the Sky Zone locations had
24 more than 35, 000 guests from all over the world.

25 55. State and local governmental authorities and public health officials around the United
26 States acknowledge that COVID-19 and the Pandemic cause direct physical loss and/or damage to
27 property. For example: (a) The State of Colorado issued a Public Health Order indicating that
28 “COVID-19...physically contributes to property loss, contamination and damage...” (b) The City

1 of New York issued an Emergency Executive Order in response to COVID-19 and the Pandemic,
2 in part “because the virus physically is causing property loss and damage.” (c) Broward County,
3 Florida issued an Emergency Order acknowledging that COVID-19 “is physically causing property
4 damage.” (d) the State of Washington issued a stay at home Proclamation stating the “COVID-19
5 pandemic and its progression...remains a public disaster affecting life, health [and] property.” (e)
6 The State of Indiana issued an Executive Order recognizing that COVID-19 has the “propensity to
7 physically impact surfaces and personal property.” (f) the City of New Orleans issued an order
8 stating “there is reason to believe that COVID-19 may spread amongst the population by various
9 means of exposure, including the propensity to attach to surfaces for a prolonged period of time,
10 thereby spreading from surface to person and causing property loss and damage in certain
11 circumstances.” (g) the State of New Mexico issued a Public Health Order acknowledging the
12 “threat” COVID-19 “poses” to “property.” (h) North Carolina issued a statewide Executive Order
13 in response to the Pandemic not only “to assure adequate protection for lives” but also to “assure
14 adequate protection of...property.” (i) The City of Los Angeles issued an Order in response to
15 COVID-19 “because, among other reasons, the COVID-19 virus can spread easily from person to
16 person and it is physically causing property loss or damage due to its tendency to attach to surfaces
17 for prolonged periods of time; and (j) The City of Kansas City, Missouri issued a Proclamation in
18 response to COVID-19 “to protect life and property.”

19 56. As a result of the presence of COVID-19 and the Orders to shut down the business,
20 Plaintiff has lost Business Income and incurred Extra Expense.

21 57. Having sustained loss covered under the Policy, Sky Zone submitted a claim to Liberty
22 Mutual. Liberty Mutual has wrongfully failed to accept coverage for the claim.

23 58. Any effort by Liberty Mutual to deny the reality that the Coronavirus causes physical
24 loss and/or damage would constitute a false and potentially fraudulent misrepresentation that could
25 endanger policyholders, such as Plaintiff, and the public. In blatant breach of their contractual
26 obligations, however, Defendants have refused to pay Plaintiff’s losses and expenses. Liberty
27 Mutual has denied claims submitted by Plaintiff under its policies.

28 59. Liberty Mutual’s failure to accept coverage for Sky Zone’s claim is based on Liberty

1 Mutual's failure to faithfully apply its own Policy language.

2 60. As a result of Liberty Mutual's wrongful denial of coverage has caused Plaintiff to suffer
3 significant damages as a result Plaintiff has incurred, and continues to incur, a substantial loss of
4 business income and additional expenses covered under the Policy.

5 **FIRST CAUSE OF ACTION**

6 **DECLARATORY RELIEF**
7 **(Against all DEFENDANTS and DOES 1 to 25)**

8 61. Plaintiff re-alleges and incorporates by reference into this cause of action each and every
9 allegation set forth in each and every paragraph of this Complaint.

10 62. Under California Code of Civil Procedure section 1060 et seq., the court may declare
11 rights, status, and other legal relations whether or not further relief is or could be claimed. An actual
12 controversy has arisen between Plaintiff and Liberty Mutual as to the rights, duties, responsibilities
13 and obligations of the parties in that Plaintiff contends and, on information and belief, Liberty
14 Mutual disputes and deny, that: (1) the Order by Faulconer, in his official capacity as Mayor of San
15 Diego, constitutes a prohibition of access to Plaintiff's Insured Premises; (2) the prohibition of
16 access by the Order is specifically prohibited access as defined in the Policy; (3) the Order triggers
17 coverage because the Policy does not include an exclusion for a *viral pandemic* and actually extends
18 coverage for loss or damage due to physical loss and damage; and (4) the Policy provides coverage
19 to Plaintiff for any current and future civil authority closures of commercial buildings in California
20 due to physical loss or damage from COVID-19 under the Civil Authority coverage parameters and
21 the Policy provides business income coverage in the event that COVID-19 has caused a loss or
22 damage at the insured premises or immediate area of the Insured Premises. Resolution of the duties,
23 responsibilities and obligation of the parties is necessary as no adequate remedy at law exists and
24 a declaration of the Court is needed to resolve the dispute and controversy.

25 63. Plaintiff seeks a Declaratory Judgement to determine whether the Order constitutes a
26 prohibition of access to its Insured Premises by a Civil Authority as defined in the Policy.

27 64. Plaintiff further seeks a Declaratory Judgement to affirm that the Order triggers
28 coverage because the Policy does not include exclusion for a *viral pandemic* and actually extends

1 coverage for physical loss or damage to the Insured Premises.

2 65. Plaintiff further seeks a Declaratory Judgment to affirm that the Policy provides
3 coverage to Plaintiff for any current and future civil authority closures of commercial buildings in
4 California due to physical loss or damage from COVID-19 and the Policy provides business income
5 coverage in the event that COVID-19 has caused a loss or damage at the Insured Premises.

6 66. Plaintiff does not seek any determination of whether COVID-19 is physically in the
7 Insured Premises, amount of damages, or any other remedy other than declaratory relief.

8 **PRAYER FOR RELIEF**

9 Wherefore, Plaintiff herein, Sky Zone, prays as follows:

10 1. For a declaration that the Order by Kevin Faulconer, in his official capacity as Mayor
11 of San Diego, constitutes a prohibition of access to Plaintiff's Insured Premises located at
12 860 Los Vallecitos Boulevard, San Marcos, California 92069, and 6133 Innovation Way,
13 Carlsbad, California 92009;

14 2. For a declaration that the prohibition of access by the Order is specifically prohibited
15 access as defined in the Policy;

16 3. For a declaration that the Order triggers coverage because the no Policy exclusion
17 applies to bar or limit coverage for Sky Zone's claim, Policy does not include an exclusion
18 for a *viral pandemic* and actually extends coverage for loss or damage due to the virus or
19 physical loss and damage;

20 4. For a declaration that the Policy provides coverage to Plaintiff for their claim and for
21 any current and future civil authority closures of commercial buildings in California due to
22 physical loss or damage from the Coronavirus under the Civil Authority coverage
23 parameters and the Policy provides business income coverage in the event that COVID-19
24 has caused a loss or damage at the insured premises or immediate area of the insured
25 premises;

26 5. For a declaration that Business Income, Civil Authority and Extra Expense losses and
27 expenses incurred and sustained as a result of COVID-19 and related civil authority actions
28 are insured and covered losses and expenses under Plaintiff's Policy;

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- 6. Defendants are obligated to pay for the full amount of the Business Income, Civil Authority and Extra Expense losses and expenses sustained and incurred, and to be sustained and incurred, as a result of COVID-19 and related civil authority actions.
- 7. For special and consequential damages against Liberty Mutual in an amount to be proved at trial;
- 8. Ordering that Defendants pay both pre- and post-judgment interest on any amounts awarded;
- 9. Awarding Plaintiff its costs and attorneys' fees and
- 10. For such other relief as the Court may deem just and proper.

Dated: November 16, 2020

THE CASAS LAW FIRM, P.C.



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