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 9 RIALTO POCKETS, INC., ET AL.

10 **UNITED STATES DISTRICT COURT**
 11 **CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

13 RIALTO POCKETS, INC.;
 14 BROOKHURST VENTURE, LLC; CITY
 OF INDUSTRY HOSPITALITY
 15 VENTURE, INC.; FARMDALE
 HOSPITALITY SERVICES, INC.; HIGH
 16 EXPECTATIONS HOSPITALITY, LLC;
 INLAND RESTAURANT VENTURE I,
 17 INC.; KENTUCKY HOSPITALITY
 VENTURE, LLC; K-KEL, INC.; L.C.M.,
 18 LLC; MIDNIGHT SUN ENTERPRISES,
 INC.; NITELIFE, INC.; OLYMPIC
 19 AVENUE VENTURE, INC.; THE
 OXNARD HOSPITALITY SERVICES,
 20 INC.; PENN AVE HOSPITALITY, LLC;
 PLATINUM SJ ENTERPRISE; PNM
 21 ENTERPRISES, INC.; ROUGE
 GENTLEMEN’S CLUB, INC.; SANTA
 22 BARBARA HOSPITALITY SERVICES,
 INC.; SANTA MARIA RESTAURANT
 23 ENTERPRISES, INC.; SARIE’S
 LOUNGE, LLC; THE SPEARMINT
 24 RHINO ADULT SUPERSTORE, INC.;
 WORLD CLASS VENUES, LLC;
 25 WASHINGTON MANAGEMENT, LLC;
 AND W.P.B. HOSPITALITY, LLC,

26 Plaintiffs,
 27

Case No. 2:20-CV-7709

**COMPLAINT FOR BREACH OF
 CONTRACT**

JURY TRIAL DEMANDED

v.

CERTAIN UNDERWRITERS AT LLOYD’S, LONDON, INCLUDING BEAZLEY FURLONGE LTD. for and on behalf of LLOYD’S SYNDICATE 2623 AND BEAZLEY FURLONGE LTD. for and on behalf of LLOYD’S SYNDICATE 0623,

Defendants.

Plaintiffs Rialto Pockets, Inc.; Brookhurst Venture, LLC; City of Industry Hospitality Venture, Inc.; Farmdale Hospitality Services, Inc.; High Expectations Hospitality, LLC; Inland Restaurant Venture I, Inc.; Kentucky Hospitality Venture, LLC; K-Kel, Inc.; L.C.M., LLC; Midnight Sun Enterprises, Inc.; Nitelife, Inc.; Olympic Avenue Venture, Inc.; The Oxnard Hospitality Services, Inc.; Penn Ave Hospitality, LLC; Platinum SJ Enterprise; PNM Enterprises, Inc.; Rouge Gentlemen’s Club, Inc.; Santa Barbara Hospitality Services, Inc.; Santa Maria Restaurant Enterprises, Inc.; Sarie’s Lounge, LLC; The Spearmint Rhino Adult Superstore, Inc.; World Class Venues, LLC; Washington Management, LLC; and W.P.B. Hospitality, LLC (collectively, “Plaintiffs”) by and through their undersigned counsel, hereby sue Defendants Certain Underwriters at Lloyd’s, London, including Beazley Furlonge Ltd. for and on behalf of Lloyd’s Syndicate 2623, and Beazley Furlonge Ltd. for and on behalf of Lloyd’s Syndicate 0623 (collectively, “Beazley”), and allege that Plaintiffs are entitled to relief based upon the following allegations:

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1 **I. NATURE OF THE ACTION**

2 **A. The Covid-19 Governmental Orders – Protecting The Public,**
3 **Including the Plaintiffs’ Employees, Patrons, And Those With Whom**
4 **They Come Into Contact, From Becoming Infected With And/Or**
5 **Transmitting Covid-19.**

6 1. The Covid-19 pandemic is an insidious disease that in many instances causes
7 very serious injury, including death – over 170,000 in the United States alone as of the
8 filing of this Complaint – to those who are exposed to the coronavirus. The transmission of
9 the virus occurs from person to person, mainly through airborne respiratory droplets
10 produced when an infected person breathes out, coughs, sneezes, or talks. Such droplets
11 containing the virus can then land in the mouths or noses of people who are nearby and/or
12 are inhaled into a person’s lungs. Droplets containing the virus can also be spread by their
13 landing on surfaces, which if someone comes in contact with, can ultimately enter (in
14 many circumstances) into a person’s respiratory system and infect them. The spread of
15 Covid-19 is more likely when people are in close proximity to one another, *i.e.*, within
16 about 6 feet. The transmission of the disease from person to person is especially difficult to
17 stop because many persons who are infected with Covid-19 do not know they are infected
18 since they are asymptomatic but nevertheless are “shedding” the virus. Such asymptomatic
19 persons, when in a public setting, can easily spread the virus to others. The chances of
20 transmitting Covid-19 are also greatly exacerbated by persons being in indoor settings.

21 2. The Plaintiffs herein, in pertinent part, operate twenty-three (23) different
22 gentlemen’s clubs, of which fourteen (14) are located in California and one club is located
23 in each of the following states: Nevada, Idaho, Kentucky, Minnesota, Pennsylvania, Texas,
24 Florida and two (2) clubs in Iowa, as well as a retail store by the name of Spearmint Rhino
25 Adult Superstore in California (collectively the “clubs”). The routine business operations
26 of the clubs is essentially 365 days a year and business is conducted almost exclusively in
27 indoor settings where employees are in close proximity not only with each other but with

1 the customers, who are also often in close proximity with other customers. The nature of
2 the clubs’ business operations, like many other kinds of business operations such as those
3 occurring in restaurants and bars, presents a setting where Covid-19 can be easily
4 transmitted, infecting the clubs’ employees and customers who, if infected, can then
5 transmit Covid-19 to others, including their own families and other persons with whom
6 they may come into contact.

7 3. As part of the efforts to stop the spread of the Covid-19 pandemic and
8 thereby protect the health and safety of the public – including the clubs’ employees, their
9 patrons, and others with whom their employees and patrons would come into contact –
10 orders were issued by state, county, and/or local governmental entities, depriving the
11 Plaintiffs of their ability to use the locations, *i.e.*, the real property out of which they
12 provide their business services (“Covid-19 Governmental Orders” or “Shut Down
13 Orders”). The Covid-19 Governmental Orders mandated, *i.e.*, required, that businesses,
14 such as the clubs operated by the Plaintiffs herein, stop conducting business. The Plaintiffs
15 have complied with the Covid-19 Governmental Orders, which have remained in effect
16 since mid-March 2020 for all the clubs other than those located in Carter Lake, Iowa,
17 Dallas, Texas, Minneapolis, Minnesota (limited capacity and limited operations schedule),
18 and the Spearmint Rhino Superstore in City of Industry, California (a retail store that was
19 closed from March 17, 2020 through June 7, 2020, and which reopened on a limited basis
20 on June 8, 2020). Because of the Covid-19 Governmental Orders, the Plaintiffs cannot
21 conduct their business operations, directly resulting in their sustaining millions of dollars
22 of losses.

23 4. Plaintiffs based upon the plain meaning of the language used in the Policy
24 reasonably believed that the Policy – which includes “Time Element coverage” for loss
25 “directly resulting from direct physical loss or physical damage” to Property Insured –
26 provided coverage when a civil authority ordered a temporary shutdown of any of their
27

1 gentlemen’s clubs for public health and safety reasons.

2 5. Plaintiffs have complied with all terms and conditions precedent contained
3 in the Policy, to the extent not waived or otherwise excused, including providing timely
4 notice of their loss. Plaintiffs are entitled to the full benefits and protections provided by
5 the Policy.

6 **B. Beazley’s Denial Of Coverage Is Based Upon Its Assertion That Only**
7 **Physical Damage To Property Triggers Its Promise To Cover Direct**
8 **Physical Loss Or Physical Damage To Property Insured.**

9 6. Defendant Beazley Furlonge Ltd. for and on behalf of Lloyd’s Syndicate
10 2623 and Beazley Furlonge Ltd. for and on behalf of Lloyd’s Syndicate 0623 (“Beazley”)
11 is a London-based insurer that issued to the Plaintiffs herein an “all risk” commercial
12 property policy, Policy Number W25A95200201, for the Policy Period January 1, 2020 to
13 January 1, 2021, which provides aggregate limits of liability of \$10,000,000 per occurrence
14 (“Beazley Policy” or “Policy”). Included within the Beazley Policy is its promise to pay its
15 Insureds, the Plaintiffs herein, “Time Element loss,” which includes the Insureds’ recovery
16 of their loss, to the extent the Insureds are:

- 17 (i) *wholly or partially prevented* from producing goods or *continuing business*
18 *operations or services*;
- 19 (ii) unable to make up lost production within a reasonable period of time, not
20 limited to the period during which production is interrupted;
- 21 (iii) *unable to continue such operations or services* during the Period of Liability;
22 and
- 23 (iv) *able to demonstrate a loss of sales for the operations, services or production*
24 *prevented. (Emphasis added) (See Beazley Policy, attached hereto as Exhibit*
25 *A, at pp. 32-33).*¹

26 _____
27 ¹ Because the Beazley Policy contains several sets of page numbers, all references to page
28 numbers will correspond to the PDF page number of this exhibit.

1 7. Plaintiffs sent notice to Beazley seeking coverage for the losses they had
2 sustained as a direct result of the Covid-19 Governmental Orders that necessitated, *i.e.*,
3 required, the closure of their business operations.

4 8. Unfortunately, Beazley has refused to honor their promise to provide the
5 protection that Plaintiffs purchased. Beazley, in its correspondence dated May 26, 2020,
6 denied coverage under Time Element section of the Beazley Policy, asserting that
7 coverage was not triggered because no “‘direct physical loss or physical damage’ to
8 property has occurred at the insured’s business premises.” Beazley went on further to
9 explain its denial by stating:

10 “Again, there is no evidence or indication that any such property has suffered any
11 physical loss or damage necessitating the closure of the insured’s businesses. Their
12 closure was ordered to prevent the spread of an infectious disease transmitted by
13 human interaction, and *not due to any physical damage to property.*” (*Emphasis*
14 added).

15 9. Beazley, per its explanation, asserts that the terms “physical loss” and
16 “physical damage” are only triggered “due to any physical damage to property.” Such an
17 interpretation of “physical loss” and “physical damage” as being triggered only by physical
18 damage to property renders the term “physical loss” illusory and without legal effect, a
19 result that is contrary to one of the basic tenets of California’s rules of contract
20 interpretation requiring that all the words or phrases used in a contract are given separate
21 and distinct meanings. (*See, e.g., Mirapad, LLC v. California Ins. Guarantee Assn.*, 132
22 Cal.App.4th 1058, 1070-73 (2005) (where policy referred to “person” and “organization”
23 separately and distinctly, the words must be given their separate and distinct meaning to
24 avoid creating ambiguity and redundancy); *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12
25 Cal.App.4th 715, 754-55 (1993) (where a pollution exclusion contained the phrase “sudden
26 and accidental,” the terms “sudden” and “accidental” must have different meanings; thus,
27 “accidental” conveys the sense of an unexpected and unintended event, while “sudden”
28 conveys the sense of an unexpected event that is abrupt or immediate in nature); *Anthem*

1 *Elecs., Inc. v. Pac. Emplrs. Ins. Co.*, 302 F.3d 1049, 1059-60 (9th Cir. 2002) (“sudden and
2 accidental” exception to an “Impaired Property” exclusion required both sudden and
3 accidental physical damage to circuit boards).

4 10. It is also axiomatic under California law that the words and phrases found in
5 a policy are given the plain everyday meaning a layperson would give them in context,
6 with each word and provision giving meaning to each other. (Cal. Civ. Code § 1636; *ACL*
7 *Technologies, Inc. v. Northbrook Property & Casualty Ins. Co.*, 17 Cal.App.4th 1773, 1792
8 (1993). There is no question that “physical damage” as used in the Beazley Policy refers to
9 “damage,” which refers to the alteration or change sustained by something that is
10 “physical,” *i.e.*, something having material existence, such as the real and personal
11 property that constitute the Property Insured under the Beazley Policy.

12 11. Giving the term “direct physical loss” the plain meaning a layperson would
13 give this phrase in context results in the conclusion that the Plaintiffs herein, because of the
14 Covid-19 Governmental Orders, sustained Time Element loss directly resulting from
15 “direct physical loss.” The word “direct” refers to something characterized by close
16 logical, causal, or consequential relationship without interruption or deviation.
17 (Webster’s Third New Int’l Dictionary 640 (1981). Case law has interpreted “direct” as
18 referring to proximate cause. (*American Tooling Center, Inc. v. Travelers Casualty &*
19 *Surety Co. of Am.*, 895 F.3d 455, 460 (6th Cir. 2018) (citation omitted)). The word
20 “physical” means something having material existence, such as the Property Insured,
21 which includes the buildings that house the clubs’ business operations. (*Blasiar, Inc. v.*
22 *Fireman’s Fund Ins. Co.*, 76 Cal.App.4th 748, 754 (1999). The word “loss” as used in
23 the phrase “physical loss” refers to “. . . losing possession; Deprivation.” (Webster’s Int’l
24 Dictionary 1338 (2002). Deprivation, in turn, means “being kept from possessing,
25 enjoying, or using something.” (Merriam-Webster.com, last accessed August 17, 2020).

1 12. A reasonable layperson giving the phrase “physical loss” its plain
2 everyday meaning in context would interpret it as applying to losing or being deprived of
3 the ability to use something that one possesses that has material existence, such as the
4 buildings in which the gentlemen’s clubs conduct their business operations. The Covid-
5 19 Governmental Orders – without any intervening event or cause – necessitated the
6 closure of the clubs’ business operations, which occurred within the confines of the
7 insured real property and meets the requirement that the “physical loss” is “direct.” This
8 is a reasonable interpretation of the terms “physical loss” that gives the phrase meaning
9 separate and distinct from “physical damage” and is consistent with California’s rules of
10 contract interpretation. This interpretation therefore should be adopted. This is true even
11 if Beazley is able to proffer another reasonable interpretation of “physical loss,” as the
12 existence of multiple reasonable interpretations, at least one of which would result in
13 coverage existing, simply creates an ambiguity that will be construed against an insurer,
14 such as Beazley here. (*Pardee Constr. Co. v. Ins. Co. of the West*, 77 Cal.App.4th 1340,
15 1352 (2000)). This is especially true where the language at issue, as is the case here, is
16 present in an Insuring Agreement which under California law is, if any uncertainty in the
17 language exists, construed broadly. (*HS Servs. v. Nationwide Mut. Ins. Co.*, 109 F.3d
18 642, 645 (9th Cir. 1997) (applying California law).

19 13. Further supporting the reasonableness of Plaintiffs’ interpretation are
20 several decisions interpreting the term “direct physical loss” in the same way as the
21 Plaintiffs herein. For example, in *Universal Sav. Bank v. Bankers Std. Ins. Co.*, 2004 WL
22 3016644, at *6 (Cal. Ct. App. Mar. 17, 2004), the California Court of Appeal held: “The
23 plain meaning of ‘direct physical loss’ encompasses physical displacement or loss of
24 physical possession. That the loss must be ‘physical’ distinguishes the loss from some
25 other, incorporeal loss. The ordinary meaning of ‘direct physical loss’ is not the same as
26 that of ‘direct physical damage,’ as the use of the terms ‘loss’ and ‘damage’ in the context
27
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1 of the insuring clause does not suggest that the terms are synonymous.”² (citing *Great*
2 *Northern Ins. Co. v. Dayco Corp.*, 620 F. Supp. 346, 351 (S.D.N.Y. 1985)); *Total*
3 *Intermodal Services, Inc. v. Travelers Property Casualty Co. of Am.*, 2018 WL 3829767, at
4 *3 & n.4 (C.D. Cal. July 11, 2018) (“Under an ‘ordinary and popular meaning,’ the ‘loss
5 of’ property contemplates that the property is misplaced and unrecoverable, without regard
6 to whether it was damaged. Furthermore, to interpret ‘physical loss of’ as requiring
7 ‘damage to’ would render meaningless the ‘or damage to’ portion of the same clause,
8 thereby violating a black-letter canon of contract interpretation – that every word be given
9 a meaning. . . . The Court therefore rejects Travelers’s proposed construction. Instead, the
10 phrase ‘loss of’ includes [*i.e.*, its construction is non-limiting] the permanent dispossession
11 of something.”) (citations omitted); *Erik Scott Media, LLC v. Owners Ins. Co.*, 2018 WL
12 4146608, at *3 (D. Utah Aug. 30, 2018) (“The term ‘direct physical loss’ is not defined in
13 the Policy. Nor is it stated that ‘direct physical loss’ requires destruction of or any physical
14 impact altering the property itself. ‘Direct physical loss’ of the property is not clear or
15 unmistakable. A plain reading of the term as used in the CPC provision could include the
16 loss of physical possession or control of property that was not physically destroyed or
17 altered in any way. The term ‘loss’ is susceptible to different interpretations and under
18 Utah law must therefore be construed in favor of coverage.”) (citation omitted).

19 14. While the type of property at issue in the cases cited in the preceding
20 paragraph was not real property, the reasoning in these decisions applies with equal force
21 to the property at issue here. The Beazley Policy’s Time Element Coverage applies “to
22 Property Insured by this Policy.” (See Beazley Policy, at p. 32). “Property Insured,” in turn,
23 includes: “A. Real Property at an Insured Location, in which the Insured has an insurable
24 interest. B. Personal Property” (*Id.* at p. 22). There are no definitions, exclusions, or
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26 ² Federal courts may consider unpublished California opinions as persuasive authority.
27 *Emp’rs Ins. of Wausau v. Granite St. Ins. Co.*, 330 F.3d 1214, 1220 n.8 (9th Cir. 2003).

1 other provisions in the Beazley Policy (and Beazley has not suggested any in its denial
2 letter) providing that the phrase “direct physical loss” in the Beazley Policy means
3 something different in the context of Real Property as opposed to Personal Property. Put
4 another way, it would be reasonable for a layperson to conclude that, under the Beazley
5 Policy, there is “direct physical loss” when the Insured loses the ability to possess, use, or
6 control all types of “Property Insured by this Policy,” which in this instance are the
7 buildings out of which the clubs conduct their business operations.

8 **C. The Covid-19 Governmental Orders is a Covered Cause Under the**
9 **“All Risk” Beazley Policy.**

10 15. The Beazley Policy is an “all risk” policy that provides coverage for all risk
11 of “direct physical loss or physical damage” other than those that are expressly excluded by
12 the policy. (*State Farm Fire & Cas. Co. v. Von Der Lieth*, 54 Cal.3d 1123, 1131 (1991)).
13 Here, the Beazley Policy does not contain any exclusion that applies to government public
14 health and safety orders, such as the Covid-19 Governmental Orders at issue here. (*See*,
15 *e.g.*, Beazley Policy at pp. 18-21). Accordingly, the Covid-19 Governmental Orders
16 constitute a covered risk, *i.e.*, a covered peril under the Beazley Policy. Beazley, as
17 reflected from a review of the Policy knew how to exclude certain kinds of governmental
18 orders, such as those involving “seizure or destruction under quarantine or custom
19 regulation, or confiscation by order of any governmental or public authority”, none of
20 which are at issue here. (*See id.*, General Exclusion A. 9. f. at 20).

21 16. As reflected in Beazley’s denial letter, Beazley does not assert that Covid-19
22 Governmental Orders are a non-covered, *i.e.*, an excluded, risk under the Beazley Policy.
23 (*See* Beazley’s Denial, at Exhibit B).

24 17. Separately, Beazley also provides additional Time Element loss coverage
25 under the Beazley Policy to its insureds in certain very limited circumstances – not at issue
26 here – such as where the Property Insured itself has not sustained physical loss or physical
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1 damage. Such additional coverage is limited to circumstances where uninsured premises,
2 within a certain physical distance from an insured location, sustain physical loss or
3 physical damage and access to an insured location is prohibited. (*See* Beazley Policy, Time
4 Element Section, at pp. 39-40).

5 **D. Beazley’s Reliance Upon the Mold Exclusion (Exclusion D) is**
6 **Misplaced.**

7 18. Beazley also argued in its denial letter that, even if coverage were afforded
8 under the Time Element provisions of its Policy coverage is barred because certain
9 exclusions apply. In particular, Beazley argued that Plaintiffs’ claim for coverage fell
10 within the scope of its Mold Exclusion (Exclusion D), which excludes “any loss, damage,
11 claim, cost, expense or other sum directly or indirectly arising out of or relating to: mold,
12 mildew, fungus, spores or other microorganism of any type” (Beazley Policy, at p.
13 21). By its express terms, the exclusion specifically refers only to specific kinds of
14 microorganisms, here “mold,” “mildew,” “fungus” or “spores.”

15 19. Beazley’s reliance on the Mold Exclusion (Exclusion D) is misplaced.³
16 Among other things, the items enumerated in the Mold Exclusion involve specific types of
17 living things. (*See, e.g.*, Cambridge Dictionary (defining microorganism as “living thing
18 that on its own is too small to be seen without a microscope”). The term “microorganism”
19 as used herein refers only to the same type of living organism of the same kind or type as
20 mold, mildew, fungus or spores. By the exclusion’s own terms, it would not apply to
21 bacteria, which does not fit within the same general category as mold, mildew, fungus or
22 spores. In any event, it is crystal clear that a virus, such as Covid-19, is not a living
23 organism and does not fit within the scope of the exclusion. (*See* Dictionary.com, last
24 accessed on August 17, 2020) (“Viruses are not technically considered living organisms
25

26 _____
27 ³ Plaintiffs provide additional reasons below for why the Underwriters’ reliance on
28 Exclusion D, as well as other exclusions, is misplaced.

1 because they are devoid of biological processes (such as metabolism and respiration) and
2 cannot reproduce on their own but require a living cell (of a plant, animal, or bacterium) to
3 make more viruses.’’). Moreover, under the rule of *ejusdem generis*, Exclusion D’s ‘‘catch-
4 all’’ phrase of ‘‘including but not limited to’’ must be construed as having the same general
5 nature as the enumerated types of ‘‘living’’ items. (Cal. Civ. Code § 3534; *Furtado v.*
6 *Metropolitan Life Ins. Co.*, 60 Cal.App.3d 17, 25 (1976)). Further, since Plaintiffs’
7 interpretation of the exclusion is a reasonable one, even if Beazley is able to proffer a
8 different reasonable interpretation of the exclusion supporting its application, it simply
9 creates an ambiguity that will be construed against Beazley. (*Pardee Constr. Co.*, *supra*,
10 77 Cal.App.4th at 1352).

11 20. Further, the Mold Exclusion is also uncertain and ambiguous to the extent it
12 requires that an insured needs scientific expertise to interpret the exclusion. (*See, e.g.*,
13 *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, 45 Cal.App.4th 1, 36
14 (1996) (‘‘A policy should not be read as it might be analyzed by an attorney or an insurance
15 expert. This is so even if the policyholder is a sophisticated insured.’’) (citations omitted);
16 *AIU Ins. Co. v. Superior Court*, 51 Cal.3d 807 (1990) (unreasonable to conclude that
17 phrase ‘‘legally obligated to pay’’ unambiguously incorporated sophisticated legal
18 distinction; thus, the court resolved the ambiguity in favor of coverage). Additionally,
19 where, as here, the language of the Mold Exclusion is uncertain or ambiguous under
20 California law is to be interpreted narrowly.

21 21. Further, under California law, certain aspects of the exclusion that provide,
22 for example, that it applies ‘‘directly or indirectly arising out of or relating to’’ to the
23 excluded risk are void and unenforceable under California law. (*Julian v. Hartford*
24 *Underwriters Ins. Co.*, 35 Cal.4th 747, 754-55 (2005) (citing, *inter alia*, *Howell v. State*
25 *Farm Fire & Casualty Co.*, 218 Cal.App.3d 1446, 1452 (1990); *Garvey v. State Farm Fire*
26 *& Casualty Co.*, 48 Cal.3d 395, 399 (1989)).

1 22. Finally, even if Plaintiffs’ claim potentially falls within the enforceable
2 portions of the Mold Exclusion and it is held to apply to the Covid-19 virus (and it does
3 not), it is a factual question for a jury to determine whether the exclusion or the Covid-19
4 Governmental Orders, mandating the shutdown of Plaintiffs’ Insured Locations are the
5 “efficient proximate cause” (*i.e.*, the “predominating” or “most important cause”) of
6 Plaintiffs’ Time Element losses. As such, Plaintiffs’ losses are covered. (*Von Der Lieth*,
7 *supra*, 54 Cal.3d at 1131-32 (observing that “the question of what caused the loss is
8 generally a question of fact”).

9 23. Because Beazley has improperly denied Plaintiffs’ claim, it has breached the
10 insurance contract, and Plaintiffs are entitled to the damages of not less than \$10 million
11 per occurrence resulting from Beazley’s breach, as well as prejudgment and post-judgment
12 interest.

13 **II. JURISDICTION AND VENUE**

14 24. This Court has jurisdiction over Plaintiffs’ Complaint based on diversity of
15 citizenship pursuant to 28 U.S.C. § 1332, as the amount in controversy, exclusive of
16 interest and costs, exceeds the sum of Seventy Five Thousand Dollars (\$75,000), and it
17 involves a controversy between a citizen of California and citizens of foreign states.

18 25. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2) because a
19 substantial part of the events or omissions giving rise to the claims occurred in this district.
20 In addition, the contract of insurance, which is the subject of this Complaint, was entered
21 into in Norco, California, which is located in the County of Riverside and, as such, the
22 Eastern Division of this Court. Moreover, this Court has personal jurisdiction over
23 Defendants because, *inter alia*, they are authorized to do business and in fact do business in
24 this judicial District and have sufficient minimum contacts with this Judicial District.

25 26. In addition, Item 4 of the Policy’s “Certificate Provisions” is entitled
26 “**Service of Suit Clause.**” This clause provides, *inter alia*, that “[i]n the event of the failure
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1 of Underwriters to pay any amount claimed to be due under the insurance described herein,
2 Underwriters have agreed that, at the request of the Assured, they will submit to the
3 jurisdiction of a Court of competent jurisdiction within the United States,” and
4 “Underwriters have further agreed that service of process in such suit may be made upon
5 FLWA Service Corp, c/o Foley & Lardner LLP, 555 California Street, Suite 1700, San
6 Francisco, CA.”

7 **III. THE PARTIES**

8 27. Plaintiff Rialto Pockets, Inc. is a California corporation having its principal
9 place of business in the County of San Bernardino, California.

10 28. Plaintiff Brookhurst Venture, LLC is a California limited liability company
11 having its principal place of business in the County of Orange, California.

12 29. Plaintiff City of Industry Hospitality Venture, Inc. is a California corporation
13 having its principal place of business in the County of Los Angeles, California.

14 30. Plaintiff Farmdale Hospitality Services, Inc. is a California corporation
15 having its principal place of business in the County of Los Angeles, California.

16 31. Plaintiff High Expectations Hospitality, LLC is a Texas limited liability
17 company having its principal place of business in the County of Dallas, Texas.

18 32. Plaintiff Inland Restaurant Venture I, Inc. is a California corporation having
19 its principal place of business in the County of Los Angeles, California.

20 33. Plaintiff Kentucky Hospitality Venture, LLC is a Delaware limited liability
21 company having its principal place of business in the County of Fayette, Kentucky.

22 34. Plaintiff K-Kel, Inc. is a Nevada corporation having its principal place of
23 business in the County of Clark, Nevada.

24 35. Plaintiff L.C.M., LLC is an Idaho limited liability company having its
25 principal place of business in the County of Ada, Idaho.

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1 36. Plaintiff Midnight Sun Enterprises, Inc. is a California corporation having its
2 principal place of business in the County of Los Angeles, California.

3 37. Plaintiff Nitelife, Inc. is a Minnesota corporation having its principal place
4 of business in the County of Hennepin, Minnesota.

5 38. Plaintiff Olympic Avenue Venture, Inc. is a California corporation having its
6 principal place of business in the County of Los Angeles, California.

7 39. Plaintiff The Oxnard Hospitality Services, Inc. is a California corporation
8 having its principal place of business in the County of Ventura, California.

9 40. Plaintiff Penn Ave Hospitality, LLC is a Delaware limited liability company
10 having its principal place of business in the County of Allegheny, Pennsylvania.

11 41. Plaintiff Platinum SJ Enterprise is a California corporation having its
12 principal place of business in the County of Santa Clara, California.

13 42. Plaintiff PNM Enterprises, Inc. is a California corporation having its
14 principal place of business in the County of Orange, California.

15 43. Plaintiff Rouge Gentlemen's Club, Inc. is a California corporation having its
16 principal place of business in the County of Los Angeles, California.

17 44. Plaintiff Santa Barbara Hospitality Services, Inc. is a California corporation
18 having its principal place of business in the County of Santa Barbara, California.

19 45. Plaintiff Santa Maria Restaurant Enterprises, Inc. is a California corporation
20 having its principal place of business in the County of Santa Barbara, California.

21 46. Plaintiff Sarie's Lounge, LLC is an Iowa limited liability company having
22 its principal place of business in the County of Pottawattamie, Iowa.

23 47. Plaintiff The Spearmint Rhino Adult Superstore, Inc. is a California
24 corporation having its principal place of business in the County of Los Angeles, California.

25 48. Plaintiff World Class Venues, LLC is an Iowa limited liability company
26 having its principal place of business in the County of Pottawattamie, Iowa.

1 49. Plaintiff Washington Management, LLC is a California limited liability
2 company having its principal place of business in the County of Los Angeles, California.

3 50. Plaintiff W.P.B. Hospitality, LLC is a Florida limited liability company
4 having its principal place of business in the County of Palm Beach, Florida.

5 51. Defendant Certain Underwriters at Lloyd's, London is comprised of a
6 number of individuals and/or corporations that subscribed to an insurance policy –
7 Commercial Property Policy No. W25A95190101 – issued to Plaintiffs. Upon information
8 and belief, the particular Lloyd's syndicates that subscribed to the Commercial Property
9 Policy are as follows:

10 a. Lloyd's Syndicate 2623, which, upon information and belief, is an
11 unincorporated association organized under the laws of England and Wales, and which is
12 managed by Beazley Furlonge Ltd., which, in turn, is wholly owned by Beazley PLC.

13 b. Lloyd's Syndicate 0623, which, upon information and belief, is
14 organized under the laws of England and Wales, and which is managed by Beazley
15 Furlonge Ltd., which, in turn, is wholly owned by Beazley PLC.

16 c. Lloyd's participated in coverage for the Policy at issue via Syndicate
17 2623 (82%) and Syndicate 623 (18%).

18 d. Lloyd's is authorized to write surplus lines insurance in the State of
19 California, such as the Commercial Property Policy at issue. (Certain Underwriters and
20 Beazley are collectively referred to herein as "Beazley.")

21 **IV. NON-PARTIES**

22 52. The following two (2) entities are referenced as a matter of context, albeit
23 they did not suffer a direct Time Element loss as the Plaintiffs suffered.

24 53. Non-Party The Spearmint Rhino Companies Worldwide, Inc. ("Companies")
25 is a Nevada corporation having its principal place of business in the County of Riverside,
26 California. Companies is the holder of all intellectual property and licenses the use of said
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1 intellectual property including, but not limited to, names, logos, trade dress, design, floor
2 and wall coverings, etc. to each of the Clubs operating under the Spearmint Rhino, Blue
3 Zebra, Dames N’ Games and California Girls brand names and is paid either a percentage
4 of gross revenues or a flat fee varied by location for such licenses. The Beazley Policy
5 identifies Companies as the Named Insured and notes its address in Norco (Riverside
6 County), California.

7 54. Non-Party Spearmint Rhino Consulting Worldwide, Inc. (“SRCW”) is a
8 Delaware corporation having its principal place of business in the County of Riverside,
9 California. SRCW is a consulting company that provides services including, but not limited
10 to, zoning, licensing, human resources, accounting, information technology, etc. to each of
11 the Clubs operating under the Spearmint Rhino, Blue Zebra, Dames N’ Games and
12 California Girls brand names and is paid either a percentage of gross revenues or a flat fee
13 varied by location for such services.

14 **V. FACTUAL BACKGROUND**

15 **A. The Covid-19 Pandemic.**

16 55. Covid-19 is an infectious disease cause by a recently discovered coronavirus
17 known as SARS-CoV-2 (“Coronavirus” or “Covid-19”). The first instances of the disease
18 spreading to humans were diagnosed in or around December 2019.

19 56. On January 21, 2020, the first American Covid-19 case was confirmed in the
20 State of Washington. (*See* Centers for Disease Control and Prevention,
21 <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html> (last
22 accessed August 15, 2020).

23 57. Shortly thereafter, by January 26, 2020, the United States Centers for
24 Disease Control (“CDC”) confirmed the first Covid-19 case in California. (See Cal. Dept.
25 of Health, <https://www.cdph.ca.gov/Programs/OPA/Pages/NR20-001.aspx> (last accessed
26 August 15, 2020)).

1 58. On January 30, 2020, the World Health Organization (“WHO”) declared that
2 the Coronavirus outbreak constituted a public health emergency of international concern.

3 59. On March 4, 2020, the first Covid-19 fatality was reported in California.

4 60. On March 11, 2020 the WHO declared Coronavirus a worldwide pandemic.

5 61. On March 13, 2020, President Trump declared the Covid-19 pandemic to be
6 a national emergency.

7 62. On March 16, 2020, the CDC and national Coronavirus Task Force issued
8 guidance to the American public advising individuals to adopt social distancing measures.

9 63. As of August 15, 2020, the number of confirmed cases of Covid-19 is over
10 21.2 million worldwide, with over 767,000 deaths. (*See* Johns Hopkins Coronavirus
11 Resource Center, <https://coronavirus.jhu.edu/map.html> (last accessed August 15, 2020)).

12 **B. State and Local Governments Order Everyone to “Stay at home” and**
13 **that Non-Essential Businesses, Such as the Clubs, Close.**

14 64. On March 4, 2020, California Governor Gavin Newsom issued an order
15 declaring “a State of Emergency to exist in California as a result of the threat of Covid-19.”
16 See State of California Executive Order N-25-20.

17 65. On March 12, 2020, Governor Newsom issued a new Executive Order
18 further enhancing state and local government’s ability to respond to the Covid-19
19 pandemic, including the cancellation of large non-essential gatherings.

20 66. On March 14, 2020, county public health offices issued an order cancelling
21 gatherings of more than 100 people and restricting gatherings of more than 35 people.

22 67. On March 15, 2020, Governor Newsom issued guidelines calling for
23 “profoundly significant steps” to limit the spread of Covid-19. These guidelines required
24 the self-isolation of all residents 65 years of age or older and the closure of all “[b]ars,
25 nightclubs, wineries, brew pubs and the like.” The guidelines further required all
26 restaurants to halve their capacities and keep customers at least six feet from one another.”
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1 (See Cowan, Jill, *California Governor Orders Radical Changes to Daily Life*, N.Y. Times
2 (Mar. 16, 2020), [https://www.nytimes.com/2020/03/16/us/california-newsom-bars-home-
isolation.html](https://www.nytimes.com/2020/03/16/us/california-newsom-bars-home-
3 isolation.html) (last accessed July 6, 2020)).

4 68. On March 19, 2020, Governor Newsom issued statewide Executive Order
5 N-33-20, which directed “all individuals living in the State of California to stay home or at
6 their place of residence except as needed to maintain continuity of operations of the federal
7 critical infrastructure sector as outlined at [https://www.cisa.gov/identifying-critical-
9 infrastructure-during-Covid-19](https://www.cisa.gov/identifying-critical-
8 infrastructure-during-Covid-19).” Plaintiffs’ gentlemen’s clubs do not fall within any of the
10 16 critical infrastructure sectors.

11 69. By its own terms, Executive Order N-33-20 was necessary to “preserve the
12 public health and safety, and to ensure the healthcare delivery system is capable of serving
13 all,” as well as to “bend the curve, and disrupt the spread of the virus.”

14 70. County and local governments across California have entered their own
15 orders mandating that resident’s shelter in place and that businesses limit or cease
16 operations. For example, on March 19, 2020, Los Angeles County and City (where 7 of
17 Plaintiffs’ 14 California nightclubs are located as well as the Spearmint Rhino Superstore)
18 issued orders significantly restricting public mobility and business operations, including a
19 prohibition of all indoor and outdoor gatherings of 10 or more people. (See Safer at Home
20 Order, <https://www.lamayor.org/COVID19Orders>).

21 71. Other states around the country have implemented similar orders, based
22 upon the Covid-19 pandemic requiring businesses, including Plaintiffs’ nightclubs, to close
23 their doors.

24 72. The above-referenced Covid-19 Governmental Orders are neither laws nor
25 ordinances.
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1 73. Plaintiffs did not have the ability or right to ignore these Covid-19
2 Governmental Orders, and doing so would have exposed Plaintiffs, *inter alia*, to fines and
3 sanctions.

4 74. Eventually, on May 4, 2020, Governor Newsom issued Executive Order N-
5 60-20 concerning the second and third stages of California’s “four-stage framework . . . to
6 allow Californians to gradually resume various activities.” Stage 2 allows gradual
7 reopening of lower-risk workplaces with adaptations, including bookstores, clothing stores,
8 florists, and sporting goods stores, with modifications. (*See* Office of Governor Newsom’s
9 Update on California’s Progress Toward Stage 2 Reopening, May 4, 2020,
10 [https://www.gov.ca.gov/2020/05/04/governor-newsom-provides-update-on-californias-](https://www.gov.ca.gov/2020/05/04/governor-newsom-provides-update-on-californias-progress-toward-stage-2-reopening)
11 [progress-toward-stage-2-reopening](https://www.gov.ca.gov/2020/05/04/governor-newsom-provides-update-on-californias-progress-toward-stage-2-reopening)). The May 4th Executive Order – which also qualifies
12 as a Covid-19 Governmental Order – states that, in Stage 3, California will allow the
13 reopening of higher-risk businesses and spaces, but it does not identify the types of
14 businesses that will fall within Stage 3.

15 75. To date, the Spearmint Rhino Superstore which is a retail store located in
16 City of Industry, California, was recently permitted to reopen on a limited basis. In
17 contrast, Plaintiffs’ clubs located in California and Nevada have not been allowed to
18 reopen at any point since March 2020 to present.

19 76. Some of Plaintiffs’ clubs located outside of California and Nevada have
20 reopened at least temporarily and sometimes only sporadically, depending upon regulatory
21 authority. Specifically, the clubs in Carter Lake, Iowa, and Dallas, Texas are currently now
22 open. The club in Minneapolis, Minnesota is also open, albeit with limited operating hours
23 and subject to more strict limited capacity requirements. The club in Lexington, Kentucky
24 opened briefly but was ordered soon thereafter once again to shut down. The club in
25 Pittsburgh, Pennsylvania was open for a short duration during this pandemic period but has
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1 remained closed, and the club in West Palm Beach, Florida opened for approximately one
2 day before closing.

3 **C. Plaintiffs Are Forced to Close Their Operations, Directly Resulting in**
4 **Time Element Financial Losses.**

5 77. Between March 14, 2020 and March 19, 2020, all of Plaintiffs' 23 clubs
6 throughout the country as well as the Spearmint Rhino Superstore were closed as a result
7 of the Covid-19 Governmental Orders.

8 78. Plaintiffs have suffered and continue to suffer Time Element losses, as set
9 forth in the Time Element Coverages, directly resulting from the Covid-19 Governmental
10 Orders that require that they shut down their business operations.

11 79. More specifically, as measured by the Policy's provisions related to "Time
12 Element loss" as set forth in the Time Element Coverages" located in Section D of the
13 Policy, Plaintiffs' losses are in excess of \$10 million as of the date of filing the instant
14 Complaint, and their losses are continuing to grow.

15 **VI. RELEVANT POLICY PROVISIONS**

16 **A. Beazley Issued an "All-Risk" Commercial Property Policy.**

17 80. The Policy issued to Plaintiffs by Beazley is an "all risk" commercial
18 property policy, which covers loss or damage to the property insured resulting from "all
19 risks" other than those expressly excluded. This Policy includes coverage for "Time
20 Element loss," which promises to cover Plaintiffs for their "Time Element loss" as set forth
21 in the "Time Element Coverage" (which include the financial losses they sustain because
22 they cannot conduct their business operations) directly resulting from a direct physical loss
23 to Property Insured under the Policy.

24 81. Beazley knew how to exclude certain risks in its Policy involving the
25 issuance of government orders, but choose not to exclude government health and safety
26 orders, such as the Covid-19 Governmental Orders. For example, in Section B of the
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1 Policy, Beazley included under General Exclusion A.9.f an exclusion that reads “seizure or
2 destruction under quarantine or custom regulation, or *confiscation by order* of any
3 governmental or public authority.” (Emphasis added). Notably, however, Beazley did not
4 include an exclusion for public health and safety orders.

5 82. Beazley, a large United Kingdom-based insurer, is also sophisticated enough
6 to define “Computer Virus”. (See Beazley Policy, Section B, APPLICATION OF THIS
7 POLICY TO ELECTRONIC DATA, at p. 17). Yet, Beazley never used (let alone defined)
8 the term “virus” in any of the exclusions contained in the Policy.

9 **B. The Insurance Certificate.**

10 83. The first portion of the Policy is the “Certificate of Beazley Insurance
11 Services” (hereinafter, the “Certificate”).

12 84. Among other things, the Certificate provides notice that the Policy has been
13 issued by “nonadmitted” or “surplus lines” insurers.

14 85. The Certificate also includes a number of “Provisions,” including Item 12,
15 entitled “**Law and Jurisdiction.**” Item 12 is a choice-of-law provision that states: “This
16 Insurance shall be governed by the laws of California and subject to the exclusive
17 jurisdiction of the courts of USA per the Service of Suite Clause [i.e., Certificate, Item 4]
18 contained therein.” Accordingly, California law applies to all of Plaintiffs’ locations at
19 issue herein, even those that are operating in states outside of California.

20 86. Item 13 of the Policy’s Certificate is entitled, “**Conformity to statute,**” and
21 it provides that “[a]ny terms of this Certificate which may conflict with applicable statutes
22 (or statutes deemed applicable by a court of competent jurisdiction) are amended to
23 conform with the minimum requirements of such statutes.”

24 **C. The General Cover Declarations Page.**

25 87. The second portion of the Policy is the “General Cover Declarations Page”
26 (“Declarations Page”).

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1 88. The Underwriters issued an “all risk” commercial property policy, bearing
2 policy number W25A95200201 for the Policy Period of January 1, 2020 to January 1, 2021
3 (“Policy”), which was a renewal of policy number W25A95190101.

4 89. The Policy names Spearmint Rhino Companies Worldwide, Inc. as the
5 Insured and includes a schedule of named insureds, including all of the other Plaintiffs in
6 this action.

7 90. The Policy insures against the following perils: “Risks of Direct Physical
8 Loss or Physical Damage excluding Flood and Earth Movement including Equipment
9 Breakdown, except are herein after excluded within this Policy”

10 **D. The Policy’s Six (6) Different Sections – Sections A through F.**

11 91. After the Declarations Page, the Policy includes six (6) different sections:
12 SCHEDULE (Section A); GENERAL PROVISIONS (Section B); PROPERTY DAMAGE
13 (Schedule C); TIME ELEMENT (Section D); LOSS ADJUSTMENT AND
14 SETTLEMENT CONDITIONS (Section E); and OTHER (Section F).

15 *1. Section A*

16 92. In the SCHEDULE (Section A), the Policy provides that the “maximum
17 limit of liability under this Policy for any one Occurrence shall not exceed **\$10,000,000** . . .
18 .”

19 *2. Section B*

20 93. In GENERAL PROVISIONS (Section B), under the term “**TERRITORY**,”
21 the Policy states that “[t]his Policy covers Insured Locations situated within the Territory
22 specified in the Schedule.”

23 94. Under the term “**INSURED LOCATION**,” the Policy states, *inter alia*, that:
24 “[t]he coverages under this Policy apply to an Insured Location unless otherwise provided.
25 Insured Location is a location listed in the Schedule and/or on a separate schedule on file
26 with the Underwriters.”

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1 95. The locations listed in the Schedule on file with the Underwriters, to wit:
2 Beazley, include each of the twenty-three (23) clubs at issue in this action as well as the
3 Spearmint Rhino Super Store retail location. Thus, all of Plaintiffs' clubs constitute Insured
4 Property under the Policy.

5 96. Section B of the Policy also contains a number of General Exclusions that
6 Beazley asserts apply to and bar coverage for Plaintiffs' claims. Those exclusions include
7 the following:

8 **GENERAL EXCLUSIONS**

9 A. Unless specifically stated elsewhere in this Policy, this Policy excludes:

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- 11 2) interruption of business;
- 12 3) loss of market or loss of use;
- 13 6) loss from enforcement of any law or ordinance:
 - 14 a) regulating the construction, repair replacement, use or
 - 15 removal, including debris removal, of any property;
 - 16 and/or . . .
 - 17 8) loss, damage, cost or expense of whatsoever nature directly or
 - 18 indirectly caused by, resulting from or in connection with the
 - 19 actual or threatened malicious use of pathogenic or poisonous
 - 20 biological or chemical materials regardless of any other cause or
 - 21 event contributing concurrently or in any other sequence thereto.

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23 C. This Policy excludes the following unless directly resulting from other
24 direct physical loss or physical damage not excluded by this Policy:

- 25 1) contamination including but not limited to the presence of pollution or
- 26 hazardous material. . . .

27 D. This Policy excludes any loss, damage, claim, cost, expense or other
28 sum directly or indirectly arising out of or relating to:

mold, mildew, fungus, spores or other microorganism of
any type, nature, or description, including but not limited
to any substance whose presence poses an actual or
potential threat to human health.

This Exclusion applies regardless whether there is (i) any physical loss or damage to Property Insured; (ii) any insured peril or cause, whether or not contributing concurrently or in any sequence; (iii) any loss of use, occupancy, or functionality; or (iv) any action required, including but not limited to repair, replacement, removal, cleanup, abatement, disposal, relocation, or steps taken to address medical or legal concerns.

3. Section C

97. Section C of the Policy is entitled “**PROPERTY DAMAGE.**”

98. The **INSURING CLAUSE** under Section C provides: “In consideration of the payment of premium as specified in the Declarations, and subject to the terms, conditions and exclusions of this Policy, the Underwriters agree to cover the Property Insured against risks of direct physical loss or physical damage occurring during the Period of Insurance.”

99. In Section C under the heading Property Insured, Beazley makes it clear that Property Insured includes the real property at an Insured Location. Specifically, Beazley states:

This Policy insures the following property, unless otherwise excluded, located at an Insured Location or within one thousand (1,000) feet thereof, to the extent of the interest of the Insured in such property.

- A. Real Property at an Insured Location, in which the Insured has an insurable interest.
- B. Personal Property: . . .

4. Section D

100. Section D of Beazley’s Policy is entitled “**TIME ELEMENT:**”

TIME ELEMENT - SECTION D

LOSS INSURED

- A. This Policy insures Time Element loss, as set forth in the Time Element Coverages, directly resulting from direct physical loss or physical damage insured by this Policy occurring during the Period of Insurance to Property Insured by this Policy.

1 B. This Policy insures Time Element loss only to the extent it cannot be reduced through:

- 2 1) the use of any property or service owned or controlled by the Insured;
- 3
- 4 2) the use of any property or service obtainable from other sources;
- 5 3) working extra time or overtime; or
- 6 4) the use of inventory,

7 all whether at an Insured Location or at any other location. The Underwriters reserve the right to take into consideration the combined operating results of all associated, affiliated or subsidiary companies of the Insured in determining the Time Element loss.

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10 C. This Policy covers expenses reasonably and necessarily incurred by the Insured to reduce the loss otherwise payable under this section of this Policy. The amount of such recoverable expenses will not exceed the amount by which the loss has been reduced.

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12 D. Except as respects Leasehold Interest, in determining the amount of loss payable, the Underwriters will consider the experience of the business before and after and the probable experience during the Period of Liability.

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15 **TIME ELEMENT COVERAGE**

16 **GROSS EARNINGS**

17 1) Measurement of Loss:

18 a) The recoverable Gross Earnings loss is the Actual Loss Sustained by the Insured of the following during the Period of Liability:

19 (i) Gross Earnings;

20 (ii) less all charges and expenses that do not necessarily continue during the interruption of production or suspension of business operations or services;

21 (iii) plus all other earnings derived from the operation of the business.

22
23 b) In determining the indemnity payable as the Actual Loss Sustained, the Underwriters will consider the continuation of only those normal charges and expenses (including up to thirty (30) days Ordinary Payroll) that would have been earned had no

interruption of production or suspension of business operations or services occurred.

c) There is recovery hereunder but only to the extent that the Insured is:

(i) wholly or partially prevented from producing goods or continuing business operations or services;

(ii) unable to make up lost production within a reasonable period of time, not limited to the period during which production is interrupted;

(iii) unable to continue such operations or services during the Period of Liability; and

(iv) able to demonstrate a loss of sales for the operations, services or production prevented.

2) The following term(s) mean(s):

Gross Earnings, as used in item 1a)(i):

a) for manufacturing operations: the net sales value of production less the cost of all raw stock, materials and supplies used in such production; and

b) for mercantile or non-manufacturing operations: the total net sales less cost of merchandise sold, materials and supplies consumed in the operations or services rendered by the Insured.

Any amount recovered under Property Damage coverage at selling price for loss or damage to merchandise will be considered to have been sold to the Insured's regular customers and will be credited against net sales.

Ordinary Payroll, as used in item 1b):

the entire payroll expense for all employees of the insured except officers, executives, department managers and employees under contract.

Research and Development

In respect of research and development activities, Gross Earnings includes the Actual Loss Sustained by the Insured of only continuing fixed charges and Ordinary Payroll directly attributable to the interruption of research and development activities that in themselves would not have produced income during the Period of Liability.

101. The Policy also contains several **TIME ELEMENT EXCLUSIONS**, in particular A. 4., that Beazley asserts applies to and bars coverage for Plaintiffs' claims:

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TIME ELEMENT EXCLUSIONS

In addition to the exclusions elsewhere in this Policy, the following exclusions apply to Time Element loss:

This Policy does not insure against:

- A. Any loss during any idle period, including but not limited to when production, operation, service or delivery or receipt of goods would cease, or would not have taken place or would have been prevented due to:
 - 1) physical loss or damage not insured by this Policy on or off the Insured Location;
 - 2) planned or rescheduled shutdown;
 - 3) strikes or other work stoppage; and/or
 - 4) any other reason other than physical loss or damage insured by this Policy.

102. As previously discussed herein the Covid-19 Governmental Orders depriving the Plaintiffs of their ability to conduct their business operations constitutes “direct physical loss,” thereby rendering Exclusion A, and in particular A. 4. inapplicable by its express terms.

VII. BEAZLEY’S BASES FOR DENYING COVERAGE ARE INCORRECT.

A. General Principles of Contract Interpretation under California Law.

103. Under California law, insurance policies are contracts. Therefore, they are governed by the rules of construction applicable to contracts. (*Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal.4th 645, 666 (1995)).

104. The fundamental goal of contract interpretation is to give effect to the mutual intention of the parties. (*Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1264 (1992)). Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*AIU Ins. Co. v. Superior Court*, 51 Cal.3d 807, 821-822 (1991)). The “clear and explicit” meaning of the provisions interpreted in their “ordinary and popular sense” controls judicial interpretation. (*Id.*)

1 105. Where a policy does not define a particular term, a court must presume that
2 the words have their plain, ordinary meanings. (*See Montrose, supra*, 10 Cal.4th at 666).
3 The plain, ordinary meaning of an undefined term may be ascertained by referring to a
4 dictionary. (*Jordan v. Allstate Ins. Co.*, 116 Cal.App.4th 1206, 1216 (2004)).

5 106. A policy is to be interpreted in its entirety with each provision interpreted in
6 the context of all the other policy provisions, so that each provision gives meaning to the
7 other parts. (*Holz Rubber Co. v. American Star Ins. Co.*, 14 Cal.3d 45, 56 (1975); *People*
8 *ex rel. Dept. of Parks & Recreation v. West-A-Rama, Inc.*, 35 Cal.App.3d 786, 793
9 (1973)). A policy is also interpreted in light of the factual context presented. (*Pulte Home*
10 *Corp. v. American Safety Indem. Co.*, 14 Cal.App.5th 1086, 1104 (2017) (citation
11 omitted). Policy language in one context can have a clear and unambiguous meaning, yet
12 in a different context have an unclear ambiguous. (*E.M.M.I., Inc. v. Zurich American Ins.*
13 *Co.*, 32 Cal.4th 465, 470 (2004) (citation omitted).

14 **B. The Policy’s Time Element Loss is Triggered – The Plain Meaning of**
15 **“Direct Physical Loss” Includes the Physical Deprivation and Loss of**
16 **Possession of the Insured’s Real Property.**

17 107. As noted above, the relevant coverage provision in the Policy is entitled
18 “TIME ELEMENT – SECTION D.” Paragraph A of this Section is the “insuring
19 agreement” for this coverage, which provides that “[t]his Policy insures Time Element
20 loss, as set forth in the Time Element Coverages, directly resulting from direct physical
21 loss or physical damage insured by this Policy occurring during the Period of Insurance to
22 Property Insured by this Policy.”

23 108. Some of the terms used in the “Time Element” insuring agreement are
24 defined in other parts of the Policy. For example, “Property Insured” refers to the different
25 real property identified in the schedule of locations provided to the Underwriters, to wit,
26 Beazley. It also includes personal property at those locations. Accordingly, as the term
27 “direct physical loss” is used in the Time Element coverage provided by the Policy, it
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1 applies both to an Insured’s real property in addition to any personal property located
2 within the real property location.

3 109. The language used in the Gross Earning’s section of the Policy’s Time
4 Element coverage reflects that this coverage applies to situations where an insured is
5 prevented, in whole or in part, from continuing its business operations or services. Thus,
6 from a contextual analysis of these related provisions, it becomes apparent that the Policy’s
7 Time Element coverage includes direct physical loss occurring at an insured location that
8 prevents the insured from conducting its business operations or services.

9 110. A number of the terms used in the Time Element “insuring clause” are not
10 defined in the Policy.

11 111. The term “direct” means “without interruption or diversion” and “without
12 any intervening agency or step.” (*In re Furnace*, 185 Cal.App.4th 649, 661 (2010) (quoting
13 Webster’s Third New International Dictionary 640 (1986)).

14 112. “Physical” is defined as “[o]f pertaining to material nature” (*Blasiar,*
15 *Inc. v. Fireman’s Fund Ins. Co.*, 76 Cal.App.4th 748, 754 (1999) (quoting 3 Oxford
16 English Dictionary 346-347 (1933)).

17 113. “Loss” has been defined as “the act of losing possession.” (*AB Recu Finans*
18 *v. Nordstern Ins. Co. of N. Am.*, 130 F.Supp.2d 596, 600 (S.D.N.Y. 2001) (quoting
19 Webster’s New Collegiate Dictionary 706 (1985)); *see also* Dictionary.dotcom (“Loss’ is
20 also defined as detriment, disadvantage, or deprivation from failure to keep, have, or get”).
21 Deprivation, in turn, means “being kept from possessing, enjoying, or using something.”
22 (Merriam-Webster.com, last accessed August 17, 2020).

23 114. The term “damage” is defined as “[p]hysical harm that impairs the value,
24 usefulness, or normal function of something.” (*HBE Corp. v. K.S. Mech., Inc.*, 2018 WL
25 6113099, at *10 (C.D. Cal. Feb. 23, 2018) (quoting Oxford English Dictionary (2013)).

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1 115. The term “or” is a disjunctive particle used to express an alternative or to
2 give a choice of one among two or more things. (*Housing Authority of County of Kings v.*
3 *Peden*, 212 Cal.App.2d 276, 278-279 (1963) (citation omitted)).

4 116. After incorporating these definitions and other relevant policy provisions, as
5 well as applying California’s general contract interpretation principles, the following
6 conclusions are reasonably drawn regarding the Time Element coverage provision:

7 a. The Policy’s Time Element coverage is provided on an “all risk” basis.
8 Thus, “all risks are covered [under the Policy’s Time Element coverage] unless specifically
9 excluded in the policy.” *Davis v. United Servs. Auto. Assn.*, 223 Cal.App.3d 1322, 1328
10 (1990).

11 b. The Policy does not contain any exclusion that applies to orders, such as the
12 Covid-19 Governmental Order issued by states, such as California and other states or other
13 government (i.e., public) authorities that prevent the Plaintiffs from continuing their
14 business operations because of public health and safety issues. Accordingly, the Shut
15 Down Orders constitute a covered risk.

16 c. Plaintiffs’ Time Element losses here directly result from the Covid-19
17 Governmental Orders at issue here. Put another way, Plaintiffs seek only losses within the
18 Time Element Coverage which are in the millions directly resulting from such orders.

19 d. The phrase “physical loss” has a meaning distinct from the phrase “physical
20 damage.” *ACL Tech., Inc. v. Northbrook Prop. & Cas. Ins. Co.*, 17 Cal.App.4th 1773, 1786
21 (1993) (court must give effect to all contract provisions so as not to render any of them
22 meaningless). Here, the phrase “physical loss” must be given a separate and distinct
23 meaning to that of “physical damage.” Any assertion by Beazley that “physical loss” is
24 synonymous with “physical damage” is therefore an unreasonable interpretation that
25 violates California’s rules of contract interpretation.

1 e. As reflected by words used in the Policy, “physical loss” triggering the
2 Policy’s Time Element coverage can exist without any “physical damage” occurring;
3 otherwise, there would be no need for Policy to include the term “physical loss.” If Beazley
4 were to assert that “physical damage” was the only way to trigger Time Element coverage
5 for real property identified as an insured location, the Policy would have to be rewritten.
6 This is not something a Court applying California law can do. (*Rosen v. State Farm*
7 *General Ins. Co.*, 30 Cal.4th 1070, 1077 (2003)).

8 117. Here, the “Time Element” coverage promised by the Policy broadly applies
9 to situations where Plaintiffs are deprived or prevented from performing their business
10 operations within the physical confines of their insured properties. This includes situations
11 where ‘direct physical loss’ has occurred such as when they cannot access or use their
12 property to conduct business operations because of a government order – a covered cause
13 of loss – preventing them from doing so. “The plain meaning of ‘direct physical loss’
14 encompasses physical displacement or loss of physical possession. That the loss must be
15 ‘physical’ distinguishes the loss from some other, incorporeal loss.” *Universal Sav. Bank*,
16 *supra*, 2004 WL 3016644, at *6.

17 118. The phrase “direct physical loss”, when analyzed here in the context of the
18 other policy provisions and underlying factual situation, is reasonably interpreted as
19 applying to the subject orders preventing the clubs from conducting their business
20 operations.

21 119. Taken together, the Policy provides Time Element coverage here because
22 Plaintiffs’ loss directly results from the Covid-19 Governmental Orders, and such orders by
23 operation of law prohibit (*i.e.*, prevent) Plaintiffs from using the physical premises of their
24 insured locations for purposes of conducting their business operations. This interpretation
25 is one that is consistent with California’s rules of contract interpretation.

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1 120. Moreover, even if Beazley is ultimately able to suggest an alternative
2 interpretation of this provision that a Court deems to be reasonable, this would only create
3 an ambiguity (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.*, 5 Cal.4th
4 854, 867 (1993)), which the Court would very likely construe against Beazley. (*Pardee*
5 *Constr. Co., supra*, 77 Cal.App.4th at 1352).

6 **C. None of the Policy Exclusions That Beazley Relies Upon Apply to**
7 **Plaintiffs' Time Element Losses.**

8 121. Finally, none of the exclusions cited by Beazley applies under the
9 circumstances presented here.

10 122. Beazley, in its denial letter, asserted that General Exclusion A. 2, A. 3, and
11 A. 6 applied to and barred coverage to the Plaintiffs' claims for coverage. (Exhibit B at p.
12 6). Beazley admits in its denial letter, however, that these exclusions do *not* apply if the
13 Time Element coverage provided by the Policy is triggered because, in such circumstances,
14 there is physical loss or physical damage to property. Specifically, Beazley in interpreting
15 A. 2, A. 3, and A. 6 asserted:

16 Any claim that would potentially fall within the scope of exclusions A. 2, 3
17 and 6 would be excluded ***unless otherwise covered by the Time Element***
18 ***coverage afforded by the policy.*** But as stated above, there is no evidence
19 or indication that the insured's claim falls within the insuring agreement of
20 such coverage, and these exclusions reinforce the assertion that physical
21 loss of or physical damage to property is required. Absent evidence that the
insured's property or neighboring properties have suffered any physical
damage, there is no coverage for the insured's loss of use of the premises,
whether due to the government mandated business closures or otherwise."
(***Emphasis*** added) (Exhibit B at p. 6).

22 The closure of the insured premises necessitated by the Covid-19 Governmental Orders,
23 however, as discussed hereinabove, constitutes "direct physical loss" of those insured
24 locations (*supra*, at ¶¶ 8-14 & 108-120). Pursuant to Beazley's own interpretation, General
25 Exclusions A. 2, A. 3, and A. 6, therefore, do not apply to Plaintiffs' claims for coverage
26 presented herein.

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1 at issue here. And while this exclusion also includes the term “use” in the phrase “use or
2 removal”, under the principle of *ejusdem generis*, this term must be construed as having a
3 similar nature to the other listed terms. (*Pfeiffer v. Countrywide Home Loans, Inc.*, 211
4 Cal.App.4th 1250, 1275 (2012) (citations omitted)). Thus, the term “use” as used in
5 Exclusion A. 6 applies to law or ordinances involving, *inter alia*, matters involving
6 construction, repair and debris removal. It does not apply to the public health and safety
7 Covid-19 Governmental Orders at issue.

8 124. Beazley’s General Exclusion A. 8 is also inapplicable here for a variety of
9 reasons. Most obviously, Exclusion A. 8, by its express terms, applies *only* to the
10 “malicious use” of pathogens or poisons. The subject Covid-19 Governmental Orders,
11 however, do not in any way involve the “malicious use” of pathogens or poisons.
12 Additionally, the Covid-19 Governmental Orders are not predicated upon the presence of
13 the pathogens or poisons (let alone the malicious use thereof) at any of the clubs; rather,
14 these health and safety orders were issued to *prevent* the introduction of Covid-19 in the
15 first place within non-essential businesses, and relatedly, to keep humans from being in
16 close proximity to one another so as to prevent its transmission. The enforcement of these
17 Covid-19 Governmental Orders did not require, let alone involve, the “use” of pathogens
18 or poisons whether or not “malicious”. Finally, large portions of the language used in
19 General Exclusion A. 8 – such as “indirectly” and “regardless of any other cause or event
20 contributing concurrently or in any other sequence thereto” – are unenforceable as a matter
21 of public policy under California law. (*Julian, supra*, 35 Cal.4th at 754-55 (citing, *inter*
22 *alia, Howell, supra*, 218 Cal.App.3d at 1452; *Garvey, supra*, 48 Cal.3d at 399).

23 125. Turning to Beazley’s General Exclusion C, the “Contamination” Exclusion
24 provides, in pertinent part, that “[t]his Policy excludes the following *unless* directly
25 resulting from other direct physical loss or physical damage not excluded by this Policy: 1)
26 *contamination* including but not limited to the presence of *pollution* or *hazardous*

1 material.” (*Emphasis* added). Beazley’s “Contamination” Exclusion, as is the case with
2 the other exclusions upon which it relies, does not apply for multiple reasons.

3 (a) *First*, the Contamination Exclusion expressly applies only to a situation
4 where there has been contamination. Here Plaintiffs’ clubs were closed without any finding
5 that any of them were, in fact, “contaminated” with Covid-19. Exclusion C, under the facts
6 applicable here, therefore does not apply.

7 (b) *Second*, the Contamination Exclusion, by its terms, applies only to situations
8 where a covered peril under the Policy did not cause the “contamination.” Exclusion C
9 applies “unless directly resulting from other direct physical loss . . . not excluded by the
10 Policy.” As discussed *supra*, the Covid-19 Governmental Orders constitute “direct physical
11 loss” that is not excluded. Accordingly, even if contamination is present (which it is not),
12 by its terms the Contamination Exclusion does not apply.

13 (c) *Third*, the language of the Contamination Exclusion, which states it applies
14 when pollution or hazardous materials are present, makes it a form of a “pollution”
15 exclusion. However, under California law, pollution exclusions apply only to situations
16 commonly thought of as environmental pollution. (*MacKinnon v. Truck Ins. Exchange*, 31
17 Cal.4th 635, 639 (2003) (holding that pollution exclusion did not apply to situation where
18 insured used pesticides to remove bee infestation which allegedly killed someone). Here,
19 even if Covid-19 were ultimately found to have contaminated an insured location the
20 Contamination Exclusion does not apply since any “contamination” that might be present
21 at a given location is not the result of “environmental pollution.”

22 126. Exclusion D, Beazley’s “Mold Exclusion” by its express terms, applies to
23 “any loss . . . directly or indirectly arising out of or relating to: mold, mildew, fungus,
24 spores or other microorganism of any type, nature or description, including but not limited
25 to any substance whose presence poses an actual or potential threat to human health.” For a
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1 number of reasons articulated below, the “Mold Exclusion” does not apply to the Covid-19
2 Governmental Orders.

3 (a) *First*, the “Mold Exclusion,” by its terms and the application of California’s
4 rules of contract interpretation, applies only to items falling within the “fungus kingdom”
5 of living things. The words Beazley uses in its “Mold Exclusion” start by enumerating four
6 (4) specific items as being within its scope. Those four (4) specific items are “. . . mold,
7 mildew, fungus, [and] spores . . .”, all of which refer to the “fungus kingdom” of living
8 things. For example, the plain meaning of “fungus” refers to “: any of a kingdom (Fungi)
9 of saprophytic and parasitic *spore-producing* eukaryotic typically filamentous organisms
10 formerly classified as plants that lack chlorophyll and include *molds*, rusts, *mildews*,
11 smuts, mushrooms, and yeasts.” (Merriam-Webster, online dictionary, last accessed
12 August 15, 2020). The “Mold Exclusion,” after listing the four specific fungus kingdom
13 items (“mold, mildew, fungus, spores”) then contains language referring to “or other
14 microorganism of any type, nature or description, including but not limited to any
15 substance whose presence poses an actual or potential threat to human health.” The “or
16 other microorganism of any type, nature or description . . .” language, under California
17 law, is interpreted as being of the same general kind or type as the specifically enumerated
18 preceding items, to wit: microorganism falling within the “fungus” family of
19 microorganism. (*See, e.g., Ortega Rock Quarry v. Golden Eagle Ins. Co.*, 141 Cal.App.4th
20 969, 981 (2006) (citing Cal. Civ. Code § 3534)). Accordingly, the “Mold Exclusion” is
21 reasonably interpreted as applying only to microorganisms falling within the “fungus
22 kingdom,” which a virus – such as the Covid-19 virus – is not part of.

23 (b) *Second*, the plain everyday meaning of “virus” does not fall within the plain
24 everyday meaning of the word “microorganism” as used in the Mold Exclusion, even if
25 one inappropriately gives the word an expansive interpretation beyond its reference to the
26 preceding enumerated items, all of which are within the “fungus kingdom” of living things.

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1 Specifically, if the enumerated items in the Mold Exclusion are simply considered to be
2 living things (as opposed to being within the “fungus kingdom”), the plain meaning of the
3 word “microorganism” simply refers to microscopic living things. (*See, e.g.*, Cambridge
4 Dictionary (defining microorganism as “living thing that on its own is too small to be seen
5 without a microscope”).) A virus such as Covid-19, by contrast, is not a living organism.
6 (*See* Dictionary.com (“Viruses are not technically considered living organisms because
7 they are devoid of biological processes (such as metabolism and respiration) and cannot
8 reproduce on their own but require a living cell (of a plant, animal, or bacterium) to make
9 more viruses.”). Since the plain everyday meaning a layperson would give the word
10 “microorganism” does not include “viruses” – which are not living things – the Mold
11 Exclusion also does not apply for this reason. Moreover, under the rule of *ejusdem generis*,
12 the Mold Exclusion’s “catch-all” phrase of “including but not limited to” must be
13 construed as having the same general nature as the enumerated (i.e., living) items. (Cal.
14 Civ. Code § 3534; *Furtado v. Metropolitan Life Ins. Co.*, 60 Cal.App.3d 17, 25 (1976)).

15 (c) *Third*, the Mold Exclusion is also uncertain and ambiguous to the extent it
16 requires that an insured needs scientific expertise to interpret the exclusion. (*See, e.g.*,
17 *Armstrong World Industries, Inc., supra*, 45 Cal.App.4th at 36 (“A policy should not be
18 read as it might be analyzed by an attorney or an insurance expert. This is so even if the
19 policyholder is a sophisticated insured.”) (citations omitted); *AIU Ins. Co., supra*, 51
20 Cal.3d 807 (1990) (unreasonable to conclude that phrase “legally obligated to pay”
21 unambiguously incorporated sophisticated legal distinction; thus, the court resolved the
22 ambiguity in favor of coverage; *Ponder v. Blue Cross of Southern California*, 145
23 Cal.App.3d 709, 724 (1983) (“On its face, the clause excluding coverage for
24 *temporomandibular joint syndrome* scarcely appears ‘comprehensible to lay persons.’ It is
25 a technical medical term which has meaning primarily for health professionals.”)).

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1 (d) *Fourth*, for the Mold Exclusion to apply here, giving the words their plain
2 everyday meaning in context, Beazley effectively is asking a court to rewrite the Mold
3 Exclusion so that the exclusion includes the concept of viruses. Such an interpretation,
4 however, would require the court to rewrite the Mold Exclusion by either: (i) adding the
5 word “virus” to the specific list of enumerated items so that it reads “mold, mildew,
6 fungus, spores, [*viruses*] or microorganisms of any type . . .”; or (ii) specially defining
7 microorganism to include, *inter alia*, “viruses.” Beazley’s interpretation, however, under
8 California’s rules of contract interpretation, is an unreasonable one to the extent it would
9 require a court to re-write the exclusion – something it cannot do – in order to interpret the
10 policy in the manner it desires. (*Rosen, supra*, 30 Cal.4th at 1077. Moreover, Beazley is a
11 very sophisticated entity and could have easily written an exclusion clearly and
12 unequivocally, as they did in connection with the issuance of other policy forms, excluding
13 viruses (*See, e.g., SA Palm Beach LLC v. Certain Underwriters at Lloyds London*, Case
14 No. 9:20-cv-80677-UU, Dkt. No. 20 at p. 20 (S.D. Fla. June 29, 2020) (the policy contains
15 exclusion for “mold, fungus, bacteria, or virus”).

16 (e) *Fifth*, under California law, certain aspects of the Mold Exclusion providing
17 it applies “directly or indirectly arising out of or relating to” to the excluded risk are void
18 and unenforceable – as a matter of public policy – under California law. (*Julian, supra*, 35
19 Cal.4th at 754-55 (citing, *inter alia*, *Howell, supra*, 218 Cal.App.3d at 1452; *Garvey*,
20 *supra*, 48 Cal.3d at 399).

21 (f) *Sixth*, as discussed above, any interpretation by Beazley of the Mold
22 Exclusion asserting it applies to a “virus” are contrary to various California rules of
23 contract interpretation and therefore as a matter of California law are unreasonable and
24 cannot be adopted and applied by a California court. (*La Jolla Beach & Tennis Club, Inc.*
25 *v. Industrial Indem. Co.*, 9 Cal.4th 27, 37 (1994). The “Mold Exclusion therefore would
26 not in such circumstances apply.

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1 (g) *Seventh*, the Plaintiffs’ interpretation of the Mold Exclusion that it does not
2 apply to viruses is consistent with California’s rules of contract and therefore is a
3 reasonable interpretation of the exclusion. Even if a court were to determine that Beazley’s
4 interpretation that the Mold Exclusion applies to “viruses” is a reasonable one, it only
5 creates a situation where multiple reasonable interpretations, one favorable to coverage and
6 one favorable to no-coverage exists. Such a situation creates an ambiguity under California
7 law. (*Pardee Constr. Co., supra*, 77 Cal.App.4th at 1352). This kind of ambiguity, along
8 with the other ambiguities that apply to the Mold Exclusion such as the need to have
9 scientific expertise to interpret it – irrespective of the rule that uncertain or ambiguous
10 exclusions are interpreted narrowly and against the insurer who drafted the language.
11 (*MacKinnon, supra*, 31 Cal.4th at 648 (citation omitted)).

12 (h) *Finally*, even if Plaintiffs’ claim falls within the scope of the enforceable
13 portions of the Mold Exclusion because it is unambiguously determined to apply to a virus
14 (and it does not), the government shutdown orders – which are a covered risk of loss under
15 the Policy – and not the Covid-19 virus, is the “efficient proximately cause” (i.e., the
16 “predominating” or “most important cause”) of Plaintiffs’ loss. As such, Plaintiffs’ Time
17 Element loss is covered irrespective of the Mold Exclusion being a contributing cause to
18 the loss. (*Von Der Lieth, supra*, 54 Cal.3d at 1131-33).

19 127. Beazley’s reliance on Time Element Exclusion A.4., which applies only to
20 Time Element coverage, as is the case with all the other exclusions upon which they rely,
21 is misplaced.

22 (a) This exclusion provides, in pertinent part, that the Policy does not insure
23 against “[a]ny loss during any idle period, including but not limited to when production,
24 operation, services or delivery or receipt of goods would cease or have not taken place or
25 would have been prevented due to: . . . 4) any other reason other than *physical loss or*
26 *damage* insured by this Policy.” (*Emphasis* added). Effectively, Time Element Exclusion
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1 A.4. provides that there is no Time Element coverage if the insureds ceased or were
2 prevented from operating because of some reason other than “physical loss or damage,” the
3 equivalent of the “physical loss or physical damage” requirement found in the Time
4 Element coverage Insuring Agreement, Paragraph A.

5 (b) Here, as expressed previously in this complaint (*see supra*, at ¶¶ 8-14 &
6 108-120), the reason Plaintiffs’ clubs ceased operating was the “direct physical loss” they
7 sustained due to the Government Shutdown Orders that prohibited, *i.e.*, necessitated, that
8 they cease operating their businesses out of the physical confines of the insured locations
9 covered by the Policy. This is further exemplified by the fact that in those jurisdictions
10 where governmental shut down orders were lifted, the clubs in those jurisdictions reopened
11 and started once again conducting their business operations. Here, Plaintiffs’ losses are
12 covered under the Time Element coverage provisions, as the closure of their operations
13 was due to “direct physical loss” thereby rendering Time Element Exclusion A. 4.
14 inapplicable.

15 128. Finally, Beazley is a sophisticated entity. It has long known of the existence
16 of viruses, epidemics, and pandemics. It has also long known of the existence of state and
17 local health and safety law orders regulating whether, when, and how businesses can
18 operate during epidemics or pandemics. Despite this knowledge, Beazley failed to exclude
19 coverage for such risks under its Policy. Beazley should be required to honor the
20 contractual bargain they entered with Plaintiffs and pay the Plaintiffs the Time Element
21 loss they sustained directly resulting from the direct physical loss they sustained here, up to
22 the Policy’s \$10 million per occurrence aggregate limits of liability.

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FIRST CAUSE OF ACTION

(Breach of Contract against Beazley)

129. Plaintiffs incorporate by reference each allegation contained in paragraphs 1 through 128, above.

130. Plaintiffs tendered their claim for Time Element losses arising from the above-referenced Covid-19 Governmental Orders.

131. The Policy obligates Beazley to pay Plaintiffs for the Time Element losses they have claim directly resulting from the Covid-19 Governmental Orders.

132. Beazley has refused to pay Plaintiffs for any, let alone all, of the Time Element losses to which Plaintiffs are entitled to under the Policy.

133. By refusing to pay Plaintiffs the \$10 million in Time Element losses per occurrence caused by the Covid-19 Governmental Orders, Beazley has breached the Policy.

134. All conditions and requirements imposed by the Policy on Plaintiffs, including but not limited to payment of premiums, timely notice of claim, and exhaustion of deductibles, if any, have been satisfied and/or waived and/or subject to an estoppel or other avoidance against Beazley.

135. As a direct and proximate result of Beazley's conduct, Plaintiffs have been deprived of the benefit of the Policy for which premiums were paid, and have sustained substantial damages in a sum to be proven at trial.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows:

ON THE FIRST CAUSE OF ACTION

- 1. For actual and compensatory damages in an amount to be determined at the time of trial.
- 2. For prejudgment and post-judgment interest;
- 3. For costs of suit incurred herein; and
- 4. For such further relief as the Court deems just and proper.

Dated: August 24, 2020

FORTIS LLP

By: /s/ Stanley H. Shure
 Attorneys for Plaintiffs
 RIALTO POCKETS, INC., ET AL.

DEMAND FOR JURY TRIAL

1
2 Plaintiffs Rialto Pockets, Inc.; Brookhurst Venture, LLC; City of Industry
3 Hospitality Venture, Inc.; Farmdale Hospitality Services, Inc.; High Expectations
4 Hospitality, LLC; Inland Restaurant Venture I, Inc.; Kentucky Hospitality Venture, LLC;
5 K-Kel, Inc.; L.C.M., LLC; Midnight Sun Enterprises, Inc.; Nitelife, Inc.; Olympic Avenue
6 Venture, Inc.; The Oxnard Hospitality Services, Inc.; Penn Ave Hospitality, LLC; Platinum
7 SJ Enterprise; PNM Enterprises, Inc.; Rouge Gentlemen’s Club, Inc.; Santa Barbara
8 Hospitality Services, Inc.; Santa Maria Restaurant Enterprises, Inc.; Sarie’s Lounge, LLC;
9 The Spearmint Rhino Adult Superstore, Inc.; World Class Venues, LLC; Washington
10 Management, LLC; and W.P.B. Hospitality, LLC hereby demand a trial by jury on all
11 claims.

12
13 Dated: August 24, 2020

FORTIS LLP

14
15 By: /s/ Stanley H. Shure
16 Attorneys for Plaintiffs
17 RIALTO POCKETS, INC., ET AL.
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