



IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

APX OPERATING COMPANY, LLC,

Plaintiff,

vs.

HDI GLOBAL INSURANCE
COMPANY,

Defendant.

C.A. No.: _____ [CCLD]

**TRIAL BY JURY OF
TWELVE DEMANDED**

COMPLAINT

Plaintiff APX Operating Company, LLC (“APX”), for its Complaint for breach of contract and declaratory judgment against Defendant HDI Global Insurance Company (“HDI”), alleges, with knowledge as to its own act and on information and belief as to the acts of all others, as follows:

I. NATURE OF ACTION

1. This is an action for breach of contract and declaratory judgment arising out of the refusal of HDI to honor the promises it made in and obligations it owes under the “all risk” property insurance policy HDI sold to Apex Parks Group, LLC (“Apex Parks”), and for which APX subsequently acquired rights to payment thereunder as part of APX’s purchase of certain assets of Apex Parks in the Chapter 11 bankruptcy cases of Apex Parks and its affiliates.

2. In exchange for premiums paid, HDI promised to pay for, *inter alia*, Gross Earnings loss and Extra Expense loss resulting from direct physical loss or

damage to certain properties, including eight properties now operated by APX through its wholly-owned subsidiaries (the “Insured Properties”). Despite these promises, however, HDI has refused to honor its contractual obligations and has denied coverage for the Gross Earnings and Extra Expense losses resulting from SARS-CoV-2-related suspensions of and reductions in operations at the Insured Properties.

3. APX is yet another victim of the insurance industry’s universal and public rejection of its coverage obligations for pandemic-related business interruption losses.

4. HDI has left APX with no choice but to seek judicial intervention to enforce the obligations owed by HDI pursuant to the terms and conditions of the “all risk” policy HDI sold (the “All Risk Policy”). The All Risk Policy is attached hereto as **Exhibit A**, and is incorporated herein by reference.

5. APX seeks a declaration that the statistically-certain presence and/or ubiquitous and inevitable presence of SARS-CoV-2 virions at or near the Insured Properties caused “risks of direct physical loss or direct physical damage” or “physical loss or damage” to the Insured Properties within the meaning of those phrases as used in the All Risk Policy, sufficient to trigger coverage under the All Risk Policy for resulting Time Element losses, including under the Gross Earnings and Extra Expense coverages, and including coverage in the Extended Period of

Liability.

6. APX also seeks a declaration that various orders issued by governmental officials prohibiting access to and use of the Insured Properties for purposes of conducting ordinary business activities caused “risks of direct physical loss or direct physical damage” or “physical loss or damage” to the Insured Properties within the meaning of those phrases as used in the All Risk Policy, sufficient to trigger coverage under the All Risk Policy for resulting Time Element losses, including under the Gross Earnings and Extra Expense coverages, and including coverage in the Extended Period of Liability.

7. APX also seeks a declaration that the aforementioned civil authority orders were issued as a direct result of “physical damage” at or within five miles of the Insured Properties, namely the statistically-certain presence and/or ubiquitous and inevitable presence of SARS-CoV-2 virions throughout the relevant locales and states, and that the orders prohibited access to the Insured Properties, all within the meaning of those phrases as used in the All Risk Policy and all sufficient to trigger coverage under the All Risk Policy for resulting Time Element losses, including under the Gross Earnings and Extra Expense coverages, and including coverage for Civil or Military Authority.

8. APX also seeks monetary damages for HDI's breach of its obligations under the All Risk Policy as declared by the Court, including payment of APX's Time Element losses.

II. PARTIES

9. Plaintiff APX Operating Company, LLC is a Delaware limited liability company.

10. APX is the sole owner of the following companies:

- a. APX Boomers! Boca Raton, LLC;
- b. APX Boomers! Irvine, LLC;
- c. APX Boomers! Livermore, LLC;
- d. APX Boomers! Modesto, LLC;
- e. APX Boomers! Santa Maria, LLC;
- f. APX Big Kahuna, LLC;
- g. APX SpeedZone Los Angeles, LLC; and
- h. APX Sahara Sam's Oasis, LLC.

11. Each of the aforementioned APX subsidiaries leases and operates one of the Insured Properties.

12. Each of the aforementioned APX subsidiaries is a Delaware limited liability company.

13. APX Boomers! Irvine, LLC; APX Boomers! Livermore, LLC; APX Boomers! Modesto, LLC; APX Boomers! Santa Maria, LLC; and APX SpeedZone Los Angeles, LLC each conduct operations at their respective Insured Property located in the State of California.

14. APX Boomers! Boca Raton, LLC and APX Big Kahuna, LLC each conduct operations at their respective Insured Property located in the State of Florida.

15. APX Sahara Sam's Oasis, LLC conducts operations at the Insured Property located in the State of New Jersey.

16. APX is informed and believes and thereon alleges that Defendant HDI Global Insurance Company is an Illinois corporation with its principal place of business in Chicago, Illinois, and is an insurance company that is licensed to do business in the State of Delaware, among other places.

17. APX is informed and believes and thereon alleges that HDI is, and at all relevant times herein, has been engaged in the business of selling property insurance policies covering risks for Delaware companies, formed under the laws of the State of Delaware, including Apex Parks, the Named Insured under the All Risk Policy, a Delaware limited liability company.

III. JURISDICTION AND VENUE

18. This Court has subject matter jurisdiction pursuant to Article IV, § 7 of the Delaware Constitution as well as 10 *Del. C.* § 541. This matter is designated to be heard in the Complex Commercial Litigation Division (CCLD) because the amount in controversy exceeds \$1 million.

19. This Court has the power to declare the parties' rights and obligations under 10 *Del. C.* §§ 6501 – 6513.

20. This Court has jurisdiction over HDI because HDI is authorized to sell or write insurance in Delaware and, at all material times, has conducted business within the state of Delaware, including by selling the All Risk Policy to a Delaware limited liability company, thereby covering risks of a Delaware insured. Venue, therefore, is also proper in this Court.

IV. APX'S FAMILY ENTERTAINMENT CENTER AND AMUSEMENT PARK BUSINESSES

21. APX, through its wholly-owned subsidiaries described above, operates six family entertainment centers and two water parks located in California, Florida, and New Jersey.

22. These eight properties are insured under the All Risk Policy ("the Insured Properties").

23. The Insured Properties include:

- a. Boomers! – Boca Raton located at 3100 Airport Road, Boca Raton, Florida;
- b. Boomers! – Irvine located at 3405 Michelson Drive, Irvine, California;
- c. Boomers! – Livermore located at 2400 Kitty Hawk Road, Livermore, California;
- d. Boomers! – Modesto located at 4215 Bangs Avenue, Modesto, California;
- e. Boomers! – Santa Maria located at 2250 North Preisker Lane, Santa Maria, California;
- f. Big Kahuna’s Water and Adventure Park located at 1007 US Highway 98 East, Destin, Florida;
- g. Speedzone – located at 17871 Castleton Street, City of Industry, California; and
- h. Sahara Sam’s Oasis Indoor and Outdoor Water Park located at 535 North Route 73, West Berlin, New Jersey.

24. The Boomers! parks are family entertainment centers with various indoor and outdoor attractions, including miniature golf, go karts, bumper boats, an indoor arcade, and food concessions.

25. Big Kahuna’s Water and Adventure Park (“Big Kahuna’s”) is an

outdoor water and adventure park with two cafés, a food court, and another food concession.

26. Speedzone is a family entertainment center with go karts, miniature golf, an indoor arcade, and food concessions.

27. Sahara Sam's Oasis Indoor and Outdoor Water Park ("Sahara Sam's") is an indoor and outdoor water park with an indoor arcade and an indoor café.

28. APX's wholly-owned subsidiaries described above took assignment of the leases for the Insured Properties on June 8, 2020 as part of the sale of certain of Apex Parks' assets to APX in the Chapter 11 bankruptcy cases of Apex Parks and its affiliates filed in April 2020.

29. The sale to APX was approved by the United States Bankruptcy Court for the District of Delaware by Order dated June 4, 2020 in Case No. 20-10910-CSS.

30. In addition, pursuant to the sale of certain of Apex Parks' assets, APX acquired, *inter alia*, Apex Parks' right to proceeds from the All Risk Policy for the claim asserted by Apex Parks under the All Risk Policy for loss from the government's failure to prepare for and prevent the impact of the pandemic on the United States, the pandemic itself, the presence of SARS-CoV-2, and/or the consequent orders of Civil Authority. Therefore, Apex Parks' claim under the All Risk Policy is now APX's claim.

V. THE ALL RISK POLICY

31. HDI sold to Apex Parks the All Risk Policy, with policy no. CPD5484800, which was extended by endorsement to include the policy period May 8, 2019 to May 8, 2020.

32. Apex Parks is the Named Insured under the All Risk Policy.

33. APX acquired Apex Parks' rights to payment under the All Risk Policy for the claim at issue in this Complaint.

34. All premiums due to HDI to purchase the All Risk Policy were paid and all applicable conditions of coverage have been satisfied.

35. The policy HDI sold is an "all-risk" insurance policy. An "all-risk" policy provides the broadest insurance coverage available to policyholders for protection of their property interests, including protection against disruption to their business operations. Under an all-risk policy, the insured's burden to establish its right to coverage for a loss is very limited—the insured needs only to show that its loss occurred and that the loss was fortuitous. The burden then shifts to the insurance company to show that a clear, express, and unambiguous exception or exclusion in the policy bars or limits coverage.

36. APX's losses due to SARS-CoV-2 and SARS-CoV-2-related suspensions of and reductions in operations at the Insured Properties are covered under the All Risk Policy sold by HDI.

37. The All Risk Policy covers Real Property and Personal Property and insures “risks of direct physical loss or direct physical damage, except as excluded, to Insured covered property while on described premises”.

38. The All Risk Policy also insures “TIME ELEMENT loss.” The All Risk Policy states, in relevant part, that:

This Policy insures TIME ELEMENT loss, as provided in the TIME ELEMENT COVERAGES, directly resulting from direct physical loss or damage of the type insured by this Policy:

- 1) to property described elsewhere in this Policy and not otherwise excluded by this Policy or otherwise limited in the TIME ELEMENT COVERAGES below;
- 2) used by the Insured, or for which the Insured has contracted use;
- 3) located at an Insured Location; and
- 4) during the Periods of Liability described in this section.

39. The eight properties at issue are all “Insured Locations” under the All Risk Policy.

40. The All Risk Policy’s “TIME ELEMENT” coverages include, *inter alia*, “GROSS EARNINGS” and “EXTRA EXPENSE.” These coverages protect against loss of earnings and loss relating to extra costs incurred to “temporarily continue as nearly normal as practicable” the business.

41. The relevant “Periods of Liability” applying to the “TIME ELEMENT” coverages under the All Risk Policy include:

- 1) For building and equipment, the period:
 - a) starting from the time of direct physical loss or damage of the type insured against; and
 - b) ending when with due diligence and dispatch the building and equipment could be:
 - (i) repaired or replaced; and
 - (ii) made ready for operations, under the same or equivalent physical and operating conditions that existed prior to the damage.
 - c) not to be limited by the expiration of this Policy.

* * *

8) If an order of CIVIL OR MILITARY AUTHORITY specifically prohibits access to the Insured Location and provided such order is the direct result of physical damage of the type insured against under this Policy at the Insured Location or within [5 miles¹] of it, the period of time:

- a) starting at the time of such direct physical damage; but
- b) not to exceed the number of consecutive days shown in the LIMITS OF LIABILITY clause of the DECLARATIONS section.

¹ Although the “PERIOD OF LIABILITY” section states “1 mile,” the Declarations of the All Risk Policy provide that the distance for Civil or Military Authority coverage is 5 miles.

42. The Declarations of the All Risk Policy provide for a 90-day time limit for Civil or Military Authority.

43. The All Risk Policy does not define the phrase “physical loss or damage” as used in the “TIME ELEMENT” coverage section or the similar phrase “direct physical loss or direct physical damage” as used in the Insuring Clause.

44. The presence of the disjunctive “or” in “physical loss or damage” and “direct physical loss or direct physical damage” means that coverage is triggered if *either* a physical loss of property *or* damage to property occurs.

45. Under its plain and ordinary meaning, or at the very least a reasonable interpretation thereof, “physical loss or damage” to property may occur when a covered cause of loss threatens or renders property unfit, unusable, or unsuitable for its intended purpose or unsafe for normal human occupancy and/or continued use. This is supported by dictionary definitions of the words “physical,” “loss,” and “damage.”

46. For instance, Webster’s Third New International Dictionary defines “physical” as “of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary.” *Physical*, Webster’s Third New International Dictionary (2020).

47. Similarly, Black’s Law Dictionary defines “physical” as: “Of, relating to, or involving material things; pertaining to real, tangible objects.” *Physical*, Black’s Law Dictionary (11th ed. 2019).

48. In addition, “loss” is defined by Merriam-Webster as “the act of losing possession,” “the harm or privation resulting from loss or separation,” or the “failure to gain, win, obtain, or utilize.” *Loss*, Merriam-Webster (Online ed. 2020).

49. Similarly, Random House Unabridged Dictionary defines “loss” as “the state of being deprived of or of being without something that one has had.” *Loss*, The Random House Dictionary of the English Language (1983).

50. Further, “damage” is defined by Lexico as “Physical harm caused to something in such a way as to impair its value, usefulness, or normal function.” *Damage*, Lexico, <https://www.lexico.com/en/definition/damage>.

51. The statistically-certain presence of SARS-CoV-2 virions in or about the Insured Properties and/or the ubiquitous and inevitable presence of SARS-CoV-2 virions throughout the locales and states where the Insured Properties are located, constitutes “physical loss or damage” and/or “direct physical loss or direct physical damage” insured under the All Risk Policy.

52. COVID-19 is spread through droplets containing SARS-CoV-2 virions, both of which are physical objects that attach to surfaces and remain in the air for prolonged periods of time.

53. The known presence or statistically-certain presence of SARS-CoV-2 virions, and/or the ubiquitous and inevitable presence of SARS-CoV-2 virions, renders property unfit, unusable, or unsuitable for its intended purpose or unsafe for normal human occupancy and/or continued use. For instance, the presence of tens or hundreds of thousands of SARS-CoV-2 virions in the air and on the surfaces of a location makes an individual's presence at that location hazardous and potentially lethal.

54. Similarly, under a plain and ordinary meaning, or at the very least a reasonable interpretation thereof, "physical loss or damage" or "direct physical loss or direct physical damage" to property may occur when a covered cause of loss renders property unsafe or otherwise unusable or results in a deprivation of the full use of and rights to property. This is supported by the aforementioned definitions.

55. Civil authority orders prohibiting access to insured properties also constitute "physical loss or damage" or "direct physical loss or direct physical damage" insured under the All Risk Policy as such orders rendered property unusable and resulted in a deprivation of the full use of and rights to affected property.

56. In addition to the "TIME ELEMENT" coverages, the All Risk Policy also includes certain "TIME ELEMENT COVERAGE EXTENSIONS," including "EXTENDED PERIOD OF LIABILITY." This coverage extension states, in

relevant part, that:

The GROSS EARNINGS coverage is extended to cover the reduction in sales resulting from:

- 1) the interruption of business as covered by GROSS EARNINGS;
- 2) for such additional length of time as would be required with the exercise of due diligence and dispatch to restore the Insured's business to the condition that would have existed had no loss occurred; and
- 3) commencing with the date on which the liability of the Company for loss resulting from interruption of business would terminate if this Extension has not been included herein.

* * *

Coverage under this Extension does not apply for more than the number of consecutive days shown in the LIMITS OF LIABILITY clause of the DECLARATIONS section.

57. The Declarations of the All Risk Policy provide for a 365-day time limit for "Extended Period [sic] of Indemnity."

58. The All Risk Policy also provides coverage for "PROFESSIONAL FEES," stating, in relevant part, as follows:

This Policy covers the actual costs incurred by the Insured, of reasonable fees payable to the Insured's accountants, architects, auditors, engineers, or other professionals, excluding the cost of using the Insured's employees, for producing and certifying any particulars or details contained in the Insured's books or documents, or such other proofs, information or evidence required by the Company resulting

from insured loss payable under this Policy for which the Company has accepted liability.

59. None of the exclusions in the All Risk Policy precludes or limits coverage for APX's business interruption losses.

VI. THE GLOBAL SPREAD OF SARS-CoV-2

60. In December 2019, during the term of the All Risk Policy, an outbreak of illness known as COVID-19 caused by a novel coronavirus formally known as SARS-CoV-2 was first identified in Wuhan, Hubei Province, China. In an unprecedented event that has not occurred in more than a century, a pandemic of global proportions ensued, with SARS-CoV-2 quickly spreading in China then to other Asian countries, the United States, Europe, and Mexico.

61. On January 30, 2020, with the outbreak spreading outside of China, the World Health Organization ("WHO") declared the SARS-CoV-2 pandemic a Public Health Emergency of International Concern.

62. On March 11, 2020, the WHO officially declared the COVID-19 outbreak a worldwide pandemic.

63. The rapid spread of COVID-19 is due in part to the highly transmissible character of SARS-CoV-2. For example, as of March 1, 2020 there were approximately 87,784 confirmed COVID-19 cases across the globe. Even despite initial shortages in available testing and laboratory capacity to process administered tests in at least some countries, including the United States, that

number increased to approximately 953,021 confirmed cases by April 1 and 3,189,808 cases by May 1. *See, e.g.*, <https://graphics.reuters.com/CHINA-HEALTH-MAP/0100B59S39E/index.html>. As of February 23, 2021, in the United States alone, there have been more than 28 million cases and more than 500,000 deaths. *See* <https://www.cnn.com/interactive/2020/health/coronavirus-us-maps-and-cases/> (last visited 02/23/2021).

64. According to the WHO, “anyone can get sick with COVID-19.” <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses>.

65. According to the Center for Disease Control (“CDC”), a person may become infected by: (1) coming into close contact (about 6 feet) with a person who has COVID-19; (2) being exposed to respiratory droplets after an infected person talks, sneezes, coughs, sings, or breathes; and/or (3) touching surfaces or objects that have SARS-CoV-2 on them, and then touching his or her mouth, eyes, or nose. *See* <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>.

66. Persons with COVID-19 can expel tens of thousands or even hundreds of thousands or more of SARS-CoV-2 virions each hour. *See* <http://www.clinlabnavigator.com/sars-cov-2-infectious-dose.html>. In addition, evidence in the context of influenza supports that persons infected with COVID-19 may expel up to 20,000 virions in a single sneeze. *See, e.g.*,

<https://www.reuters.com/article/us-flu-cough/whats-in-a-cough-20000-viruses-idUSTRE54B16F20090512>.

67. Asymptomatic individuals may also transmit SARS-CoV-2. Based on a recent publication, it is estimated that at least 50% of new infections likely originated from people without any symptoms. *See* https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2774707?utm_source=For_The_Media&utm_medium=referral&utm_campaign=ftm_links&utm_term=010721. Thus, even individuals who appear healthy and present no identifiable symptoms of the disease have and continue to spread SARS-CoV-2 by breathing, speaking, or touching objects and surfaces. These activities deposit tens or hundreds of thousands of SARS-CoV-2 virions in the air and on surfaces rendering the air and surfaces changed from their previous condition.

68. According to a report in *The New York Times*, “[a]n infected person talking for five minutes in a poorly ventilated space can produce as many viral droplets as one infectious cough.” <https://www.nytimes.com/interactive/2020/04/14/science/coronavirus-transmission-cough-6-feet-ar-ul.html>. In addition, one human sneeze can expel droplets that can travel up to 27 feet at nearly a hundred miles an hour. <https://www.nationalgeographic.com/science/2020/04/coronavirus-covid-sneeze-fluid-dynamics-in-photos/>.

69. Although these virions containing droplets are very small, they are

still physical, tangible objects that can travel and attach to other surfaces and cause harm, loss, and damage, and physically alter property and/or the integrity of property. Virions, themselves, are microscopic and made up of genetic material surrounded by a protein shell, *see* <https://rockedu.rockefeller.edu/component/what-are-viruses-made-of/>, but they are capable of being observed and can attach themselves to other things they encounter. When droplets and virions contact objects, they alter those objects, although not in a way perceptible by the naked human eye. Virions also alter the air at properties by making it dangerous and potentially lethal to breathe.

70. Evidence suggests that SARS-CoV-2 virions may remain viable for hours to days on surfaces made from a variety of materials. Studies support that SARS-CoV-2 virions can survive and remain virulent on stainless steel and plastic for up to 6 days, on glass and banknotes for 3 days, and on wood and cloth for 24 hours. *See* [https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247\(20\)30003-3/fulltext](https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247(20)30003-3/fulltext). Testing in similar contexts suggests SARS-CoV-2 virions can survive on ceramics for at least 5 days and on silicon rubber for 3 days. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4659470/>. Studies from the National Institutes of Health support that SARS-CoV-2 virions may be detected in aerosols, including the droplets from breathing, for up to three hours, on plastic and stainless steel for up to three days, and on cardboard for up to twenty-four

hours. See <https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days>; <https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html>. In addition, the CDC confirmed that SARS-CoV-2 RNA was identified on surfaces of the *Diamond Princess* cruise ship a full 17 days after the cabins were vacated. <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.htm>.

71. Because the Insured Properties are frequented by large numbers of people in close proximity and who come into contact with common surfaces, and because at least a portion of each of the Insured Properties contains enclosed spaces, the Insured Properties are susceptible to circumstances favorable to the spread of COVID-19/SARS-CoV-2.

VII. GOVERNMENT RESPONSES

72. From the inception of the understanding of the outbreak in Wuhan, China well into the later months of 2020, the federal government in the United States repeatedly failed to appreciate the significance—both scientifically and medically—of SARS-CoV-2, and failed to institute procedures and policies that would protect United States businesses and persons from SARS-CoV-2 and its impact on United States society. Those failures are a substantial cause of the losses and impacts of SARS-CoV-2 on the U.S. economy, generally, and on APX’s business, specifically.

73. Due in part to the federal government's dereliction of duty, beginning in early March 2020, in response to SARS-CoV-2 and/or risks created by SARS-CoV-2, state and local government officials in the United States issued orders suspending or severely curtailing the operations of non-essential businesses, including operations at the Insured Properties.

74. These orders resulted from the need to address the spread of SARS-CoV-2 and transmission of COVID-19, including because of the known presence or statistically-certain presence of SARS-CoV-2 virions throughout the locales affected by the orders, and the virtual certainty of transmission of these virions and, therefore, COVID-19 to people gathering in close proximity, and from person to property to person.

75. At least some of the orders affecting the Insured Properties specifically state that they were being issued because SARS-CoV-2 causes and has caused loss or damage to property. By way of example, Order No. 2020-7 of the Health Officer of the County of Santa Barbara stated that the "Stay Well at Home" order was being issued because of "the propensity of [SARS-CoV-2] to spread person to person and also because [SARS-CoV-2] physically is causing property loss or damage due to its proclivity to attach to surfaces for prolonged periods of time."

76. Examples of the orders affecting the Insured Properties include those set forth below.

California State and County Orders

77. On March 4, 2020, the Governor of California proclaimed a state of emergency.

78. On March 12, 2020, the Governor of California issued Executive Order N-25-20 ordering, *inter alia*, that “All residents are to heed any orders and guidance of state and local public health officials, including but not limited to the imposition of social distancing measures, to control the spread of COVID-19.”

79. On March 12, 2020, the Health Officer and Public Health Director of Santa Barbara County, California mandated cancellation or postponement of nonessential gatherings of 250 or more people within Santa Barbara County, where Boomers! – Santa Maria is located.

80. On March 16, 2020, the Health Officer of the County of Alameda, California ordered that all non-essential businesses with a facility in Alameda County, where Boomers! – Livermore is located, were “required to cease all activities at facilities located within the County except Minimum Basic Operations”

81. On March 16, 2020, the Health Officer of the County of Los Angeles Department of Public Health, the county where Speedzone is located, ordered the

immediate closure of arcades and prohibited “all indoor public and private gatherings and all outdoor public and private events within a confined space, where at least 50 people are expected to be in attendance at the same time.”

82. On March 19, 2020, the Governor of California issued Executive Order N-33-20, a statewide “Stay At Home” Order, requiring all California residents to stay home or at their place of residence, unless maintaining the continuity of operations of critical infrastructure sectors. This order resulted in the shut-down of non-essential businesses, *i.e.* non-critical infrastructure sector businesses, that were not already forced to do so pursuant to previously-issued county or local orders or guidance.

83. As a result of the aforementioned orders and additional orders, operations at Boomers! – Irvine, Boomers! – Livermore, Boomers! – Modesto, Boomers! – Santa Maria, and Speedzone were suspended.

84. In late June and early July 2020, following the lifting of the closure mandates, the four California Boomers! entertainment centers re-opened.

85. Since re-opening, each property has been subject to social distancing procedures and protocols, and has experienced other significant limitations on operations (including restrictions on capacity, hours, and attractions) as well as subsequent civil authority orders resulting in further suspension of operations, all

of which have detrimentally impacted and/or continue to detrimentally impact financial performance.

86. On November 6, 2020, following the lifting of the above-referenced closure mandates and subsequent closure orders issued by the County of Los Angeles Department of Public Health, Speedzone re-opened.

87. Since re-opening, Speedzone has been subject to social distancing procedures and protocols, and has experienced other significant limitations on operations (including restrictions on capacity, hours, and attractions) as well as subsequent civil authority orders resulting in further suspension of operations, all of which have detrimentally impacted and/or continue to detrimentally impact financial performance.

88. None of the California Insured Properties' operations has yet returned to its pre-interruption level of earnings.

Florida State and County Orders

89. On March 1, 2020, the State of Florida Department of Health issued a Declaration of Public Health Emergency.

90. The Governor of Florida also issued a series of executive orders in response to SARS-CoV-2, including Executive Order No. 20-83 dated March 24, 2020, directing the State Surgeon General and State Health Officer to issue a public health advisory against all social or recreational gatherings of ten or more

people, and Executive Order No. 20-89, dated March 30, 2020, directing, in relevant part, that Palm Beach County, where Boomers! – Boca Raton is located, “restrict public access to businesses and facilities deemed non-essential.” These orders resulted in the shut-down of Boomers! – Boca Raton.

91. On April 1, 2020, the Governor of Florida also issued Executive Order No. 20-91, ordering that, effective April 3, 2020, all persons in Florida were to limit their movements outside of their home to only those necessary to obtain, provide, or conduct essential activities. This order prevented Big Kahuna’s from re-opening operations following its seasonal closure.

92. As a result of the aforementioned orders and additional orders, operations at Boomers! – Boca Raton and Big Kahuna’s were suspended.

93. In June 2020, following the lifting of the closure mandates, Big Kahuna’s and Boomers! – Boca Raton re-opened. Since re-opening, both parks have been subject to social distancing procedures and protocols, and have experienced other significant limitations on operations (including restrictions on capacity), all of which have detrimentally impacted and/or continue to detrimentally impact financial performance.

94. Neither Insured Property’s operations has yet returned to its pre-interruption level of earnings.

New Jersey State Orders

95. On March 9, 2020, the Governor of New Jersey issued Executive Order 103, declaring a Public Health Emergency and State of Emergency.

96. Executive Order 103 expressly noted there were positive cases of COVID-19 spread across numerous counties in New Jersey, including in Camden County where Sahara Sam's is located.

97. On March 16, 2020, the Governor of New Jersey issued Executive Order 104, closing to the public all "Entertainment centers."

98. On March 21, 2020 the Governor of New Jersey issued Executive Order 107, requiring all residents to stay at home unless performing essential activities, and requiring all non-essential businesses to close to the public.

99. As a result of the aforementioned orders, operations at Sahara Sam's were suspended.

100. On July 2, 2020, following the lifting of the stay-at-home and closure mandates, Sahara Sam's re-opened.

101. Since re-opening, Sahara Sam's has been subject to social distancing procedures and protocols, and has experienced other significant limitations on operations (including restrictions on capacity), all of which have detrimentally impacted and/or continue to detrimentally impact financial performance.

102. Sahara Sam's operations have not yet returned to their pre-interruption level of earnings.

The Orders Resulted From “Physical Damage” to Property and Prohibited Access to the Insured Properties

103. The aforementioned orders are only examples and do not include all orders affecting the Insured Properties.

104. Given SARS-CoV-2's ubiquitous and inevitable presence and the fact that SARS-CoV-2 virions are necessarily present on the surfaces or in the air at locations, whether inside an infected person who is present at a property or by an infected person's "shedding" of SARS-CoV-2 virions by the thousands, tens of thousands or hundreds of thousands into the air or onto surfaces at a property; and given that the ubiquitous presence of SARS-CoV-2 virions renders property unfit, unusable, or unsuitable for its intended purpose or unsafe for normal human occupancy and/or continued use, property in the states affected by the aforementioned orders had suffered "physical damage," and these orders directly resulted from "physical damage" to property throughout the relevant locations impacted by the orders, including physical damage to property at the Insured Properties and/or third-party property near the Insured Properties.

105. With respect to the ubiquitous presence of SARS-CoV-2 virions, such presence has been recognized by at least one state high court in considering conditions in Pennsylvania. In *Friends of Danny DeVito v. Wolf*, 227 A.3d 872

(Pa. 2020), the Pennsylvania Supreme Court considered the governor's proclamation of a disaster emergency throughout the entire Commonwealth and found that, in light of the "nature of [SARS-CoV-2] and the manner in which it is transmitted," "any location . . . where two or more people can congregate is within the disaster area." *Id.* at 890.

106. This ubiquitous presence of SARS-CoV-2 virions is or was true throughout much of the globe, including in all or part of the United States.

107. As a result of the aforementioned orders and/or other civil authority orders, access to the Insured Properties was prohibited.

108. The aforementioned restrictions prevented or severely curtailed operations at the Insured Properties, resulting in a deprivation of the full use of and rights to the properties, and thereby causing "physical loss or damage" to the Insured Properties.

109. Prior to the issuance of any of the orders suspending or curtailing non-essential business operations, thousands of individuals would be present at the Insured Properties on a nearly daily basis (save for the seasonal closure of Big Kahuna's). These individuals would come into contact with common surfaces, and, in many instances, be in close physical proximity to each other.

110. Given the number of infected individuals; the highly contagious nature of COVID-19; the initial lack of available testing and the initial lack of

laboratory capacity to quickly process the tests that were administered; the fact that many of those afflicted with COVID-19 are asymptomatic yet able to transmit COVID-19; the fact that COVID-19/SARS-CoV-2 spreads easily from person to property to person *etc.*, especially where people are in close physical contact and sharing common surfaces; the vast number of SARS-CoV-2 virions expelled into the air by an infected person by breathing, coughing and sneezing; the fact that SARS-CoV-2 virions may remain in the air and on physical surfaces for extended periods of time; and the fact that there are not commercially-available methods to accurately test for SARS-CoV-2 virions in the air or on physical surfaces, it is a statistical certainty that SARS-CoV-2 virions were physically present in the air, within infected persons, and on surfaces located at most, if not all, of the Insured Properties prior to the issuance of the aforementioned civil authority orders, and that infected individuals would have been present at all of the Insured Properties and surrounding properties on an ever-increasing number in the absence of the issuance of those orders.

111. Exhalation by these infected individuals when coughing, sneezing, talking, laughing, and even simply breathing created respiratory droplets and aerosolized particles containing SARS-CoV-2 virions that were inhaled into the noses, mouths, and lungs of other individuals and, to a lesser extent, deposited on

the surfaces within the properties where later contact by uninfected individuals undoubtedly resulted in transmission of COVID-19 to those individuals.

112. Each presence of an individual, whether symptomatic or asymptomatic, infected with COVID-19 resulted in the release of thousands or tens of thousands of SARS-CoV-2 virions into the air and onto the surfaces within the insured property in which that individual was present, making that property dangerous and the air at that property potentially lethal to breathe.

VIII. COVERED LOSSES

113. APX has suffered and continues to suffer significant losses of earnings due to SARS-CoV-2-related suspensions of or reductions in operations at the Insured Properties.

114. APX has also suffered Extra Expense losses to continue operations at the Insured Properties, including but not limited to costs for signage, personal protective equipment, and protective shields.

115. The statistically-certain presence of SARS-CoV-2 virions at or near the Insured Properties, and/or the ubiquitous and inevitable presence of SARS-CoV-2 virions throughout the locales and states where the Insured Properties are located, is a covered cause of loss, because it is a risk of direct physical loss or direct physical damage, and not otherwise excluded under the All Risk Policy.

116. The issuance of the above-referenced civil authority orders is also a

covered cause of loss, because it is a risk of direct physical loss or direct physical damage, and not otherwise excluded under the All Risk Policy.

117. The issuance of the above-referenced civil authority orders is also a covered cause of loss, because the Gross Earnings loss and Extra Expense loss coverages include Civil or Military Authority coverage, the orders resulted from “physical damage” (*i.e.*, the statistically-certain presence and/or ubiquitous and inevitable presence of SARS-CoV-2 virions) at or within five miles of the Insured Properties, and the civil authority orders are not otherwise excluded under the All Risk Policy.

118. Each of the Insured Properties is within five miles of other businesses and properties that have also suffered physical damage due to SARS-CoV-2 virions and/or civil authority orders. Nearby businesses and properties suffered alteration of their premises and contents as a result of the virtually certain and ubiquitous presence of SARS-CoV-2 virions due to gathering of people affected by COVID-19, whether symptomatic or asymptomatic.

119. The above-referenced orders and/or other civil authority orders, issued as a direct result of the physical damage described above, operated to prohibit access to the Insured Properties and the immediate surrounding areas.

120. The statistically-certain presence of SARS-CoV-2 virions at or near the Insured Properties and/or the ubiquitous and inevitable presence of SARS-

CoV-2 virions throughout the locales and states where the Insured Properties are located, and/or the above-referenced civil authority orders or other civil authority orders, directly impacted the Insured Properties, resulting in a suspension of operations, and significant financial losses.

IX. HDI'S DUTIES UNDER THE ALL RISK POLICY

121. As a result of the physical loss of and damage to the Insured Properties from the statistically-certain presence of SARS-CoV-2 virions at or near the Insured Properties and/or the ubiquitous and inevitable presence of SARS-CoV-2 virions throughout the locales and states where the Insured Properties are located, and/or civil authority orders prohibiting access to the Insured Properties, HDI is obligated by the All Risk Policy to pay APX's Time Element losses under the All Risk Policy, including under the Gross Earnings and Extra Expense coverages, and including coverage for Civil or Military Authority and in the Extended Period of Liability.

122. The aforementioned presence of SARS-CoV-2 virions and/or civil authority orders has caused physical loss or damage to the Insured Properties because the properties were rendered unusable for their intended purpose or unsafe for normal human occupancy or continued use, resulting in a deprivation of the full use of and rights to the properties.

123. The functionality of those properties and their economic utility was

temporarily lost. The suspension of or reduction in operations resulting from the lost functionality caused significant financial losses.

124. As there is no quick, accurate, or efficient method to test for the presence of SARS-CoV-2 in or on property, as many of those afflicted with COVID-19 are asymptomatic yet able to transmit SARS-CoV-2, and as the employees and customers at the Insured Properties were so numerous, it is statistically certain that SARS-CoV-2 virions were in and on the Insured Properties and would have been present during continued normal operations, and in and on surrounding properties, and physical loss or damage must thus be presumed.

125. Further, as a result of the aforementioned civil authority orders directly resulting from physical damage to property at or within five miles of the Insured Properties, and prohibiting access to the Insured Properties, HDI is obligated by the All Risk Policy to pay APX's business interruption losses under the All Risk Policy, including under the Gross Earnings and Extra Expense Time Element coverages, and including coverage for Civil or Military Authority.

X. HDI'S IMPROPER COVERAGE DENIAL

126. HDI was timely notified of a claim for SARS-CoV-2-related losses relating to the Insured Properties under the All Risk Policy.

127. In its November 10, 2020 coverage denial letter, HDI stated there was no "covered 'direct physical loss or direct physical damage' as required under the

Policy’s Insuring Clause” and that “there is no coverage for any claimed time element loss” as “direct physical loss or damage of the type insured under the Policy” had not been identified.

128. HDI’s position on “physical loss or damage” and “direct physical loss or direct physical damage” is improper and without merit for all of the reasons set forth in paragraphs 43-55 above.

129. In its November 10, 2020 coverage denial letter, HDI also asserted that various policy exclusions precluded coverage, including the All Risk Policy’s “Disease, infestation, insect, animal or vermin damage” exclusion and “contamination” exclusion.

130. The All Risk Policy provides that it “excludes the following, but, if physical damage not excluded by this Policy results, then only that resulting damage is insured: . . . 6) Disease, infestation, insect, animal or vermin damage. . . .”

131. The All Risk Policy also “excludes the following unless directly resulting from other physical damage not excluded by this Policy: 1) contamination including but not limited to the presence of pollution or hazardous material. . . .”

132. HDI cannot meet its burden of proving that either of the above-referenced exclusions (or any other exclusions) operate to preclude coverage.

133. Among other reasons, the “Disease, infestation, insect, animal or vermin damage” exclusion does not apply to diseases like COVID-19, which has been transmitted in the United States by and between humans.

134. Rather, interpreting “disease” in the context of the terms immediately following it (“infestation, insect, animal or vermin damage”), as is appropriate under the interpretive doctrine of *noscitur a sociis*, the only potential “diseases” precluded by this exclusion are diseases transmitted by insects, animals, and vermin, such as diseases transmitted by rats and mice, mites, and cockroaches.

135. Further, the All Risk Policy’s definitions of “contamination,” “pollution,” and “hazardous material,” demonstrate that HDI did not intend the “contamination” exclusion to apply to viruses like SARS-CoV-2. Rather, the exclusion was intended to apply only to viruses subject to traditional environmental regulations, such as medical waste.

136. In addition, by its terms, the “contamination” exclusion only precludes “contamination.” It does not preclude loss or damage to or resulting from contamination, such as the loss of earnings APX has suffered and continues to suffer.

137. At no time subsequent to receiving notice of the claim has HDI, or its representatives, requested to access, inspect, and/or test the Insured Properties.

138. All conditions precedent to bringing this action and obtaining coverage pursuant to the All Risk Policy and applicable law have been substantially performed or otherwise satisfied, or alternatively, performance has been excused by HDI's acts, representations, conduct, or omissions.

COUNT I
(For Declaratory Relief)

139. APX incorporates by reference the allegations contained in paragraphs 1-138.

140. As set forth above, the All Risk Policy protects against APX's Gross Earnings loss and Extra Expense loss resulting from the statistically-certain presence of SARS-CoV-2 virions at or near the Insured Properties, and/or the ubiquitous and inevitable presence of SARS-CoV-2 virions throughout the locales and states where the Insured Properties are located, and/or the above-referenced civil authority orders or other applicable civil authority orders affecting the Insured Properties.

141. HDI breached and continues to breach its contractual obligations, as set forth in the All Risk Policy, by failing and/or refusing to pay the aforementioned covered Gross Earnings and Extra Expense losses.

142. As a direct and proximate result of HDI's breaches of contract and refusal to acknowledge its coverage obligations, APX has suffered and will

continue to suffer serious harm in an amount of millions of dollars, exclusive of interests and costs.

143. An actual and justiciable controversy exists between APX and HDI regarding the interpretation, application, and meaning of the All Risk Policy.

144. Accordingly, APX is entitled to the declaratory judgment of this Court of its rights and of the obligations of HDI under the All Risk Policy.

145. Declaratory relief from this Court will resolve all outstanding issues of policy construction between APX and HDI under the All Risk Policy.

COUNT II
(For Breach of Contract)

146. APX incorporates by reference the allegations contained in paragraphs 1-145.

147. HDI sold to Apex Parks the All Risk Policy, which was a valid and binding contract.

148. APX acquired Apex Parks' right to proceeds from the All Risk Policy for the SARS-CoV-2-related claim asserted by Apex Parks under the All Risk Policy.

149. APX has incurred, and will incur in the future, covered Gross Earnings loss and Extra Expense loss as a result of SARS-CoV-2-related suspensions and reductions in operations at the Insured Properties.

150. HDI breached and continues to breach its contractual obligations under the All Risk Policy by failing and/or refusing to pay the aforementioned covered Gross Earnings and Extra Expense losses.

151. As a result of HDI's breaches, APX has suffered monetary damages.

PRAYER FOR RELIEF

WHEREFORE, APX requests that judgment be entered in its favor and against HDI as follows:

- a. Declare the statistically-certain presence of SARS-CoV-2 virions at or near the Insured Properties and/or the ubiquitous and inevitable presence of SARS-CoV-2 virions throughout the locales and states where the Insured Properties are located causes "risks of direct physical loss or direct physical damage" and "physical loss or damage" to property sufficient to trigger coverage under the All Risk Policy for APX's associated Time Element losses;
- b. Declare the civil authority orders described above or other applicable civil authority orders caused "risks of direct physical loss or direct physical damage" and "physical loss or damage" to property, within the meaning of those phrases as used in the All Risk Policy, as sufficient to trigger coverage under the All

- Risk Policy for APX's associated Time Element losses;
- c. Declare the civil authority orders described above and/or other applicable civil authority orders were issued as a direct result of "physical damage" at or within five miles of the Insured Properties, namely the statistically-certain presence and/or ubiquitous and inevitable presence of SARS-CoV-2 virions throughout the relevant locales and states, and prohibited access to the Insured Properties, all within the meaning of those phrases as used in the All Risk Policy, as sufficient to trigger coverage under the All Risk Policy for APX's associated Time Element losses;
 - d. Declare HDI must pay APX up to the limit of liability for Time Element coverages for each occurrence, including coverage for Extended Period of Liability, as well as qualified Professional Fees for APX's covered losses;
 - e. Award APX all monetary damages suffered by APX as a result of HDI's breaches, including, without limitation, compensatory damages, consequential damages, pre-judgment interest, post-judgment interest, attorneys' fees, and costs; and
 - f. Such additional relief as the Court deems just and appropriate.

JURY DEMAND

Pursuant to Rules 38(b) and 38(d) of the Superior Court Rules of Civil Procedure, APX demands a trial by jury of twelve as to all issues so triable.

Dated: March 5, 2021

REED SMITH LLP

Respectfully submitted,

/s/ Benjamin P. Chapple _____

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