

Cause No. _____

INTERSTATE FIRE & CASUALTY COMPANY;
CERTAIN UNDERWRITERS AT LLOYD'S OF
LONDON AND LONDON MARKET COMPANIES
SUBSCRIBING TO POLICY NO. BOWPN1900110;
CERTAIN UNDERWRITERS AT LLOYD'S OF
LONDON AND LONDON MARKET COMPANIES
SUBSCRIBING TO POLICY NO. BOWPN1900109;
CERTAIN UNDERWRITERS AT LLOYD'S OF
LONDON AND LONDON MARKET COMPANIES
SUBSCRIBING TO POLICY NO. BOWPN1900406;
CERTAIN UNDERWRITERS AT LLOYD'S OF
LONDON SUBSCRIBING TO POLICY NO.
B66482AAA; CERTAIN UNDERWRITERS AT
LLOYD'S OF LONDON AND LONDON MARKET
COMPANIES SUBSCRIBING TO POLICY NO.
BOWPN1900112; and EVEREST INDEMNITY
INSURANCE COMPANY,

Plaintiffs,

v.

FERTITTA ENTERTAINMENT, INC.; FERTITTA
HOSPITALITY, LLC; MPBB HOLDINGS I, LLC;
1600 WEST LOOP SOUTH, LLC; ACE AMERICAN
INSURANCE COMPANY; PICC PROPERTY &
CASUALTY CO., LTD.; ARCH SPECIALTY
INSURANCE COMPANY; AXIS SURPLUS
INSURANCE COMPANY; HOMELAND
INSURANCE COMPANY OF NEW YORK; GREAT
AMERICAN INSURANCE COMPANY OF NEW
YORK; LEXINGTON INSURANCE COMPANY;
NATIONAL FIRE & MARINE INSURANCE
COMPANY; LANDMARK AMERICAN INSURANCE
COMPANY; STARR SURPLUS LINES INSURANCE
COMPANY; and DOES 1-100,

Defendants.

IN THE DISTRICT COURT

OF HARRIS COUNTY, TEXAS

____ JUDICIAL DISTRICT

**PLAINTIFFS' ORIGINAL PETITION
FOR DECLARATORY JUDGMENT**

Plaintiffs Interstate Fire & Casualty Company, Certain Underwriters at Lloyd's of
London, and London Market Companies Subscribing to Policy No. BOWPN1900109; Certain
Underwriters at Lloyd's of London, and London Market Companies Subscribing to Policy No.

BOWPN1900110; Certain Underwriters at Lloyd’s of London, and London Market Companies Subscribing to Policy No. BOWPN1900406; Certain Underwriters at Lloyd’s of London, and London Market Companies, Subscribing to Policy No. BOWPN1900112; Certain Underwriters at Lloyd’s of London Subscribing to Policy No. B66482AAA, and Everest Indemnity Insurance Company (collectively “Plaintiff Insurers”) bring this Original Petition For Declaratory Judgment against Defendants Fertitta Entertainment, Inc.; Fertitta Hospitality, LLC; MPBB Holdings I, LLC; and 1600 West Loop South, LLC (hereafter collectively “Fertitta” or “Fertitta Defendants”) and, in order for the Court to be able to grant complete relief, nominal Defendants Ace American Insurance Company; PICC Property & Casualty Co., Ltd.; Arch Specialty Insurance Company; Axis Surplus Insurance Company; Homeland Insurance Company of New York; Great American Insurance Company of New York; Lexington Insurance Company; National Fire & Marine Insurance Company; Landmark American Insurance Company; and Starr Surplus Lines Insurance Company (collectively, the “Nominal Defendants” and together with the Plaintiff Insurers, the “Insurers”), and Does 1-100.

INTRODUCTION

This declaratory judgment action seeks to resolve an insurance-coverage dispute between Fertitta, which operates a nationwide chain of restaurants, hospitality, and gaming facilities, and the numerous Insurers who participate in a multi-layered \$750 million commercial property insurance program (the “Program”).

Fertitta made a claim for insurance benefits with respect to Cancellation of Bookings & Disruption of Gaming Operations as defined in the Program (the “Booking Cancellation Extension”). The claim related to Fertitta’s Golden Nugget Casinos and was subject to an aggregate limit of liability for any one policy year. The Insurers participating in the relevant layer of the Program promptly acknowledged coverage under the Booking Cancellation Extension and, after receiving Fertitta’s proof of loss, agreed to pay the full amount of insurance coverage they determined to be available (\$2.5 million).

After being advised that it would receive the available limits of the Booking Cancellation Extension, Fertitta notified certain Insurers that it was expanding its claim to include all locations closed due to governmental orders issued to slow the spread of COVID-19 through social distancing. Based on contemporaneous discussions, it appeared this expanded claim was presented under the Time Element extension for Interruption by Civil or Military Authority (“Civil Authority”), but Fertitta later indicated that it contended (or may contend) that coverage also exists under the Business Interruption, Extra Expense, and Contingent Business Interruption, and Contingent Extra Expense provisions of the Program. Plaintiff Insurers dispute Fertitta is entitled to recover its claimed losses under any of those coverages, and instead contend as follows.

First, there is no coverage under the Business Interruption provision because Fertitta has not established “direct physical loss, damage or destruction” to insured property by a covered peril which necessarily interrupted or interfered with Fertitta’s business.

Second, there is no Extra Expense coverage here because Fertitta has not established any costs incurred as a result of any direct physical loss or damage of insured property by a covered peril.

Third, there is no Civil Authority coverage because, among other reasons, Fertitta has not established “direct physical loss, damage or destruction” to any property by a “peril insured,” as required by the Policies’ insuring language.

Fourth, there is no Contingent Business Interruption and Extra Expense coverage because, among other reasons, Fertitta has not shown that any suppliers or receivers of goods and services had not sustained a “direct physical loss, damage or destruction” of the type insured under the Program.

Fifth, even if the insuring language of the foregoing coverages were triggered, Fertitta’s claimed losses would be excluded by the Policies’ virus exclusions. The social distancing orders issued by local and regional governments in response to the COVID-19 pandemic did not cause

any physical injury to property and were issued in an effort to curtail the potential future spread of the coronavirus.

The Plaintiff Insurers understand that Fertitta disputes the coverage position outlined above, and instead intends to advance claims for coverage under Fertitta's dramatically different interpretation of the relevant policy language. Accordingly, to ensure that all disputes among all parties to the Program are resolved fully and expeditiously, in the most logical and efficient forum—which is the county and state of Fertitta's principal place of business—and so that complete judicial relief can be afforded, the Plaintiff Insurers hereby seek a comprehensive declaratory judgment from this Court.

DISCOVERY CONTROL PLAN

1. Plaintiffs intend for discovery to be conducted under Level 2 pursuant to Tex. R. Civ. P. 190.1 and 190.3. Plaintiffs affirmatively plead that this suit is not governed by the expedited actions process under Tex. R. Civ. P. 169. Pursuant to Tex. R. Civ. P. 47, Plaintiffs state that they seek monetary relief over \$1,000,000 in the form of attorneys' fees only, as well as declaratory relief.

PARTIES

2. At all times relevant herein, plaintiff Interstate Fire & Casualty Company was and is incorporated in Illinois, with its principal place of business at 225 W. Washington St., Chicago, IL 60606.

3. At all times relevant herein, plaintiff Certain Underwriters at Lloyd's of London and London Market Companies Subscribing to Policy No. BOWPN1900110 are United Kingdom entities with a principal place of business in the United Kingdom.

4. At all times relevant herein, plaintiff Certain Underwriters at Lloyd's of London and London Market Companies Subscribing to Policy No. BOWPN1900109 are United Kingdom entities with a principal place of business in the United Kingdom.

5. At all times relevant herein, plaintiff Certain Underwriters at Lloyd's of London and London Market Companies Subscribing to Policy No. BOWPN1900406 are United Kingdom entities with a principal place of business in the United Kingdom.

6. At all times relevant herein, plaintiff Certain Underwriters at Lloyd's of London and London Market Companies Subscribing to Policy No. BOWPN1900112 are United Kingdom entities with a principal place of business in the United Kingdom

7. At all times relevant herein, plaintiff Certain Underwriters at Lloyd's of London Subscribing to Policy No. B66482AAA are United Kingdom entities with a principal place of business in the United Kingdom.

8. At all times relevant herein, plaintiff Everest Indemnity Insurance Company was and is a corporation organized under the laws of Delaware, with its principal place of business located at 477 Martinsville Road, Liberty Corner, New Jersey.

9. The Fertitta Defendants own or operate a group of affiliated restaurants, hospitality, and gaming facilities throughout the United States, including multiple locations in or around Houston, Texas. Publicly, the Fertitta Defendants are known under trade names such as Landry's and Golden Nugget, and form part of the business empire owned by Houston billionaire Tilman Fertitta.

10. Defendant Fertitta Entertainment, Inc. is a Texas corporation with its principal place of business in Harris County. It can be served with process by serving its registered agent, Steven L. Scheinthal, at 1510 West Loop South, Houston, Texas 77027.

11. Defendant Fertitta Hospitality, LLC is a Texas limited liability company with its principal place of business in Harris County. It can be served with process by serving its registered agent, Steven L. Scheinthal, at 1510 West Loop South, Houston, Texas 77027.

12. Defendant MPBB Holdings I, LLC is a Texas limited liability company with its principal place of business in Harris County. It can be served with process by serving its registered agent, Fertitta 1996 Children's Trust, 1510 West Loop South, Houston, Texas 77027.

13. Defendant 1600 West Loop South, LLC is a Texas limited liability company with its principal place of business in Harris County. It can be served with process by serving its registered agent, Steven L. Scheinthal, at 1510 West Loop South, Houston, Texas 77027.

14. Nominal Defendant Arch Specialty Insurance Company was and is a corporation organized under the laws of Missouri, with its principal place of business located at 2345 Grand Blvd., Suite 900, Kansas City, Missouri.

15. Nominal Defendant Lexington Insurance Company was and is a corporation organized under the laws of Delaware, with its principal place of business located at 99 High Street, Floor 24, Boston, Massachusetts.

16. Nominal Defendant Homeland Insurance Company of New York was and is a corporation organized under the laws of New York, with its principal place of business located at 605 Highway 169 North, Suite 800, Plymouth, Minnesota.

17. Nominal Defendant Great American Insurance Company was and is a corporation organized under the laws of Ohio, with its principal place of business located at 301 E. Fourth Street, 21st Floor, Cincinnati, Ohio.

18. Nominal Defendant Axis Surplus Insurance Company was and is a corporation organized under the laws of Illinois, with its principal place of business located at 303 W. Madison Street, Chicago, Illinois.

19. Nominal Defendant National Fire & Marine Insurance Company was and is a corporation organized under the laws of Nebraska, with its principal place of business located at 1314 Douglas Street, Suite 1400, Omaha, Nebraska.

20. Nominal Defendant Ace American Insurance Company was and is a corporation organized under the laws of Pennsylvania, with its principal place of business located at 426 Walnut Street, Philadelphia, Pennsylvania.

21. Nominal Defendant Landmark American Insurance Company was and is a corporation organized under the laws of New Hampshire, with its principal place of business located at 945 East Paces Ferry Road, Suite 1800, Atlanta, Georgia.

22. Nominal Defendant Starr Surplus Lines Insurance Company was and is a corporation organized under the laws of Texas with its principal place of business located at 399 Park Avenue, 8th Floor, New York, New York.

23. Nominal Defendant PICC Property & Casualty Company, Ltd. was and is a corporation organized under the laws of China, with its principal place of business located in Beijing, China.

24. The identities of the defendants designated as “DOES 1-100” are not known at this time, but are sued herein fictitiously to include any other persons and entities who may be affiliated with Fertitta and/or who have, or who may claim to have, any right or interest in any of the Policies with respect to the matters alleged above.

25. On information and belief, the Nominal Defendants do not dispute the Plaintiff Insurers’ contentions as set forth below, but are sued herein as nominal defendants to ensure they are bound by any resulting declaratory judgment, thereby providing complete relief to all interested parties and avoiding the potential risk of inconsistent judgments and the cost of piecemeal litigation.

JURISDICTION AND VENUE

26. This Court has subject matter jurisdiction over all matters alleged herein pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code because Fertitta and the Insurers have interests under written insurance contracts and have a dispute about their rights and obligations under those policies. The parties thus require the court to construe coverage provisions and declare the parties’ rights. Further, the damages sought in the form of attorneys’ fees are within the jurisdictional limits of the Court.

27. Personal jurisdiction exists over the Fertitta Defendants because, on information and belief, the Fertitta Defendants have their headquarters and, thus, their principal places of business in Texas. Therefore, the Fertitta Defendants are subject to the general jurisdiction of the Court. Personal jurisdiction exists over the Nominal Defendants because they (i) issued and delivered an insurance contract to policyholders domiciled in Texas, or alternatively, (ii) are

expected to waive any objection to personal jurisdiction in this matter in order to promote complete relief among all parties in interest.

28. Venue is proper in this Court because, among other reasons: (a) Fertitta's corporate headquarters is in Houston; (b) on information and belief, Fertitta's business decisions with respect to the Program were made in Houston; (c) the insurance policies forming part of the Program were issued at Fertitta's above-alleged address in Houston; (d) any payments made under the policies would be issued to Fertitta's Houston address; (e) on information and belief, the premium payments for the Program were paid from Houston; and (f) Fertitta owns or operates multiple businesses in or around Houston at which Fertitta contends it suffered covered business interruption losses.

THE INSURANCE PROGRAM

29. For the period of May 31, 2019 to May 31, 2020, Insurers issued individual policies of insurance, subject to their applicable terms, limits and exclusions (collectively the "Policies"), to the Fertitta Defendants as the named insureds, and their "affiliated, parent and their direct and indirect subsidiary companies and/or corporations, including any limited liability companies in which any insured entity is a partner or member and any partnership or joint venture in which any of the precedent entities have a majority interest or management control or are responsible to insure, all as now exist or may hereafter be constituted or acquired, and any party in interest which any of the preceding entities are responsible to insure..." The Policies further provide that "With respect to partnership and joint ventures in which any of the preceding entities do not have a majority interest or management control or are not responsible to insure, then only the Insured's interest in such partnerships or joint ventures shall be insured under this Policy."

30. The Policies are part of the multi-layered insurance Program, in which the individual Insurers participate at different levels of indemnity, depending on their respective Policy limits and the limits of the underlying Policies in the Program. The individual Policies issued by each participating Insurer include unique declaration pages, schedules, notices, and endorsements (collectively "Insurer-Specific Forms").

31. In addition, each Insurer's Policy includes a standard Policy form with four addenda (the "Global Form"), which does not vary among the Insurers other than Clause E of the Declarations, entitled "Participation," which sets forth the details regarding each Insurer's participation in the Program (e.g., the layers and percentages in which it participates), and the Insurer-specific signature block. The Global Form also includes six standard endorsements (the "Global Endorsements"), although individual Insurers may delete or modify some or all of the Global Endorsements in their individual Policies and may add their own endorsements as part of their Insurer-Specific Forms.

32. The Global Form contains an "Excess Participation Clause" applicable to all Insurers that participate "on an excess basis." (Clause 14.) That clause specifies, in relevant part, that "[t]here will be no coverage hereunder until the amount of direct physical loss, damage or destruction arising out of any one **Occurrence** exceeds the underlying layer above which the **Company**'s participation attaches, as shown in the Participation Clause E. of the Declarations[.]" (*Id.*)

33. To avoid undue burden and repetition, Plaintiffs are not attaching copies of all of the individual policies to this Petition. The policies are voluminous and the Fertitta Defendants possess copies of the applicable policies. Plaintiffs will make the policies available to the Court at the appropriate time in this action.

THE GLOBAL POLICY FORM

34. As noted above, for any Insurer's individual Policy, the Global Form may be modified by the Insurer-Specific Forms or by modifying or deleting one or more of the Global Endorsements. Subject to those variations, the following paragraphs summarize the policy language in the Global Form that is most directly implicated in the parties' current dispute.

35. In the "Perils Insured Against" clause of the Policy Provisions, the Global Form specifies that it only covers "risk of direct physical loss, damage or destruction" to "property described herein, except as hereinafter excluded." (Clause 1.) "Wherever used" in the Global

Form, “the term “peril(s) insured against” is expressly defined to include these “conditions,” including the requirement of “direct physical loss, damage or destruction.” (*Id.*)

36. The Global Form generally defines covered property as “[t]he interest of the **Insured** in all real and personal property,” along with certain other specified categories of tangible property, such as “[p]ersonal property of others for which the **Insured** is responsible or has agreed to insure[.]” (Clause 2.A.)

37. At all relevant times, Fertitta has the burden to prove, subject to all other terms, conditions, and limitations in the Policies, that a peril insured against resulted in direct physical loss, damage or destruction to covered property.

38. While Fertitta has not established the presence of COVID-19 and/or the SARS-CoV-2 virus at any insured locations, Plaintiff Insurers contend its mere presence (even if established by Fertitta) does not cause direct physical loss, damage or destruction by a peril insured against, to establish a covered loss.

39. Under the Global Form, an insured making a claim for Business Interruption losses must meet the common threshold prerequisite requirement of establishing “direct physical loss, damage, or destruction” to covered “real [or] personal property” by a peril insured against. (Clauses 2.B(1) & 2.BB(1).)

40. In relevant part, the Global Form provides with respect to Clause 2.B as follows:

B. Business Interruption

- (1) Loss resulting from necessary interruption of business conducted by the **Insured**, whether total or partial, and caused by direct physical loss, damage, or destruction insured herein during the term of this **Policy** to real and personal property as described in Clause 2.A. of the Policy Provisions.
- (2) If such loss occurs during the term of this **Policy**, it shall be adjusted on the basis of Actual Loss Sustained by the **Insured**, consisting of the Net Profit which is thereby prevented from being earned and of all charges and expenses only to the extent that these must necessarily continue during the interruption of business,

including **Ordinary Payroll**, and only to the extent such charges and expenses would have been incurred had no loss occurred.

41. The Global Form provides with respect to Clause 2.BB. as follows:

BB. Business Interruption - Loss of Profits

- (1) Loss of Gross Profit and Loss Adjustment Expenses resulting from interruption of or interference with the business, and caused by direct physical loss, damage or destruction insured herein during the term of this **Policy** to real and personal property as described in Clause 2.A.

42. Inasmuch as Fertitta cannot establish that it sustained direct physical loss, damage or destruction caused by a peril insured against that necessarily interrupted its business, Fertitta has failed to establish coverage for Business Interruption.

43. With respect to Fertitta's Extra Expense claim, the Global Policies provide as follows:

C. Extra Expense

- (1) Extra Expense incurred resulting from direct physical loss, damage or destruction insured herein during the term of this **Policy** to real or personal property as described in Clause 2.A of the Policy Provisions.
- (2) Extra Expense means the excess of the total cost chargeable to the operation of the **Insured's** business over and above the total cost that would normally have been incurred to conduct the business had no direct physical loss, damage or destruction occurred.

44. Inasmuch as Fertitta cannot establish that it sustained direct physical loss, damage or destruction caused by an insured peril, Fertitta has failed to establish coverage for Extra Expense.

45. As to Fertitta's Claim of Contingent Business Interruption or Contingent Extra Expense, the Global Form provides as follows:

G. Time Element Extensions

- (1) This **Policy** insures against **Time Element** losses resulting from:

(b) Contingent Business Interruption and Contingent Extra Expense

Direct physical loss, damage or destruction as insured herein to property of the type insured that wholly or partially prevents any direct or indirect supplier of any tier of goods and/or services to the **Insured** from rendering their goods and/or services, other than the services described in subparagraph (a) above, or property of the type insured that wholly or partially prevents any direct or indirect receiver or any tier of goods and/or services from the **Insured** from accepting the **Insured's** goods and/or services, such supplier or receiver to be located anywhere in the world where permitted by law.

46. The Contingent Business Interruption and Contingent Extra Expense is subject to a \$25 million Program sublimit.

47. Inasmuch as Fertitta cannot establish that direct physical loss, damage or destruction caused by an insured peril prevented a direct or indirect supplier or receiver of the insured from being able to supply or receive goods or services, Fertitta has failed to invoke coverage for Contingent Business Interruption and Contingent Extra Expense.

48. With respect to the Time Element Extension is for "Interruption by Civil or Military Authority," the Global Form provides as follows:

(2) This **Policy** insures against **Time Element** losses resulting from:

(a) Interruption by Civil or Military Authority:

An interruption of business, whether total or partial, during the period of time when, in connection with or following a peril insured against, access to real or personal property is impaired by order or action of civil or military authority.

49. Subject to a Program sublimit of \$25 million and a 5-mile distance limitation, the Civil Authority coverage is available for up to a 30-day Period of Recovery.

50. Inasmuch as Fertitta cannot establish that direct physical loss, damage or destruction caused by an insured peril impaired access to its real or personal property by order or

action of civil or military authority, Fertitta has failed to establish coverage for Interruption by Civil or Military Authority.

51. The Global Form policies expressly and specifically exclude loss, damage, or destruction caused by pollution and/or contamination of any kind, including from a virus, direct or indirect, arising from any cause whatsoever. It is undisputed that COVID-19 is caused by the SARS-CoV-2 virus and as such the virus exclusion applies to preclude coverage for the claims of Fertitta. Thus, even if Fertitta could meet its burden of establishing physical loss, damage or destruction as set forth above, which it cannot, Plaintiff Insurers contend this exclusion bars coverage inasmuch as Fertitta's claimed losses under the Business Interruption, Extra Expense, Civil Authority, Contingent Business Interruption and/or Contingent Extra Expense coverages were directly or indirectly caused by COVID-19 and/or the SARS-CoV-2 virus.

52. Certain of the Policies do not provide coverage for any loss caused directly or indirectly by a pathogenic substance or material.

53. It is undisputed that COVID-19 and/or SARS-CoV-2 are pathogenic substances or materials, and as such the Insurers whose Policies contain such exclusions contend they also apply to preclude coverage for Fertitta's claims under the aforementioned coverages.

THE INSURANCE CLAIM

54. On or about March 16, 2020, Fertitta's broker provided a First Notice of Loss under the Program with respect to Fertitta's three Golden Nugget casinos in New Jersey, Mississippi, and Louisiana.

55. On or about March 19, 2020, Fertitta's broker amended its notice by adding two additional Golden Nugget casinos in Nevada to the claim.

56. Insurers' independent adjuster, Sedgwick, Inc. ("Sedgwick"), promptly investigated the claim and confirmed that the five casinos were closed as a result of executive orders or proclamations issued in the relevant states to slow the spread of COVID-19. None of the government orders relied on by Fertitta specifically identified any of Fertitta's insured

locations. To investigate the amount of Fertitta's claimed loss, Sedgwick requested further information substantiating the casinos' financial data.

57. On May 6, 2020, while still awaiting the requested information, Sedgwick acknowledged that coverage existed for the casino-related losses under the Booking Cancellation Extension in Global Endorsement No. 2 from those carriers that provided that coverage.¹

58. On June 17, 2020, Fertitta's broker provided a Revised First Notice of Loss expanding its claim to include closures at all of Fertitta's insured locations, nationwide, as a result of governmental orders related to COVID-19. Based on communications from Fertitta and its broker, Sedgwick understood the expanded claim was premised not on the Booking Cancellation Extension, but rather the Civil Authority coverage. Unlike the Booking Cancellation Extension, however, the Civil Authority coverage requires "direct physical loss, damage or destruction" of property by a "peril insured against." Sedgwick requested further details on June 24, 2020 and advised that additional information requests would be forthcoming.

59. On July 6, 2020, Sedgwick then wrote to Fertitta regarding its expanded claim for benefits, along with a detailed list of requests for further information. As a result of subsequent developments, it appeared that Fertitta's expanded claim was not necessarily limited to the Civil Authority coverage, and that Fertitta also contends or may contend that coverage exists under the Time Element coverages for Business Interruption, Extra Expense, and Contingent Business Interruption and Contingent Extra Expense.

60. As of the date of this Original Petition, Fertitta has failed to respond to Sedgwick's information requests. In particular, Fertitta provided no information indicating that any of its property had suffered any "direct physical loss, damage or destruction."

¹ The excess Insurers participating in the second layer of the Program and higher were not involved with this coverage determination, because the annual Program sublimit for the Booking Coverage Extension falls entirely within the primary layer of insurance.

COUNT FOR DECLARATORY JUDGMENT

61. The Plaintiff Insurers re-allege and incorporate each and every allegation in this Original Petition into this Count, as if set forth in its entirety.

62. Under the Texas Civil Practice And Remedies Code, Chapter 37, section 37.001 *et seq.*, this Court may issue a declaratory judgment to settle and afford relief from uncertainty and insecurity with respect to the litigants' rights, status, and other legal relations.

63. As confirmed by Fertitta's prior demands and communications, an actual controversy has arisen between Insurers and Fertitta regarding their respective rights, duties, and legal relations under the Program with respect to Fertitta's expanded claim for insurance benefits for all its locations nationwide. In particular, but not exclusively, those disputed issues include:

a) Whether Fertitta's covered property suffered any "direct physical loss, damage or destruction" by a "peril insured against" or any similar terminology used in any Insurer-Specific Forms associated with COVID-19;

b) Whether property within 5 miles of Fertitta's covered property suffered any "direct physical loss, damage or destruction" by a "peril insured against" or any similar terminology used in any Insurer-Specific Forms associated with COVID-19;

c) Whether "access" to Fertitta's covered locations was "impaired" by the government orders, as required by the Civil Authority coverage;

d) Whether any impairment of access was "in connection with or following a peril insured against," as required by the Civil Authority coverage;

e) Whether direct physical loss, damage or destruction by an insured against peril prevented a direct or indirect supplier or receiver of the insured from being able to supply or receive goods or services;

f) Whether Fertitta's claimed losses fall within the Civil Authority coverage or, to the extent sought, the other coverages for Business Interruption, Extra Expense, Contingent Business Interruption and Contingent Extra Expense;

g) Whether the exclusion for loss resulting from “virus” or viral “contamination,” or similar exclusionary language used in any Insurer-Specific Forms, precludes coverage for Fertitta’s claimed losses; and

h) Whether the exclusion for “pathogenic or poisonous biological or chemical materials” precludes coverage for Fertitta’s claimed losses.

64. Resolution of the litigants’ rights, duties, and obligations in connection with the foregoing is necessary because Insurers have no other adequate remedy at law, and a declaration from the Court is needed to resolve the dispute and controversy and grant complete relief to all parties in interest.

65. The Plaintiff Insurers therefore seek the following declarations from the Court:

a) Fertitta cannot establish “direct physical loss, damage or destruction” by a “peril insured against” or any similar terminology used in any Insurer-Specific Forms to covered property associated with COVID-19;

b) Fertitta cannot establish that property within 5 miles of Fertitta’s covered property suffered any “direct physical loss, damage or destruction” by a “peril insured against” or any similar terminology used in any Insurer-Specific Forms associated with COVID-19;

c) The government orders did not impair “access” to Fertitta’s covered locations;

d) Any impairment of access to Fertitta’s covered locations was not “in connection with or following a peril insured against”;

e) Fertitta cannot establish that “direct physical loss, damage or destruction” by a “peril insured against” prevented a direct or indirect supplier or receiver of the insured from being able to supply or receive goods or services;

f) Fertitta’s claimed losses fall outside the Civil Authority coverage and, to the extent sought, the other coverages for Business Interruption, Extra Expense, Contingent Business Interruption and Contingent Extra Expense;

g) The exclusion for loss resulting from “virus” or viral “contamination” or similar exclusionary language used in any Insurer-Specific Forms precludes coverage for Fertitta’s claimed losses; and

h) The exclusion for “pathogenic or poisonous biological or chemical materials” precludes coverage for Fertitta’s claimed losses.

66. The Plaintiff Insurers further seek an award of reasonable and necessary attorneys’ fees in connection with this action, as are equitable and just, under Tex. Civ. Prac. & Rem. Code § 37.009, including those fees incurred in the proceeding before this Court, any Court of Appeals, and the Texas Supreme Court.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff Insurers pray for the following relief:

1. A declaratory judgment in favor of Insurers, and against Fertitta, adjudging and declaring that:

- a) Fertitta’s covered property did not suffer any “direct physical loss, damage or destruction” (or any similar terminology used in any Insurer-Specific Forms) associated with COVID-19;
- b) Property within 5 miles of Fertitta’s covered property did not suffer any “direct physical loss, damage or destruction” (or any similar terminology used in any Insurer-Specific Forms) associated with COVID-19;
- c) The government orders did not impair “access” to Fertitta’s covered locations;
- d) Any impairment of access to Fertitta’s covered locations was not “in connection with or following a peril insured against”;
- e) None of Fertitta’s direct or indirect suppliers or receivers were prevented from being able to supply or receive goods or services due to direct physical loss, damage or destruction by an insured peril;

- f) Fertitta's claimed losses fall outside the Civil Authority coverage and, to the extent sought, the other coverages for Business Interruption, Extra Expense, Contingent Business Interruption and Contingent Extra Expense;
- g) The exclusion for loss resulting from "virus" or viral "contamination," or any similar exclusionary language in any Insurer-Specific Forms, precludes coverage for Fertitta's claimed losses; and
- h) The exclusion for "pathogenic or poisonous biological or chemical materials" precludes coverage for Fertitta's claimed losses.

2. An award of the Plaintiff Insurers' reasonable and necessary attorneys' fees in connection with this action, as are equitable and just under Tex. Civ. Prac. & Rem. Code § 37.009, including those fees incurred in the proceeding before this Court, any Court of Appeals, and the Texas Supreme Court;

- 3. An award of costs to the Plaintiff Insurers as the prevailing parties; and
- 4. Any and all further relief to which the Plaintiff Insurers show themselves entitled.

Dated: October 8, 2020

Respectfully Submitted,

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