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8  
9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**

11 SUNSTONE HOTEL INVESTORS,  
INC.,

12 Plaintiff,

13 v.

14 ENDURANCE AMERICAN  
SPECIALTY INSURANCE  
15 COMPANY, a corporation,

16 Defendant.

Case No. 8:20-cv-02185-CJC-KES

**DEFENDANT ENDURANCE  
AMERICAN SPECIALTY  
INSURANCE COMPANY'S  
OPPOSITION TO PLAINTIFF  
SUNSTONE HOTEL INVESTORS,  
INC.'S MOTION FOR PARTIAL  
JUDGMENT ON THE PLEADINGS**

Date: July 12, 2021  
Time: 1:30 p.m.

Judge: Hon. Cormac J. Carney  
Courtroom: 9B  
Complaint filed: November 13, 2020

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1 **I. INTRODUCTION**<sup>1</sup>

2 Sunstone has not presented any undisputed facts in the pleadings that warrant  
3 judgment on the pleadings and allow it to bypass discovery, depositions, and expert  
4 analysis. Indeed, Sunstone’s Motion for Partial Judgment on the Pleadings relies  
5 on facts that Endurance has not admitted, and under federal procedural law, “any  
6 allegations made by the moving party that have been denied or contradicted are  
7 assumed to be false.” *H & C Global Supplies SA DE CV v. Pandol Assocs. Mktg.,*  
8 *Inc.*, 2013 WL 5954812, at \*1 (E.D. Cal. Nov. 6, 2013). Sunstone’s motion should  
9 be denied on that basis alone. But Sunstone reaches beyond disputed facts,  
10 introducing new allegations about the cleaning of the Marriott Boston Long Wharf  
11 and the science of COVID-19 transmission that appear nowhere in its Complaint—  
12 an improper attempt to short-circuit this litigation. Endurance has not been  
13 afforded an opportunity to develop evidence on those and other fact-specific and  
14 expert-specific issues, which are plainly inappropriate for resolution at the  
15 pleadings stage.

16 When discovery is conducted, Endurance may be able to develop facts  
17 showing that the Interruption Period at the Marriott Boston Long Wharf ended  
18 earlier than Sunstone claims. *See Gen. Conference Corp. of Seventh-Day*  
19 *Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230  
20 (9th Cir. 1989) (plaintiff’s motion for judgment on the pleadings should be denied  
21 when the pleadings raise “issues of fact that, if provided, would defeat recovery”).  
22 Endurance could show that the Interruption Period ended when the presence of the  
23 virus at the Marriott Boston Long Wharf was no longer a source of the interruption  
24 to operations, even if operations subsequently remained suspended for other  
25 reasons, evidence that would preclude coverage under the Policy’s clear terms.  
26 Endurance could also show, for example, that after the presence of the virus was

27 \_\_\_\_\_  
28 <sup>1</sup> Unless otherwise specified, all emphasis is added.

1 eliminated, the Marriott Boston Long Wharf was unable to resume operations for  
2 regulatory reasons—evidence that again would preclude coverage under the Policy.  
3 Sunstone’s effort to read ambiguity into those provisions cannot be squared with  
4 the Policy’s plain language.

5 The Court should resolve this dispute on the evidence, not on the pleadings.

6 **II. BACKGROUND**

7 **A. The Policy**

8 Endurance issued Site Environmental Impairment Liability Policy  
9 GER10011343500 (the “Endurance Policy” or the “Policy”) to Sunstone for the  
10 period of June 22, 2017, to June 22, 2020.<sup>2</sup> The Endurance Policy provides a  
11 variety of coverages for environmental risks.

12 **1. Coverage D.1 – Business Interruption and Extra Expense**

13 Coverage D.1—the only type of coverage Sunstone seeks—provides that  
14 Endurance will pay for “Business Interruption Losses and Extra Expenses during  
15 the Interruption Period that directly result from Pollution Condition(s) or Biological  
16 Agent Condition(s) [o]n or under a Scheduled Location”:

17 **D. COVERAGE D – BUSINESS INTERRUPTION AND EXTRA EXPENSE**

18 The Company shall pay, up to the Limits of Liability as specified in the Declarations and after the  
19 **Waiting Period, the Insured’s Business Interruption Losses and Extra Expenses during the**  
20 **Interruption Period that directly result from Pollution Condition(s) or Biological Agent**  
21 **Condition(s):**

22 **1. On or under a Scheduled Location,** provided that:

- 23 a. Such **Pollution Condition(s) or Biological Agent Condition(s)** result in **Cleanup Costs**  
24 covered under this **Policy**; and
- 25 b. The **Pollution Condition(s) or Biological Agent Condition(s)** were first **Discovered**  
26 and reported to the Company during the **Policy Period** or the Automatic Extended  
27 Reporting Period or the Optional Extended Reporting Period, if any; or

28 (*Id.* at § I.D., Dkt. 1-1 at p. 11.) Coverage D is subject to a three-day waiting  
period. (*Id.* at Declarations Item 7, Dkt. 1-1 at p. 7.)

<sup>2</sup> The Policy is attached as Exhibit A to the Complaint. (Dkt. 1-1.)

2. **Biological Agent Condition(s)**

“Biological Agent Condition(s)” is defined to mean “the presence of Biological Agents at, upon or within a Scheduled Location”:

- 4. **Biological Agent Condition(s)** means the presence of **Biological Agents** at, upon or within a **Scheduled Location**, which the **Insured** had not **Discovered** prior to the inception of this **Policy**, provided that:
  - a. There is actual or alleged **Bodily Injury** or **Property Damage** due to or associated with such **Biological Agents**; or
  - b. The **Biological Agents** affect an area greater than 25 square feet or requires **Corrective Actions** as determined by an **Environmental Professional**.

(*Id.* at § VIII.4, Dkt. 1-1 at p. 26.) “Biological Agents” means “any (a) Bacteria (including legionella pneumophila) or Fungi; (b) Viruses or other pathogens; or (c) Other microorganisms; whether or not such are living.” (*Id.* at § VIII.3, Dkt. 1-1 at p. 26.)

3. **Interruption Period**

The Interruption Period—the only period during which Business Interruption Losses and Extra Expenses may be paid—begins when a Biological Agent Condition “directly interrupts the Insured’s operations at a Scheduled Location” and ends at the earliest of four possible times, including when the Biological Agent Condition “no longer is a source of the interruption to the Insured’s operations, regardless of whether the interruption is continuing for any reason after the . . . Biological Agent Condition(s) has been addressed”:

- 24. **Interruption Period** means the period of time that:
  - a. begins when a **Pollution Condition(s)** or **Biological Agent Condition(s)** directly interrupts the **Insured’s** operations at a **Scheduled Location**; and
  - b. ends upon the earliest of when:
    - i. The **Pollution Condition(s)** or **Biological Agent Condition(s)** no longer is a source of the interruption to the **Insured’s** operations, regardless of whether the interruption is continuing for any other reason after the **Pollution Condition(s)** or **Biological Agent Condition(s)** has been addressed;
    - ii. The **Scheduled Location** is repaired, rebuilt or replaced with reasonable speed and similar quality or should have been repaired, rebuilt or replaced with reasonable speed and quality;
    - iii. The **Insured’s** operations resume at a new permanent location; or

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iv. With respect to a Paragraph 2. of Coverage D – Business Interruption And Extra Expense, the **Pollution Condition(s)** or **Biological Agent Condition(s)** giving rise to the **Interruption Period** has remained at least five (5) miles beyond the boundaries of the **Scheduled Location** for seven (7) consecutive days.

(*Id.* at § VIII.24, Dkt. 1-1 at pp. 30-31.)

The Policy specifies that the Interruption Period does not include “any delay caused by the enforcement of any local or state ordinance or law regulating the construction, use or repair, or demolition of property”:

**Interruption Period** does not include any delay caused by the enforcement of any local or state ordinance or law regulating the construction, use or repair, or demolition of property. The expiration date of this **Policy** does not end the **Interruption Period**. With respect to b. i., the

(*Id.* at § VIII.24, Dkt. 1-1 at p. 31.)

It also specifies that the Interruption Period will be deemed to have ended “even if operations cannot resume at the Scheduled Location for regulatory reasons” and “even if it is not physically possible for such operations to resume for reasons other than the physical presence of Pollutant(s) or Biological Agents at a Scheduled Location”:

expiration date of this **Policy** does not end the **Interruption Period**. With respect to b. i., the **Interruption Period** will be deemed to have ended (1) even if operations cannot resume at the **Scheduled Location** for regulatory reasons; (2) due to a breach, suspension or cancellation of, or the failure to obtain, maintain, renew or extend any permit, lease, license or contract, even if directly or indirectly related to a **Pollution Condition(s)** or **Biological Agent Condition(s)**; or (3) even if it is not physically possible for such operations to resume for reasons other than the physical presence of **Pollutant(s)** or **Biological Agents** at a **Scheduled Location**.

(*Id.*)

**B. The Pleadings**

**1. The Complaint**

Sunstone is a “lodging real estate investment trust that presently has, or at all relevant times had, an interest in 20 hotel properties.” (Complaint, Dkt. 1, at ¶ 1.) Sunstone claims that as a result of the COVID-19 pandemic, it was forced to suspend operations at its properties, and seeks coverage for its losses under the Endurance Policy. (*Id.* at ¶¶ 3, 42.)



1 Sunstone alleges that one of its properties, the Marriott Boston Long Wharf,  
2 hosted a Biogen conference in February 2020 and that this conference was a  
3 COVID-19 “superspreader event.” (*Id.* at ¶¶ 2, 44.) Sunstone alleges that the  
4 Marriott Boston Long Wharf was closed as of March 12, 2020, (*id.* at ¶ 44), but  
5 does not allege the reason for the closure. While the Complaint states that Sunstone  
6 was “informed by the Centers for Disease Control and Prevention that  
7 approximately three attendees of that [Biogen] conference tested positive for  
8 COVID-19,” (*id.* at ¶ 44), it also alleges that as a result of the COVID-19  
9 pandemic, “civil authorities throughout the world issued ‘stay-at-home,’ and  
10 ‘shelter in place,’ travel restrictions, quarantine, and other orders, including orders  
11 requiring the suspension of non-essential business operations” (*id.* at ¶ 42).

12 The Complaint suggests that Sunstone is also seeking coverage for losses at  
13 other “Scheduled Locations around the country,” (*id.* at ¶ 43), but includes no  
14 specific allegations about any property other than the Marriott Boston Long Wharf.  
15 Sunstone has confirmed that it is seeking coverage only under section D.1 of the  
16 Policy. (*See* Sunstone’s Opposition to Endurance’s Motion to Dismiss, Dkt. 19, at  
17 1:15-2:5, 7:25-8:14.)

## 18 2. The Answer

19 Endurance denied many of the Complaint’s allegations, primarily because  
20 Sunstone possesses the alleged facts and Endurance has not had an opportunity to  
21 conduct discovery on those allegations. For example, in response to Sunstone’s  
22 allegations that it was “informed by the Centers for Disease Control and Prevention  
23 that approximately three attendees of that [Biogen] conference tested positive for  
24 COVID-19” and that it “closed as of March 12, 2020,” Endurance stated: “To the  
25 extent a response is required, Endurance responds that it is without sufficient  
26 knowledge or information to form a belief concerning those allegations and  
27 therefore denies those allegations.” (Compl. ¶ 44; Answer, Dkt. 22, ¶ 44.)  
28 Endurance likewise denied the allegation that the Marriott Boston Long Wharf

1 “was closed for months after being identified as a COVID-19 ‘super spreader.’”  
2 (Compl. ¶ 47; Answer ¶ 47.)

3 **C. Procedural History**

4 On January 8, 2021, Endurance filed a motion to dismiss, arguing that  
5 because Sunstone had not satisfied its \$100,000 Self-Insured Retention, which was  
6 a condition precedent to coverage for Cleanup Costs under D.1, Sunstone did not  
7 incur any Cleanup Costs “covered under this Policy.” (Dkt. 13.) Endurance’s  
8 motion did not address the Interruption Period provision. The Court denied  
9 Endurance’s motion on February 26, (Dkt. 21), and on March 12, Endurance  
10 answered the Complaint (Dkt. 22).

11 On May 17, 2021, Sunstone filed a motion for partial judgment on the  
12 pleadings based on the length of the Interruption Period at the Marriott Boston  
13 Long Wharf. (Dkt. 27.) Although the Complaint does not allege these facts,  
14 Sunstone’s motion claims that: the Marriott Boston Long Wharf closed on March  
15 12, 2020, to “clean” the property after its “superspreader” event (Dkt. 27-1 at 2:8-  
16 14); the cleaning was completed two days later (*id.*); and the property stayed closed,  
17 with operations “interrupted to this day” (*id.* at 3:4-6, 5:20-21). Sunstone contends  
18 that the Interruption Period at this property did not end when the property was  
19 cleaned to eliminate the virus; instead, it claims that the Interruption Period  
20 continues until Sunstone “can resume operations at pre-COVID levels that are not  
21 subject to government orders limiting those operations.” (*Id.* at 2:8-3:6.)

22 **III. LEGAL STANDARD**

23 Judgment on the pleadings is appropriate only “when, taking all the  
24 allegations in the non-moving party’s pleadings as true, the moving party is entitled  
25 to judgment as a matter of law.” *Ventress v. Japan Airlines*, 486 F.3d 1111, 1114  
26 (9th Cir. 2007) (quotations omitted). “The allegations of the nonmoving party must  
27 be accepted as true, while any allegations made by the moving party that have been  
28 denied or contradicted are assumed to be false.” *H & C Global Supplies SA DE CV*

1 *v. Pandol Assocs. Mktg., Inc.*, 2013 WL 5954812, at \*1 (E.D. Cal. Nov. 6, 2013).  
2 The facts are viewed in the light most favorable to the nonmoving party, and all  
3 reasonable inferences are drawn in favor of that party. *Id.*; *Living Designs, Inc. v.*  
4 *E.I. Dupont de Nemours and Co.*, 431 F.3d 353, 360-61 (9th Cir. 2005).

#### 5 **IV. ARGUMENT**

##### 6 **A. Sunstone’s Motion Is Improperly Based on Allegations that** 7 **Endurance Denied or the Complaint Did Not Include**

8 Sunstone’s motion is improper because it is based on facts that Endurance  
9 has not admitted. It should be denied for that reason alone. Judgment on the  
10 pleadings is appropriate only “when, taking all the allegations in the non-moving  
11 party’s pleadings as true, the moving party is entitled to judgment as a matter of  
12 law.” *Ventress*, 486 F.3d at 1114 (quotations omitted). When the plaintiff is the  
13 moving party, a motion for judgment on the pleadings can be based only on  
14 allegations that the defendant has admitted in its answer; “any allegations made by  
15 the moving party that have been denied or contradicted are assumed to be false.” *H*  
16 *& C Global Supplies*, 2013 WL 5954812, at \*1; *see also Gen. Conference Corp. of*  
17 *Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d  
18 228, 230 (9th Cir. 1989) (“[A] plaintiff is not entitled to judgment on the pleadings  
19 when the answer raises issues of fact that, if proved, would defeat recovery.”).

20 Sunstone’s motion is not confined to facts that Endurance admitted in its  
21 answer. Instead, Sunstone repeatedly refers to allegations from its own Complaint  
22 that Endurance has denied. For example, Sunstone’s motion claims: “Attendees of  
23 that [Biogen] conference tested positive for COVID-19 by March 4, 2020 and the  
24 property was closed on March 12, 2020. Sunstone suspended its operations for  
25 months, and operations remain interrupted to this day.” (Mot. at 5:19-22.)  
26 Endurance did not admit these allegations in its answer, (*see* Compl. ¶ 44; Answer ¶  
27 44), and Endurance is entitled to discovery on when attendees tested positive, when  
28 the property was closed, when the property was cleaned, how long the cleaning

1 lasted, how long operations remained suspended, and the reasons for the suspension  
2 of operations. For example, contrary to Sunstone’s assertion in its motion that  
3 “operations remain interrupted to this day,” the Boston Marriott Long Wharf  
4 website currently allows guests to make reservations (and does not warn guests that  
5 COVID-19 is present on the premises).<sup>3</sup> Whether operations “remain interrupted to  
6 this day” is a disputed factual issue that requires discovery to resolve.

7 Sunstone’s motion also goes beyond that defect, introducing new allegations  
8 about the “cleaning of the property” and the risk of “COVID-19 transmission” that  
9 Endurance has not even had an opportunity to admit or deny. For example:

- 10 • Sunstone’s motion claims: “The scientific community agrees. According  
11 to the CDC, ‘surface disinfection once- or twice-per-day had little impact  
12 on reducing estimated risks’ of COVID-19 transmission.” (Mot. at 13:26-  
13 28.) This allegation does not appear in the pleadings and is plainly an  
14 expert issue inappropriate for resolution at the pleadings stage. Indeed,  
15 Sunstone neglects to mention that the CDC recently updated its guidance,  
16 and now advises: “Cleaning with a household cleaner that contains soap  
17 or detergent reduces the amount of germs on surfaces and decreases risk  
18 of infection from surfaces. In most situations, cleaning alone removes  
19 most virus particles on surfaces.”<sup>4</sup> Endurance is entitled to present  
20 evidence on this and its own expert testimony on the cleaning of the virus  
21 and the effect on COVID-19 transmission.
- 22 • Sunstone’s motion claims: “Other studies show that COVID-19 is ‘much  
23 more resilient to cleaning than other respiratory viruses so tested.’” (Mot.  
24 at 14:18-21.) This allegation does not appear in the pleadings and is  
25 another issue for experts. Again, Endurance is entitled to present its own

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26 <sup>3</sup> See <https://www.marriott.com/hotels/travel/boslw-boston-marriott-long-wharf/>.

27 <sup>4</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/disinfecting-your-home.html#surfaces> (updated Apr. 5, 2021).

1 expert testimony on virus cleaning and resilience.

- 2 • Sunstone’s motion claims: “There is no fact or science-based support for  
3 the notion that the virus ceased being a source of Sunstone’s interruption  
4 after a two-day cleaning and, as noted, it remained both a source and  
5 ‘direct’ cause of Sunstone’s interruption, at a minimum, until the closure  
6 order was lifted and Sunstone could resume operations in a limited  
7 capacity.” (Mot. at 14:26-28.) These allegations do not appear in the  
8 pleadings, and they raise issues of fact. Endurance will need an  
9 opportunity to conduct discovery showing that the Marriott Boston Long  
10 Wharf’s operations were suspended for reasons other than the presence of  
11 the virus on the premises.

12 Because Sunstone’s motion is based on fact issues and expert issues that  
13 Endurance has not admitted or even had a chance to respond to, Sunstone’s motion  
14 should be denied, and the parties should be permitted to conduct discovery on these  
15 issues. Indeed, Endurance has served discovery on Sunstone on these precise  
16 issues.<sup>5</sup>

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17  
18 <sup>5</sup> The Complaint refers to a correspondence in which Endurance allegedly took a  
19 position on the length of the interruption period (Compl. ¶ 47), but in that  
20 correspondence, Endurance asked Sunstone to “[p]lease provide all information  
21 related to any alleged Interruption Period.” (See Declaration of Jeffrey Schulman in  
22 Support of Sunstone’s Motion for Partial Judgment on the Pleadings, Dkt. 27-2, Ex.  
23 A at p. 10.) Endurance reminded Sunstone: “Please note that the Interruption  
24 Period does not include, among other things, any delays caused by the enforcement  
25 of any local or state ordinance or law regulating the use of property. The  
26 Interruption Period will also be deemed to have ended even if, among other things,  
27 operations cannot resume at the Scheduled Location for regulatory reasons, and  
28 even if it is not physically possible for such operations to resume for reasons other  
than the physical presence of Biological Agents at a Scheduled Location. Please let  
us know if there is any further relevant information.” (*Id.*) Endurance is entitled to  
discovery on these issues before there can be any determination of when the  
Interruption Period ended.

1           **B. Facts Could Be Established Showing that the Interruption Period**  
 2           **Ended When the Presence of the Virus at Marriott Long Wharf**  
 3           **Was No Longer a Source of the Interruption to Operations**

4           Sunstone’s motion should also be denied because a proper discovery process  
 5 would allow Endurance to refute Sunstone’s allegations. As noted, all allegations  
 6 must be construed in the light most favorable to Endurance, and the motion for  
 7 judgment on the pleadings should be denied if the pleadings “raise issues of fact  
 8 that, if proved, would defeat recovery.” *Gen. Conference Corp.*, 887 F.2d at 230.  
 9 Endurance could develop facts showing that the Interruption Period ended when the  
 10 presence of the virus at Marriott Boston Long Wharf was no longer a source of the  
 11 interruption to operations, even if the property remained closed for other reasons—  
 12 evidence that would foreclose coverage under the Policy’s clear terms. When  
 13 interpreting an insurance policy, the court must “look to the language of the  
 14 contract in order to ascertain its plain meaning or the meaning a layperson would  
 15 ordinarily attach to it.” *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18 (1995).<sup>6</sup>  
 16 Policy terms should be given their “ordinary and popular usage, unless used by the  
 17 parties in a technical sense or a special meaning is given to them by usage.” *See*  
 18 *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115 (1999) (citation and quotation  
 19 marks omitted).

20           Only during the “Interruption Period” will Endurance pay for Business  
 21 Interruption Losses and Extra Expenses that directly result from Pollution  
 22 Conditions or Biological Agent Conditions “[o]n or under a Scheduled Location”:

23           D. COVERAGE D – BUSINESS INTERRUPTION AND EXTRA EXPENSE

24           The Company shall pay, up to the Limits of Liability as specified in the Declarations and after the  
 25           **Waiting Period, the Insured’s Business Interruption Losses and Extra Expenses during the**  
 26           **Interruption Period that directly result from Pollution Condition(s) or Biological Agent**  
 27           **Condition(s):**

28           1. On or under a **Scheduled Location**, provided that:

29           <sup>6</sup> The Policy provides that California law will govern any litigation concerning or  
 30 relating to the Policy. (*See* Policy at Choice of Forum and Law Amended  
 31 Endorsement, Dkt. 1-1 at p. 60.)

1 (Policy at § I.D, Dkt. 1-1 at p. 11.) “Biological Agent Condition(s)” is defined to  
2 mean “the presence of Biological Agents at, upon or within a Scheduled Location”:

3 4. **Biological Agent Condition(s)** means the presence of **Biological Agents at, upon or within a**  
4 **Scheduled Location**, which the **Insured** had not **Discovered** prior to the inception of this **Policy**,  
5 provided that:

6 (*Id.* at § VIII.4, Dkt. 1-1 at p. 26.) As both of these provisions make clear,  
7 Sunstone is entitled to coverage only when a Biological Agent is present at the  
8 property.

9 The Policy then explains when the Interruption Period—the period for which  
10 Sunstone may be entitled to coverage—begins and ends. The Interruption Period  
11 begins when a Pollution Condition or Biological Agent Condition directly  
12 interrupts the Insured’s operations at a Scheduled Location:

13 24. **Interruption Period** means the period of time that:  
14 a. begins when a **Pollution Condition(s)** or **Biological Agent Condition(s)** directly interrupts  
15 the **Insured’s** operations at a **Scheduled Location**; and

16 (*Id.* at § VIII.24, Dkt. 1-1 at p. 30.) Because “Biological Agent Condition(s)”  
17 means “the presence of Biological Agents at, upon or within a Scheduled  
18 Location,” this means that the Interruption Period begins when “[the presence of  
19 Biological Agents at, upon or within a Scheduled Location] directly interrupts the  
20 Insured’s operations at a Scheduled Location.”

21 The Interruption Period ends at the earliest of four possible times, including  
22 when the Pollution Condition or Biological Agent Condition is no longer a source  
23 of the interruption to operations, “regardless of whether the interruption is  
24 continuing for any other reason after the Pollution Condition(s) or Biological Agent  
25 Condition(s) has been addressed”:

1 24. **Interruption Period** means the period of time that:

- 2 a. begins when a **Pollution Condition(s)** or **Biological Agent Condition(s)** directly interrupts  
the **Insured's** operations at a **Scheduled Location**; and
- 3 b. ends upon the earliest of when:
- 4 i. **The Pollution Condition(s) or Biological Agent Condition(s) no longer is a source of**  
5 **the interruption to the Insured's operations, regardless of whether the interruption is**  
6 **continuing for any other reason after the Pollution Condition(s) or Biological Agent**  
7 **Condition(s) has been addressed;**

7 (*Id.*) Applying the definition of “Biological Agent Condition(s),” this means that  
8 the Interruption Period ends when “[the presence of Biological Agents at, upon or  
9 within a Scheduled Location] no longer is a source of the interruption to the  
10 Insured’s operations, regardless of whether the interruption is continuing for any  
11 other reason after [the presence of Biological Agents at, upon or within a Scheduled  
12 Location] has been addressed.”

13 Leaving no doubt about the Interruption Period’s end, the Policy reiterates  
14 that the Interruption Period will be deemed to have ended “even if it is not  
15 physically possible for such operations to resume for reasons other than the  
16 physical presence of Pollutant(s) or Biological Agents at a Scheduled Location”:

17 expiration date of this **Policy** does not end the **Interruption Period**. **With respect to b. i., the**  
18 **Interruption Period will be deemed to have ended** (1) even if operations cannot resume at the  
19 **Scheduled Location** for regulatory reasons; (2) due to a breach, suspension or cancellation of, or  
20 the failure to obtain, maintain, renew or extend any permit, lease, license or contract, even if  
21 directly or indirectly related to a **Pollution Condition(s)** or **Biological Agent Condition(s)**; or  
22 (3) even if it is not physically possible for such operations to resume for reasons other than the  
23 physical presence of **Pollutant(s)** or **Biological Agents** at a **Scheduled Location**.

21 (*Id.*, Dkt. 1-1 at p. 31.)

22 In the course of discovery, Endurance could develop facts establishing that,  
23 after a certain period of time, the presence of the virus at, upon, or within the  
24 Marriott Boston Long Wharf was no longer a source of the interruption to  
25 operations, regardless of whether the interruption continued for any other reason  
26 after the presence of the virus at the property was addressed. For example,  
27 discovery may show that the virus was initially present at the Marriott Boston Long  
28



1 Wharf; that the property was closed for cleaning and disinfecting to eliminate the  
 2 virus; that the virus was eliminated from the premises; and that operations remained  
 3 suspended for reasons other than the physical presence of the virus, such as  
 4 precautionary measures or decreased demand in the hospitality industry due to the  
 5 pandemic. If these facts are established, there can be no dispute that the  
 6 Interruption Period ended when the virus was no longer present on the property,  
 7 and Sunstone's effort to access coverage after the virus's elimination from the  
 8 property will fail. Because facts may be developed that show that the Interruption  
 9 Period ended before the Marriott Boston Long Wharf reopened, judgment on the  
 10 pleadings is inappropriate.<sup>7</sup>

11 **C. Facts Could Be Established Showing that Operations at the**  
 12 **Marriott Boston Long Wharf Could Not Resume for Regulatory**  
 13 **Reasons**

14 Discovery could similarly allow Endurance to develop facts showing that  
 15 after the presence of the virus was eliminated, the Marriott Boston Long Wharf was  
 16 unable to resume operations for regulatory reasons. The Policy specifically states  
 17 that the Interruption Period will be deemed to have ended when the Biological  
 18 Agent Condition is no longer a source of the interruption to operations, "even if  
 19 operations cannot resume at the Scheduled Location for regulatory reasons":

20 expiration date of this Policy does not end the Interruption Period. With respect to b. i., the  
 21 Interruption Period will be deemed to have ended (1) even if operations cannot resume at the  
 22 Scheduled Location for regulatory reasons; (2) due to a breach, suspension or cancellation of, or  
 23 the failure to obtain, maintain, renew or extend any permit, lease, license or contract, even if

23 <sup>7</sup> In its February 26, 2021 order denying Endurance's motion to dismiss, the Court  
 24 noted: "It seems to the Court that it would be a very rare situation where losses  
 25 caused by a virus like the coronavirus resulted in Cleanup Costs over \$100,000."  
 26 (Dkt. 21 at 7:4-6.) Discovery will show, however, that it is common for  
 27 policyholders to incur Cleanup Costs exceeding \$100,000 for similar environmental  
 28 losses, such as losses involving legionella bacteria, and Sunstone itself has  
 submitted claims to Endurance in other contexts for Cleanup Costs exceeding  
 \$100,000. Though not directly relevant to this motion, this provides an example of  
 the types of issues that cannot be resolved without discovery.

1 (Id.)<sup>8</sup>

2 Discovery could reveal facts showing that the virus was initially present at  
 3 the Marriott Boston Long Wharf; that the property was closed for cleaning and  
 4 disinfecting to eliminate the virus; that the virus was eliminated from the premises;  
 5 and that operations remained suspended because of state-wide or city-wide  
 6 government orders. The facts may establish that those state-wide and city-wide  
 7 orders were issued as a precaution—to prevent the future spread of the virus—not  
 8 because the virus was present at the Marriott Boston Long Wharf specifically. *See,*  
 9 *e.g., Tralom, Inc. v. Beazley USA Servs., Inc.*, 2020 WL 8620224, at \*6 (C.D. Cal.  
 10 Dec. 29, 2020) (“Government Orders were issued to enforce social distancing and  
 11 for the prevention of the spread of disease and not because of the physical alteration  
 12 of property”); *Another Planet Ent., LLC v. Vigilant Ins. Co.*, 2021 WL 774141, at  
 13 \*1 (N.D. Cal. Feb. 25, 2021) (“The closure orders were clearly passed in response  
 14 to the virus in the community at large, not in specific response to the presence of  
 15 the virus at properties within a mile of [the insured’s] facilities”).

16 Because Endurance could develop facts showing that the presence of the  
 17 virus at, upon, or within the Marriott Boston Long Wharf was no longer a source of  
 18 the interruption to operations after a certain number of days—and that regulatory  
 19 reasons were what prevented operations from resuming—Endurance is entitled to  
 20 discovery on this issue, and Sunstone’s motion for judgment on the pleadings  
 21 should be denied.

22 **D. Sunstone Has Not Established Any Ambiguity in the Policy**  
 23 **Language**

24 Despite laboring to muddy the plain language of the Policy, Sunstone has  
 25 failed to establish any ambiguity in the Interruption Period provision. Policy  
 26 language is ambiguous only if it “is capable of two or more constructions, both of

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27 <sup>8</sup> The Policy also specifies that the Interruption Period does not include any delay  
 28 caused by the “enforcement of any local or state ordinance or law regulating the  
 construction, *use* or repair, or demolition of property.” (*Id.*)

1 which are reasonable.” *State of Cal. v. Continental Cas. Co.*, 55 Cal. 4th 186, 195  
2 (2012) (citation omitted). Courts should not “strain to create an ambiguity where  
3 none exists.” *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18-19 (1995). The  
4 “fact that language could be more explicit does not render it ambiguous,” and an  
5 insured cannot establish an ambiguity simply by pointing to what the insurer “could  
6 have” or “should have” done to “promote clarity.” *See Great Western Drywall, Inc.*  
7 *v. Interstate Fire & Cas. Co.*, 161 Cal. App. 4th 1033, 1042 (2008); *Cal. Cas. Ins.*  
8 *Co. v. Northland Ins. Co.*, 48 Cal. App. 4th 1682, 1694 (1996). Yet that is precisely  
9 what Sunstone attempts to do, repeatedly referring to ways the Policy “could have”  
10 been more explicit or suggesting isolated word changes that “might arguably be  
11 more consistent.” (*See, e.g., Mot. at 11:24-25, 12:13-7, 14:3-7.*)

12 First, Sunstone argues that Endurance could have defined the Interruption  
13 Period “as particular events or dates,” rather than a “period of time.” (*Mot. at*  
14 *11:24-12:2.*) But Sunstone does not explain why it believes the phrase “period of  
15 time” is ambiguous. And Endurance of course could not have known the specific  
16 dates on which the Marriott Boston Long Wharf’s Interruption Period would begin  
17 and end when it issued the Policy in 2017.

18 Second, Sunstone points out that the Interruption Period begins when a  
19 Biological Agent Condition “directly interrupts” the insured’s operations, but ends  
20 when the Biological Agent Condition “no longer is a source of the interruption.”  
21 (*Mot. at 12:3-13:24.*) Sunstone argues without support that “directly interrupts”  
22 and “no longer is a source” must therefore mean different things. (*Id.*) But even if  
23 that were so, Sunstone fails to explain why the difference matters, or why it  
24 believes the presence of the virus at the property could remain “a source of the  
25 interruption” after the property is cleaned and the virus is no longer present.  
26 Sunstone points to a dictionary definition of “source” as “a generative force:  
27 CAUSE” and “a point of origin or procurement: BEGINNING.” (*Mot. at 14:24-*  
28 *25.*) If Sunstone’s argument is that the presence of the virus remains a “source of

1 the interruption” indefinitely because it was the “origin” of the interruption, even  
2 when the virus is no longer present and operations remain suspended for other  
3 reasons, that argument is nonsensical—by that reasoning, the Interruption Period  
4 would *never* end because the presence of the virus will always be the “origin” of  
5 the interruption. This would contradict several Policy provisions, including its  
6 statements that: (i) the Interruption Period ends “regardless of whether the  
7 interruption is continuing for any other reason after the Pollution Condition(s) or  
8 Biological Agent Condition(s) has been addressed”; (ii) the Interruption Period will  
9 be deemed to have ended “even if operations cannot resume at the Scheduled  
10 Location for regulatory reasons”; and (iii) the Interruption Period will be deemed to  
11 have ended “even if it is not physically possible for such operations to resume for  
12 reasons other than the physical presence of Pollutant(s) or Biological Agents at a  
13 Scheduled Location.”

14 Third, Sunstone contends that the Policy could have stated that the  
15 Interruption Period ends when a Biological Agent Condition “no longer is *the*  
16 source of the interruption to the Insured’s operations,” rather than when the  
17 Biological Agent Condition “no longer is *a* source of the interruption to the  
18 Insured’s operations.” (Mot. at 14:1-11.) Again, Sunstone fails to explain why this  
19 distinction matters. Once the virus is no longer present at a Scheduled Location,  
20 there is no longer any “Biological Agent Condition” at all (per the definition of the  
21 term), so a Biological Agent Condition is neither *a* source nor *the* source of the  
22 Business Interruption.

23 Finally, Sunstone claims that “Endurance elected not to start the Interruption  
24 Period on the date when there was ‘physical presence’ of a virus or end the  
25 Interruption Period on the date when it was no longer physically present.” (Mot. at  
26 15:6-8.) Contrary to Sunstone’s assertion, Endurance did just that. The  
27 Interruption Period begins when a “Biological Agent Condition(s) directly  
28 interrupts the Insured’s operations at a Scheduled Location”—and “Biological

1 Agent Condition(s)” means “***the presence of Biological Agents at, upon or within***  
2 ***a Scheduled Location.***” The Interruption Period ends when a “Biological Agent  
3 Condition(s) no longer is a source of the interruption to the Insured’s operations”—  
4 and, again, “Biological Agent Condition(s)” means “***the presence of Biological***  
5 ***Agents at, upon or within a Scheduled Location.***” The Policy confirms that the  
6 Interruption Period ends “even if it is not physically possible for such operations to  
7 resume for reasons other than the ***physical presence*** of Pollutant(s) or Biological  
8 Agents at a Scheduled Location.” And the insuring agreement affords coverage  
9 only for losses that “directly result from Pollution Condition(s) or Biological Agent  
10 Condition(s) ***[o]n or under a Scheduled Location.***”

11 Sunstone’s motion also misstates the standard for evaluating the Interruption  
12 Period provision. Sunstone claims that the Interruption Period provision must be  
13 “conspicuous, plain and clear” to be enforceable, (*see* Mot. at 9:26-10:18, 11:1-11),  
14 but that rule applies only to exclusions, which the Interruption Period is not. As the  
15 California Court of Appeal has explained, “[i]nsurance policies have two parts: (1)  
16 the insuring agreement which defines the type of risks covered under the policy;  
17 and (2) the exclusions, which remove coverage for certain risks which initially fall  
18 within the insuring clause.” *Van Ness v. Blue Cross of Cal.*, 87 Cal. App. 4th 364-  
19 373-74 (2001). Under California law, any policy exclusions or similar provisions  
20 that take away coverage initially granted must be “conspicuous, plain and clear.”  
21 *See id.*; *see also State Farm Mut. Auto. Ins. Co. v. Jacober*, 10 Cal. 3d 193, 207  
22 (1973) (en banc) (“[O]ur cases have uniformly required that exclusions be  
23 ‘conspicuous, plain and clear.’”); *De May v. Interinsurance Exch.*, 32 Cal. App. 4th  
24 1133, 1137 (1995) (“An exclusionary clause must be conspicuous, plain and  
25 clear.”) (quotations omitted). Courts have confirmed that this rule does not apply to  
26 limitations that appear in the insuring agreement. *See Van Ness*, 87 Cal. App. 4th at  
27 374 (“Conspicuous, plain and clear” requirement did not apply because the  
28 supposed limitation on coverage—the “limited fee schedule”—was part of the

1 insuring clause); *Gravelle v. Health Net Life Ins. Co.*, 2009 WL 210450, at \*7  
2 (N.D. Cal. Jan. 26, 2009) (similar).

3 Here, the Interruption Period provision is part of the insuring agreement—the  
4 clause that provides coverage in the first instance. Insuring agreement D.1 states  
5 that Endurance will pay “the Insured’s Business Interruption Losses and Extra  
6 Expenses **during the Interruption Period** that directly result from Pollution  
7 Condition(s) or Biological Agent Condition(s) [o]n or under a Scheduled  
8 Location . . . .” Like other terms in the insuring agreement, “Interruption Period” is  
9 capitalized and bolded, indicating that it is a defined term, and is defined in the  
10 Policy’s “Definitions” section. The Policy contains a separate “Exclusions”  
11 section, but the Interruption Period is not discussed there. Because the Interruption  
12 Period is part of the insuring agreement, not an exclusion that takes away coverage  
13 that the Policy previously granted, the “conspicuous, plain and clear” standard that  
14 Sunstone cites is inapplicable here. In any event, the Interruption Period provision  
15 is conspicuous, plain, and clear, as demonstrated above.

16 **V. CONCLUSION**

17 For all the foregoing reasons, the Court should deny Sunstone’s motion for  
18 partial judgment on the pleadings.

19  
20  
21 Dated: June 10, 2021

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