

**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

G & P HOSPITALITY, LLC d/b/a
STUBBORN MULE,

Plaintiff,

v.

TRAVELERS CASUALTY INSURANCE
COMPANY OF AMERICA,

Defendant.

Case No. 2:20-cv-05148- ODW-AS

SECOND AMENDED COMPLAINT

JURY TRIAL DEMANDED

Plaintiff G & P Hospitality, LLC d/b/a Stubborn Mule (“Plaintiff”) brings this Second Amended Complaint against Defendant Travelers Casualty Insurance Company of America (“Travelers” or “Defendant”) and, upon information and belief, alleges as follows:

NATURE OF THE CASE

1. This is a civil action seeking declaratory relief arising from Plaintiff’s contracts of insurance with Defendant.
2. In light of the Coronavirus global pandemic and state and local orders mandating that all non-essential in-store businesses must shut down, and the suffering of physical harm and impact and damages, within Plaintiff’s business premises and/or within the immediate area surrounding and outside its business premises, Plaintiff was forced to suspend its regular business to customers on March 16, 2020.
3. Plaintiff’s insurance policies provide coverage for all non-excluded business losses, and thus provide coverage here.
4. As a result, Plaintiff is entitled to declaratory relief that its business is covered for all business losses that have been incurred in an amount greater than \$150,000.00.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332, because there is complete diversity of citizenship between Plaintiff and Defendant. Plaintiff has suffered business losses at each restaurant in an amount greater than \$150,000.00. The amount in controversy necessary for diversity jurisdiction over a declaratory judgment action is measured by the value of those business losses. *Id.* § 1332(a).

6. This Court has personal jurisdiction over Defendant. Defendant has engaged in substantial business in this District, including the formation of the Policies underlying Plaintiff's claims, and Defendant have therefore personally availed themselves of jurisdiction in this District.

7. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this District, including the formation of the Policies underlying Plaintiff's claims.

PARTIES

8. Plaintiff is a limited liability company that owns and operates a restaurant, Stubborn Mule, located at 661 W Arrow Highway, San Dimas, CA 91773. Plaintiff is owned by Patrick Malone and Geoffery Rau, who are both citizens of California.

9. Defendant Travelers is an insurance company that insured Plaintiff for business interruption insurance. Defendant Travelers Casualty is headquartered at One Tower Square Hartford, Connecticut 06183. Defendant Travelers Casualty is a citizen of Connecticut.

10. At all relevant times, Defendant is a corporation doing business in the State of California. Defendant issued a policy to Plaintiff to cover business interruption loss from May 1, 2019 until May 1, 2020 for its restaurant at 661 W Arrow Highway, San Dimas, CA 91773 (the "Insured Property"). The policy number is 680-9J94085A-19-42. This policy was intended to cover losses to business interruption. *See* Declaration, attached hereto as Exhibit 1 (the "Policy").

Defendant transacts business of insurance in the State of California and within Los Angeles County, and the basis of this suit arises out of such conduct. Plaintiff's policy was renewed on May 1, 2020.

11. The policy for Plaintiff is currently in full effect, includes coverage for, among other things, business personal property, business income, special business income, and professional business income.

12. Plaintiff submitted a claim for a business loss pursuant to its policy, seeking coverage under the policy. Defendant rejected Plaintiff's business loss and business interruption claims and other claims, contending, *inter alia*, that Plaintiff did not suffer physical damage to its property directly and stating other reasons why Plaintiff purportedly is not entitled to coverage for the losses and damages claimed.

FACTUAL ALLEGATIONS

I. Insurance Coverage

13. Defendant entered into a contract of insurance with Plaintiff, whereby payments were made to Defendant in exchange for Defendant's promise to indemnify Plaintiff for losses including, but not limited to, business income losses at Insured Property of Plaintiff.

14. Plaintiff's Insured Property is covered under the Policy issued by Defendant. *See* Ex. 1.

15. The Policy provides, among other things property, business personal property, business income and extra expense, contamination coverage, and additional coverages.

16. Plaintiff faithfully paid policy premiums to Defendant, specifically to provide, among other things, additional coverages in the event of business interruption or closures for a variety of reasons, including by order of Civil Authority.

17. Under the Policy, business interruption insurance coverage is extended to apply to, *inter alia*, the actual loss of business income sustained, and the actual, necessary and reasonable extra expenses incurred.

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

19. An all-risk Policy such as that purchased by Plaintiff is one that protects against catastrophic events, such as the one occurring now, involving the global COVID-19 Pandemic that has resulted in the widespread, omnipresent and persistent presence of COVID-19 in and around Plaintiff's Insured Property, including adjacent properties. Coverage under an all-risk Policy is to be broadly interpreted and provided.

20. Plaintiff's all-risk policy includes coverage for business interruption, which is standard in most all-risk commercial property insurance policies, along with coverage for extended expenses.

21. Plaintiff purchased the Policy expecting to be insured against losses, including, but not limited to, business income losses suffered at the Insured Property.

22. Plaintiff purchased, among other coverages, business interruption coverage for closure by Order of Civil Authority.

23. Based upon information and belief, the Policy provided by Defendant included language that is essentially standardized language adopted from and/or developed by the ISO ("Insurance Service Office"). The ISO, founded in 1971, provides a broad range of services to the property and casualty insurance industry. In addition to providing standardized or form language to be used in policies, ISO collects and manages databases containing large amounts of statistical,

actuarial, underwriting, and claims information, fraud-identification tools, and other technical services. ISO describes itself as follows: “ISO provides advisory services and information to many insurance companies. ... ISO develops and publishes policy language that many insurance companies use as the basis for their products.” ISO General Questions, Verisk, <https://www.verisk.com/insurance/about/faq/> (last visited June 5, 2020); see also Insurance Services Office (ISO), Verisk, <https://www.verisk.com/insurance/brands/iso/> (last visited June 5, 2020).

24. The language in the Policy is language that is “adhesionary” in that Plaintiff was not a participant in negotiating or drafting its content and provisions.

25. Plaintiff possessed no leverage or bargaining power to alter or negotiate the terms of the Policy, and more particularly, Plaintiff had no ability to alter, change or modify standardized language derived from the ISO format.

26. Upon information and belief, the “Virus Exclusion” in the Policy was never intended by the ISO nor Defendant to pertain to a situation like the present global Pandemic of the Coronavirus and therefore does not apply to exclude coverage in this matter.

27. Upon information and belief, the Virus Exclusion in the policy was developed by the ISO in response to the SARS situation that occurred in or around 2005-2006, which was not a Pandemic and not a global Pandemic as is the present COVID-19 Pandemic situation, and therefore was never intended to exclude coverage for a circumstance as presented in this matter.

28. Further, the Virus Exclusion was first permitted by state insurance departments due to misleading and fraudulent statements by the ISO that property insurance policies do not and were not intended to cover losses caused by viruses, and so the Virus Exclusion offers mere clarification of existing law. To the contrary, before the ISO made such baseless assertions, courts

considered contamination by a virus to be physical damage. Defendant's use of the Virus Exclusion to deny coverage here shows that the Virus Exclusion was fraudulently adopted, adhesionary, and unconscionable. See <https://www.propertycasualty360.com/2020/04/07/here-we-go-again-virus-exclusion-for-covid-19-and-insurers/> (last visited June 12, 2020).

29. The Virus Exclusion was improperly added to policies by insurance carriers to expand the exclusions of coverage in their policies without disclosing to insurance commissioners/state insurance regulators that the provision was reducing coverage. The reason that insurance carriers did not disclose the actual effect of the Virus Exclusion clauses to reduce coverage was so that insurance carriers could maintain premium levels as though coverage levels was not being reduced.

30. The Virus Exclusion cause was promoted as being part and parcel of prior provisions that limited coverage without causing a change when in fact that was not the case.

31. The Virus Exclusion was marketed by insurance carriers to insurance regulators as being nothing more than a clarification of the microorganism or bacterium language in policies when in fact the Virus Exclusion was added to policies to constitute an expansion of exclusionary language without disclosure.

32. The Virus Exclusion attempts to make losses or damage suffered or caused by a virus to be on equal footing with damages suffered or caused by a bacterium or microorganism so as to enable insurance carriers to assert the virus exclusion as a defense in the same manner as asserting bacterium or microorganism as a defense when there was no disclosure of this subterfuge to insurance regulators.

33. Regulatory estoppel applies and Defendant should not be permitted to rely on the Virus Exclusion because of its conduct and any associated conduct of the ISO to inappropriately

obtain the permission of state insurance commissioners or departments to include the language of the Virus Exclusion in its policies.

34. Even so, the Virus Exclusion applies only to “loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.”

35. The Virus Exclusion has limited applicability as it is intended to apply only to claims based on personal injury that it causes and not intended to apply to other types of losses that can be associated with an underlying virus such as that here involving business losses where no personal injury is claimed to have occurred as part of Plaintiff’s claim.

36. The Virus Exclusion does not apply for regulatory estoppel reasons alleged above, the physical losses sustained were not personal injury losses and the losses sustained were not solely because of the virus but because of the civil authority orders.

37. The Policy does not have an exclusion for a Pandemic. As an all-risks policy, coverage is presumed unless clearly and unambiguously excluded. There is no such exclusion for a Pandemic or for action taken in response to a Pandemic such as the entry of Civil Authority Orders.

38. Plaintiff purchased the Policy with an expectation that it was purchasing a policy that would provide coverage in the event of business interruption and extended expenses, such as that suffered by Plaintiff as a result of COVID-19.

39. At no time had Defendant, or its agents, notified Plaintiff that the coverage that Plaintiff had purchased pursuant to an all-risk policy that included business interruption coverage, had exclusions and provisions that purportedly undermined the very purpose of the coverage, of providing benefits in the occurrence of business interruption and incurring extended expenses.

40. The purported exclusions of the Policy that Defendant has or are expected to raise in defense of Plaintiff's claim under the Civil Authority coverage of the Policy are contradictory to the provision of Civil Authority Order coverage and violates the public policy of the State of California and other states as a contract of adhesion and hence is not enforceable against Plaintiff.

41. Access to Plaintiff's business was prohibited by Civil Authority Orders which precluded Plaintiff from operating their Insured Property in the manner intended, for which such insurance was purchased. The Policy provides for coverage for actual loss of business sustained and actual expenses incurred as a covered loss caused by the prohibitions of the Civil Authority Orders in the area of Plaintiff's Insured Property, which applies to circumstances presented by the Plaintiff.

42. The reasonable expectations of Plaintiff, *i.e.*, an objectively reasonable interpretation by the average policyholder of the coverage that was being provided, was that the business interruption coverage included coverage when a civil authority forced closure of the business for an issue of public safety involving the COVID-19 pandemic in the immediate area surrounding the Insured Property.

43. The Policy does not exclude the losses suffered by Plaintiff and therefore, the Policy does provide coverage for the losses incurred by Plaintiff.

44. Plaintiff suffered direct loss or damage within the definitions of the Policy as loss of use of property as it was intended to be used, as here, constitutes loss or damage.

45. The virus and bacterium exclusions do not apply because Plaintiff's losses were not solely caused by a virus, bacterium or other microorganism. Instead, Plaintiff's losses were also caused by the entry of Civil Authority Order, particularly those by Governor Newsom and by the California Department of Health, to mitigate the spread of COVID-19. The Civil Authority

Orders were issued because of damage to individuals and property caused by COVID-19. The Civil Authority Orders were more than mere social distancing enactments but required closure.

46. The Civil Authority Order prohibited access to Plaintiff's Insured Property, and the area immediately surrounding Covered Property, in response to dangerous physical conditions described above resulting from COVID-19.

47. As a result of the presence of COVID-19 and the Civil Authority Order, Plaintiff lost Business Income and incurred Extra Expense.

48. Based on information and belief, Defendant has accepted the Policy premiums with no intention of providing any coverage for business losses or the Civil Authority extension due to a loss and shutdown from a pandemic. Plaintiff made a claim under the Policy, and upon information and belief, Defendant has no intention of paying the claim. Plaintiff has submitted a claim to its insurance carriers related to such losses, but Defendant denied Plaintiff's claims wherein, Defendant identified many provisions of the Policy that it relies on for determining that coverage for the types of claims that Plaintiff was making would not be covered. Essentially, Defendant's reject Plaintiff's business loss and business interruption claims and other claims, contending, *inter alia*, that Plaintiff did not suffer physical damage to its property directly and stating other reasons why Plaintiff is not purportedly entitled to coverage for the losses and damages claimed.

II. The Coronavirus Pandemic

49. The scientific community, and those personally affected by the virus, recognize COVID-19 as a cause of real physical loss and damage. It is clear that contamination of the Insured Property is a direct physical loss requiring remediation to clean the surfaces of the business constituting the Insured Property.

50. The virus that causes COVID-19 remains stable and transmittable in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard and up to two to three days on plastic and stainless steel. *See* <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last visited April 9, 2020).

51. The CDC has issued a guidance that gatherings of more than 10 people must not occur. People in congregate environments, which are places where people live, eat, and sleep in close proximity, face increased danger of contracting COVID-19.

52. On March 11, 2020 the World Health Organization (“WHO”) made the assessment that COVID-19 shall be characterized as a pandemic. *See* <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

53. The global Coronavirus pandemic is exacerbated by the fact that the deadly virus physically infects and stays on surfaces of objects or materials where it can “fomite.” Human coronaviruses can remain infectious on inanimate surfaces at room temperature for up to 9 days. At a temperature of 30 degrees Celsius (86 degrees F) or more the duration of persistence is shorter. *See* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7132493/> (last visited July 16, 2020).

54. A particular challenge with the novel coronavirus is that it is possible for a person to be infected with COVID-19 but be asymptomatic. Thus, seemingly healthy people unknowingly spread the virus via speaking, breathing, and touching objects.

55. While infected droplets and particles carrying COVID-19 may not be visible to the naked eye, they are physical objects which travel to other objects and cause harm. Habitable surfaces on which COVID-19 has been shown to survive include, but are not limited to, stainless steel, plastic, wood, paper, glass, ceramic, cardboard, and cloth.

56. The virus is thought to spread mainly from person-to-person: between people who are in close contact with one another (within about 6 feet); through respiratory droplets produced when an infected person coughs, sneezes or talks; these droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs; and some recent studies have suggested that COVID-19 may be spread by people who are not showing symptoms. *See* <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

57. The CDC has noted that it may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes but that this is not thought to be the main way the virus spreads, but we [the CDC] are still learning more about how this virus spreads.

58. The CDC has said that the best way to prevent illness is to avoid being exposed to this virus and that steps can be taken to slow its spread: Maintain good social distance (about 6 feet). This is very important in preventing the spread of COVID-19; Wash your hands often with soap and water. If soap and water are not available, use a hand sanitizer that contains at least 60% alcohol; Routinely clean and disinfect frequently touched surfaces; and Cover your mouth and nose with a cloth face covering when around others.

59. The CDC has noted that the primary and most important mode of transmission for COVID-19 is through close contact from person-to-person. Based on data from lab studies on COVID-19 and what we [the CDC] know about similar respiratory diseases, it may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes, but this isn't thought to be the main way the virus spreads. <https://www.cdc.gov/media/releases/2020/s0522-cdc-updates-covid-transmission.html> (last edited May 23, 2020).

60. Compliance with the CDC recommendations, along with compliance with the Civil Authority Orders of California and local counties (see below), effectively made it impossible for Plaintiff to operate its restaurant business in the usual and customary manner causing the practice to suffer business losses and added expenses as provided for and covered under the Policy.

61. China, Italy, France, and Spain have implemented the cleaning and fumigating of public areas prior to allowing them to re-open publicly due to the intrusion of microbials.

62. A French Court has determined that business interruption coverage applies to the COVID-19 Pandemic. *See*

<https://www.insurancejournal.com/news/international/2020/05/22/569710.htm>.

63. Similarly, on September 15, 2020, the United Kingdom's High Court found that the 'disease' and/or 'denial of access' clauses in the various insurance policy wordings provide coverage in the circumstances of the COVID-19 pandemic, and that the trigger for coverage caused policyholders' losses. The High Court further noted,

The fact that a provision in a contract is expressed as an exception does not necessarily mean that it should be approached with a pre-disposition to construe it narrowly. Like any other provision in a contract, words of exception or exemption must be read in the context of the contract as a whole and with due regard for its purpose. As a matter of general principle, it is well established that that if one party, otherwise liable, wishes to exclude or limit his liability to the other party, he must do so in clear words; and that the contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed.

<https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-judgment.pdf>.

64. The virus that causes COVID-19 remains stable and transmittable in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard and up to two to three

days on plastic and stainless steel. See <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last visited April 9, 2020).

65. Most of Plaintiff's products are packaged in cardboard boxes, and many of its products are shipped or imported from Asia, South America, Latin America, and Europe, where the COVID-19 pandemic is also ongoing, thus hindering the continuation of its business.

66. The CDC has issued a guidance that gatherings of more than 10 people must not occur. People in congregate environments, which are places where people live, eat, and sleep in close proximity, face increased danger of contracting COVID-19.

67. The determination by a Court of another country that coverage exists is consistent with public policy that in the presence of a worldwide Pandemic, such as COVID-19, businesses that possess business interruption insurance coverage should recover their losses from the insurance carriers

III. Civil Authority

68. On March 4, 2020, the State of California declared a State of Emergency for the entire state of California as a result of COVID-19.

69. On March 11, 2020, the State of California set restrictions on large gatherings.

70. On March 16, 2020, the State of California prohibited all gatherings regardless of size. This order effectively shut down all non-essential businesses.

71. The Governor of California, Gavin Newsom, ordered a State of Emergency and a stay at home order on March 19, 2020. See Executive Order N-33-20, attached herein as Exhibit 2.

72. On May 7, 2020, Governor Newsom loosened restrictions, but only to curbside retail, childcare, manufacturing and logistics. See Order of the State of Public Health, attached herein as Exhibit 3, and <https://covid19.ca.gov/roadmap/>(last visited May 16, 2020).

73. On May 29, 2020, Plaintiff's business was able to begin re-opening.

74. On June 20, 2020, Governor Newsom permitted the reopening of low risk businesses in Stage 2. *See* Executive Order N-60-20, attached herein as Exhibit 4. However, this was short lived in light of the massive uptick in new Coronavirus cases and deaths in California over the weeks following June 20, 2020.

75. Therefore, effective July 13, 2020, the State of California updated its Orders, providing that effective that date:

All Counties must close indoor operations involving: Dine-in Restaurants; Wineries and tasting rooms; movie theatres; Family Entertainment Centers (such as bowling alleys, miniature golf; batting cages and arcades); zoos and museums; and cardrooms. In addition, bars, brewpubs, breweries and pubs were required to close all operations both indoor and outdoor statewide, unless they are offering sit-down dine-in meals. Alcohol can only be sold in the same transaction as a meal. See <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-on-Closure-of-Sectors-in-Response-to-COVID-19.aspx> (last visited July 16, 2020) and <https://covid19.ca.gov/roadmap-counties/> (last visited July 16, 2020).

76. Plaintiff's business was unable to operate due to the stay-at-home orders for public safety issued by the State of California (the "Orders"). Plaintiff has submitted a claim to its insurance carriers related to such losses, but Defendant denied Plaintiff's claims.

77. The Civil Authority Orders in and around Plaintiff's place of businesses also explicitly acknowledge that COVID-19 causes direct physical damage and loss to property. Civil Authority Orders entered in other states confirm this as well. For example, the City of New York Order explicitly stated that COVID-19 "is causing property loss and damage[.]" <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-101.pdf>. Similarly, the Pennsylvania Supreme Court recently clarified the Governor Wolf's Civil Authority Orders and supported Plaintiff's position that physical loss and damage exists, resulting in coverage here. *See Friends of DeVito, et. al v. Wolf*, No. 68 MM 2020 (Pa. April 13, 2020).

78. Further, on April 10, 2020, President Trump seemed to support insurance coverage for business loss like that suffered by the Plaintiff.

REPORTER: Mr. President may I ask you about credit and debt as well. Many American individuals, families, have had to tap their credit cards during this period of time. And businesses have had to draw down their credit lines. Are you concerned Mr. President that that may hobble the U.S. economy, all of that debt number one? And number two, would you suggest to credit card companies to reduce their fees during this time?

PRESIDENT TRUMP: Well it's something that we've already suggested, we're talking to them. Business interruption insurance, I'd like to see these insurance companies—you know you have people that have paid. *When I was in private I had business interruption.* When my business was interrupted through a hurricane or whatever it may be, I'd have business where I had it, I didn't always have it, sometimes I had it, sometimes, I had a lot of different companies. But if I had it I'd expect to be paid. You have people. I speak mostly to the restaurateurs, where they have a restaurant, they've been paying for 25, 30, 35 years, business interruption. They've never needed it. All of a sudden they need it. And I'm very good at reading language. I did very well in these subjects, OK. And I don't see the word pandemic mentioned. Now in some cases it is, it's an exclusion. But in a lot of cases I don't see it. I don't see it referenced. And they don't want to pay up. I would like to see the insurance companies pay if they need to pay, if it's fair. And they know what's fair, and I know what's fair, I can tell you very quickly. But business interruption insurance, that's getting a lot money to a lot of people. And they've been paying for years, sometimes they just started paying, but *you have people that have never asked for business interruption insurance, and they've been paying a lot of money for a lot of years for the privilege of having it, and then when they finally need it, the insurance company says 'we're not going to give it.' We can't let that happen.*

See <https://youtu.be/cMeG5C9TjU> (last visited on April 17, 2020) (emphasis added).

79. The President is articulating a few core points:
- a. Business interruption is a common type of insurance.
 - b. Businesses pay in premiums for this coverage and should reasonably expect they'll receive the benefit of the coverage.

c. This pandemic should be covered unless there is a specific exclusion for pandemics.

d. If insurers deny coverage, they would be acting in bad faith.

80. These Civil Authority Orders and proclamations, as they relate to the closure of all “non-life- sustaining businesses,” evidence an awareness on the part of both state and local governments that COVID-19 causes damage to property. This is particularly true in places where business is conducted, such as Plaintiff’s, as the requisite contact and interaction causes a heightened risk of the property becoming contaminated and required constant sanitation and cleaning to avoid spread of COVID-19.

81. Plaintiff’s adherence to the requirements of these Civil Authority Orders and proclamations was in furtherance of the protecting the public, the public’s good, supportive of public policy to attempt to minimize the risk of spread of COVID-19 and consistent with it complying with the Civil Authority Orders entered.

IV. Impact on Plaintiff

82. As a result of the Orders referenced herein, access to Plaintiff’s Insured Property was significantly impacted causing the suspension of or reduction of business operations.

83. Plaintiff’s business loss occurred when the State of California issues its order on March 16, 2020 banning any gatherings at an establishment.

84. Prior to March 16, 2020, Plaintiff’s business was open. Plaintiff’s Insured Property is not a closed environment, and because people – staff, customers, community members, and others – constantly cycle in and out, there is an ever-present risk that the Insured Property is contaminated and would continue to be contaminated.

85. Businesses like Plaintiff’s are more susceptible to being or becoming contaminated, as both respiratory droplets and fomites are more likely to be retained on the Insured Property and

remain for far longer as compared to a facility with open-air ventilation. Plaintiff could not use their restaurant for its intended purpose. Therefore, the novel coronavirus has caused “direct physical loss of or damage to” Plaintiff’s Insured Property under the Policy.

86. Plaintiff’s business is highly susceptible to rapid person-to-property transmission of the virus, and vice-versa, because the activities of the customers and the staff require them to work in close proximity to one another within the property and to come in contact with personal property within the building premises that could contain the COVID-19 novel coronavirus.

87. The virus is physically impacting Plaintiff. Any effort by Defendant to deny the reality that the virus causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger Plaintiff and the public.

88. Plaintiff’s restaurant is highly susceptible to contamination and damage, from, among other things, the rapid person-to-person and person-to-property contamination as COVID-19 is carried into the Insured Property from the surrounding area and other contaminated and damaged premises.

89. Because of the nature of COVID-19 as described above, relating to its persistence in locations and the prospect of causing asymptomatic responses in some people, the risk of infection to persons is not only high, but could cause persons with asymptomatic responses to then come into contact with others who would not be so fortunate as to suffer merely an asymptomatic response, and instead suffer serious illness.

90. The Civil Authority Orders entered by the state and local government were in the exercise of authority to protect the public and minimize the risk of spread of disease.

91. Even with the entry of these Civil Authority Orders there remained physical impact not only in and within Plaintiff’s business property but in and around the surrounding location of

Plaintiff's business property in light of COVID-19 presence not being detectable other than through microscopic means, and occurrence of illness.

92. The entry of the Civil Authority Orders to mitigate health risks to the public by attempting to prevent COVID-19 contamination, through the closing businesses and ordering persons to stay at home resulted in a physical impact on Plaintiff's business and Insured Property.

93. Plaintiff specifically sought coverage for business interruption losses and extended expenses and paid premiums for such coverage and with an expectation that the Policy Plaintiff purchased provided such coverage, with no disclosures to the contrary being made to Plaintiff by Defendant or its agents.

94. Plaintiff had no choice but to comply with the Civil Authority Orders, for failure to do so would have exposed Plaintiff to fines and sanctions. Plaintiff's compliance with mandates resulted in Plaintiff suffering business losses, business interruption and extended expenses of the nature that the Policy covers and for which Plaintiff's reasonable expectation was that coverage existed in exchange for the premiums paid. As a result of these Orders, Plaintiff has incurred, and continues to incur, among other things, a substantial loss of business income and additional expenses covered under the Policy.

95. A declaratory judgment is necessary to be entered that determines that coverage exists under the Policy for the events and circumstances described herein. The entry of a declaratory judgment will prevent Plaintiff from being left without vital insurance coverage that was paid for through premiums to ensure the survival of the business which were significantly impacted due to the omnipresence of the Coronavirus in the restaurant and the areas surrounding the restaurant and because of the described shutdowns involving the amenities, the California

restaurant and the impact that the civil authorities' response had on the communities where the restaurant is located and on the prospect of patrons at the restaurant.

CAUSE OF ACTION

DECLARATORY RELIEF

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

97. The Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides that in “a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a).

98. An actual controversy has arisen between Plaintiff and Defendant as to the rights, duties, responsibilities and obligations of the parties under the Policy in that Plaintiff contends and, on information and belief, Defendant dispute and deny that:

- a. The Orders constitute a prohibition of access to Plaintiff's Insured Property;
- b. The prohibition of access by the Orders has specifically prohibited access as defined in the Policy;
- c. The Civil Authority Orders trigger coverage
- d. The Policy provides coverage to Plaintiff for any current and future closures in California due to physical loss or damage directly or indirectly from the Coronavirus and/or pandemic circumstance under the Civil Authority coverage parameters;
- e. The Policy's exclusions for virus and bacteria do not apply to the circumstances presented in the lawsuit and the kind and types of damages and losses suffered by Plaintiff;
- f. Defendant's denial of coverage for losses sustained that were caused by the entry of the Civil Authority Orders referenced, and Plaintiff's adherence to the Civil Authority Orders violates public policy;
- g. That under the circumstances of this Pandemic and the entry of the Civil Authority Orders referenced, Plaintiff had no choice but to comply with the

Civil Authority Orders, and that Plaintiff's compliance resulted in Plaintiff suffering business losses, business interruption and extended expenses which is therefore a covered expense;

- h. That the Policy provides business income coverage in the event that Coronavirus has directly or indirectly caused a loss or damage at the insured premises or immediate area of the Insured Property; and
- i. Resolution of the duties, responsibilities and obligation of the parties is necessary as no adequate remedy at law exists and a declaration of the Court is needed to resolve the dispute and controversy.

99. Plaintiff seeks a Declaratory Judgment to determine whether the Civil Authority Orders constitute a prohibition of access to Plaintiff's Insured Property.

100. Plaintiff further seeks a Declaratory Judgment to affirm that the Civil Authority Orders trigger coverage.

101. Plaintiff further seeks a Declaratory Judgment to affirm that the Policy provides coverage to Plaintiff for any current and future Civil Authority closures of businesses in the State of California due to physical loss or damage from the Coronavirus and that the Policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the Insured Property.

102. Plaintiff further seeks a Declaratory Judgment to affirm that any reliance on the Virus Exclusion clause is estopped by the principles of regulatory estoppel.

103. Plaintiff does not seek any determination of whether the Coronavirus is physically in or at the Insured Property, a specific amount of damages, or any other remedy other than declaratory relief

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for a judgment against Defendant as follows:

- a. For a declaration that the Civil Authority Orders constitute a prohibition of access to Plaintiff's Insured Property.

- b. For a declaration that the prohibition of access by the Civil Authority Orders specifically prohibited access as defined in the Policy.
- c. For a declaration that the Civil Authority Orders trigger coverage under the Policy.
- d. For a declaration that the Policy provides coverage to Plaintiff for any current and future closures in California due to physical loss or damage directly or indirectly from the Coronavirus and/or pandemic circumstance under the Civil Authority coverage parameters.
- e. For a declaration that the Policy's exclusions for virus and bacteria do not apply to the circumstances presented in the lawsuit and the kind and types of damages and losses suffered by Plaintiff.
- f. For a declaration that Defendant's denial of coverage for losses sustained that were caused by the entry of the Civil Authority Orders referenced, and Plaintiff's adherence to the Civil Authority Orders, violates public policy.
- g. For a declaration that under the circumstances of this Pandemic and the entry of the Civil Authority Orders referenced, Plaintiff had no choice but to comply with the Civil Authority Orders, and that Plaintiff's compliance resulted in Plaintiff suffering business losses, business interruption and extended expenses which is therefore a covered expense.
- h. For a declaration that the Policy provides coverage to Plaintiff for any current, future and continued closures of non-essential businesses due to physical loss or damage directly or indirectly from the Coronavirus.
- i. For a declaration that the Policy provides business income coverage in the event that Coronavirus has directly or indirectly caused a loss or damage at the Plaintiff's Insured Property or the immediate area of the Plaintiff's Insured Property.
- j. For such other relief as the Court may deem proper.

JURY TRIAL DEMANDED

Plaintiff hereby demands trial by jury.

Dated: October 5, 2020

Respectfully submitted,

/s/ Jake Douglass

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