

1 David M. Birka-White (State Bar No. 85721)  
2 dbw@birka-white.com  
3 BIRKA-WHITE LAW OFFICES  
4 178 E. Prospect Avenue  
5 Danville, CA 94526  
6 Telephone: (925) 362-9999  
7 Facsimile: (925) 362-9970

8 [Additional Counsel Listed on Signature Page]

9 Attorneys for Plaintiff  
10 MORTAR AND PESTLE CORP.  
11 d/b/a OLEA RESTAURANT

12 **UNITED STATES DISTRICT COURT**  
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

14 MORTAR AND PESTLE CORP. d/b/a  
15 OLEA RESTAURANT,  
16  
17 Plaintiff,  
18  
19 v.  
20  
21 ATAIN SPECIALTY INSURANCE  
22 COMPANY a/k/a ATAIN INSURANCE  
23 COMPANY,  
24  
25 Defendant.

Case No.: 3: 20-cv-3461

**COMPLAINT**

**JURY TRIAL DEMANDED**

26 Plaintiff Mortar and Pestle Corp. d/b/a Olea Restaurant (“Plaintiff” or “Olea Restaurant”) brings this Complaint, alleging relief against Defendant Atain Specialty Insurance Company a/k/a Atain Insurance Company (“Defendant” or “Atain”) and avers as follows:

27 **NATURE OF THE CASE**

28 1. This is a civil action seeking declaratory relief arising from Plaintiff’s contract of insurance with Defendant.

///

///



1 policy was intended to cover losses to business interruption. *See* Declaration, attached hereto as  
2 Exhibit 1 (“Policy”).

3 11. The Policy is currently in full effect in providing, among other things, personal  
4 property, business income and extra expense, contamination coverage and additional coverage.  
5

6 12. Plaintiff submitted a claim for a date of loss pursuant to its policy seeking coverage  
7 under this policy. Defendant rejected Plaintiff’s claim for coverage for business loss and business  
8 interruption and other claims, contending, *inter alia*, that Plaintiff did not suffer physical damage  
9 to its property directly and stating other reasons why Plaintiff purportedly is not entitled to coverage  
10 for the losses and damages. Defendant also claimed the policy does not cover losses due to the  
11 Virus Exclusion Clause.

12 **FACTUAL BACKGROUND**

13 **I. Insurance Coverage**

14 13. Plaintiff faithfully paid policy premiums to Defendant, specifically to provide,  
15 among other things, additional coverages in the event of business interruption or closures by order  
16 of Civil Authority and for business loss for property damage.

17 14. Under the Policy, insurance is extended to apply to the actual loss of business  
18 income sustained and the actual, necessary and reasonable extra expenses incurred when access to  
19 the Insured Property is specifically prohibited by order of civil authority as the direct result of a  
20 covered cause of loss to property in the immediate area of Plaintiff’s Insured Property. This  
21 additional coverage is identified as coverage under “Civil Authority.”

22 15. The Policy is an all-risk policy, insofar as it provides that covered causes of loss  
23 under the policy means coverage for all covered losses, including but not limited to direct physical  
24 loss or direct physical damage, unless the loss is specifically excluded or limited in the Policy.

25 16. The Policy also covers for damages resulting from business interruption when there  
26 is property damage. The exclusion for viruses does not apply to this pandemic. The Policy does  
27 identify any exclusions for a pandemic.

28 ///

1 17. Based on information and belief, Defendant has accepted the policy premiums with  
2 no intention of providing any coverage for business losses or the Civil Authority extension due to  
3 a loss and shutdown and property damage.

4 **II. The Coronavirus Pandemic**

5 18. The scientific community, and those personally affected by the virus, recognize the  
6 Coronavirus as a cause of real physical loss and damage. It is clear that contamination of the Insured  
7 Property would be a direct physical loss requiring remediation to clean the surfaces of the dental  
8 practice.

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

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

16 21. The global Coronavirus pandemic is exacerbated by the fact that the deadly virus  
17 physically infects and stays on surfaces of objects or materials, “fomites,” for up to twenty-eight  
18 (28) days.

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

21 **III. Civil Authority**

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

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

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

27 ///

28 ///

1           26.     On March 17, 2020, the State of California issued a stay at home order that all non-  
2 essential workers must stay at home as a result of COVID-19. This order has been extended  
3 indefinitely.

4           27.     Plaintiff’s restaurant is unable to operate due to the stay-at-home orders for public  
5 safety issued by the State of California. Plaintiff has submitted a claim to its insurance carrier  
6 related to such losses.

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

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

16                   PRESIDENT TRUMP: Well it’s something that we’ve already  
17 suggested, we’re talking to them. **Business interruption insurance**,  
18 I’d like to see these insurance companies—you know you have  
19 people that have paid. When I was in private I had business  
20 interruption. When my business was interrupted through a hurricane  
21 or whatever it may be, I’d have business where I had it, I didn’t  
22 always have it, sometimes I had it, sometimes, I had a lot of  
23 different companies. *But if I had it I’d expect to be paid.* You have  
24 people. I speak mostly to the restaurateurs, where they have a  
25 restaurant, they’ve been paying for 25, 30, 35 years, business  
26 interruption. They’ve never needed it. All of a sudden they need it.  
27 And I’m very good at reading language. I did very well in these  
28 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.

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

27     ///

28     ///

- 1           29. The President is articulating a few core points:
- 2               a. Business interruption is a common type of insurance.
- 3               b. Businesses pay in premiums for this coverage and should reasonably expect
- 4               they'll receive the benefit of the coverage.
- 5               c. This pandemic should be covered unless there is a specific exclusion for
- 6               pandemics.
- 7               d. If insurers deny coverage, they would be acting in bad faith.

8           30. These Orders and proclamations, as they relate to the closure of all “non-life-

9 sustaining businesses,” evidence an awareness on the part of both state and local governments that

10 COVID-19 causes damage to property. This is particularly true in places where business is

11 conducted, such as Plaintiff’s, as the requisite contact and interaction causes a heightened risk of

12 the property becoming contaminated.

13           **IV. Impact on Plaintiff**

14           31. As a result of the Orders referenced herein, Plaintiff shut its doors to its restaurant.

15           32. Plaintiff’s business loss occurred when the State of California issues its order on

16 March 16, 2020 banning any gatherings at an establishment.

17           33. Prior to March 16, 2020, Plaintiff was open. Plaintiff’s restaurant is not a closed

18 environment, and because people – staff, customers, community members, and others – constantly

19 cycle in and out of the restaurant, there is an ever-present risk that the Insured Property is

20 contaminated and would continue to be contaminated.

21           34. Businesses like the Plaintiff’s restaurant are more susceptible to being or becoming

22 contaminated, as both respiratory droplets and fomites are more likely to be retained on the Insured

23 Property and remain viable for far longer as compared to a facility with open-air ventilation.

24           35. Plaintiff’s business is also highly susceptible to rapid person-to-property

25 transmission of the virus, and vice-versa, because the service nature of the business places staff and

26 customers in close proximity to the property and to one another and because the nature of the

27 restaurant and activity exposes to high level of respiratory droplets and fomites being released into

28 the air of the property.

1 36. The virus is physically impacting Plaintiff. Any effort by Defendant to deny the  
2 reality that the virus causes physical loss and damage would constitute a false and potentially  
3 fraudulent misrepresentation that could endanger Plaintiff and the public.  
4

5 37. A declaratory judgment determining that the coverage provided under the Policy  
6 exists and is necessary so as to prevent Plaintiff from being left without vital coverage acquired to  
7 ensure the survival of the trucking school due to the shutdown caused by the civil authorities'  
8 response. As a result of these Orders, Plaintiff has incurred, and continues to incur, among other  
9 things, a substantial loss of business income and additional expenses covered under the Policy.

10 **CAUSE OF ACTION**

11 **DECLARATORY RELIEF**

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

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

18 40. An actual controversy has arisen between Plaintiff and Defendant as to the rights,  
19 duties, responsibilities and obligations of the parties under the Policy in that Plaintiff contends and,  
20 on information and belief, the Defendant disputes and denies that:

- 21 a. The Orders constitute a prohibition of access to Plaintiff's Insured Property;
- 22 b. The prohibition of access by the Orders has specifically prohibited access as
- 23 defined in the Policy;
- 24 c. The Policy's Exclusion of Loss Due to Virus or Bacteria does not apply to the
- 25 business losses incurred by Plaintiff here. These exclusions do not apply to the
- 26 pandemic;
- 27 d. The Orders trigger coverage;
- 28 e. The Policy provides coverage to Plaintiff for any current and future civil
- authority closures of business in California due to physical loss\or damage



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

directly or indirectly from the Coronavirus under the Civil Authority coverage parameters. The policy does not exclude the pandemic;

f. 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

g. 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.

41. Plaintiff seeks a Declaratory Judgement to determine whether the Orders constitute a prohibition of access to Plaintiff’s Insured Property as Civil Authority as defined in the Policy.

42. Plaintiff further seeks a Declaratory Judgement to affirm that the Order triggers coverage.

43. 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 the policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the Insured Property.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff herein prays as follows:

- a. For a declaration that the Orders constitute a prohibition of access to Plaintiff’s Insured Property.
- b. For a declaration that the prohibition of access by the Orders is specifically prohibited access as defined in the Policy.
- c. For a declaration that the Orders trigger coverage under the Policy.
- d. For a declaration that the Policy provides coverage to Plaintiff for any current, future and continued civil authority closures of businesses in California due to physical loss or damage directly or indirectly from the Coronavirus under the Civil Authority coverage parameters.
- e. 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.
- f. For such other relief as the Court may deem proper.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TRIAL BY JURY IS DEMANDED**

Plaintiff hereby demands trial by jury.

DATED: May 21, 2020

Respectfully submitted,

BIRKA-WHITE LAW OFFICES

By: /s/ David M. Birka-White  
DAVID M. BIRKA-WHITE

David M. Birka-White (State Bar No. 85721)  
dbw@birka-white.com  
**BIRKA-WHITE LAW OFFICES**  
178 E. Prospect Avenue  
Danville, CA 94526  
Telephone: (925) 362-9999  
Facsimile: (925) 362-9970

Arnold Levin, Esq. (Pa. Bar No. 02280)  
Laurence Berman, Esq. (Pa. Bar No. 26965)  
Frederick Longer, Esq. (Pa. Bar No. 46653)  
Daniel Levin, Esq. (Pa. Bar No. 80013)  
**LEVIN SEDRAN & BERMAN LLP**  
510 Walnut Street, Suite 500  
Philadelphia, PA 19106-3697  
Telephone: (215) 592-1500  
Facsimile: (215) 592-4663  
alevin@lfsblaw.com  
flonger@lfsblaw.com  
dlevin@lfsblaw.com

Richard M. Golomb, Esq. (PA Bar No: 42845)  
Kenneth J. Grunfeld, Esq. (PA Bar No: 84121)  
**GOLOMB & HONIK, P.C.**  
1835 Market Street, Suite 2900  
Philadelphia, PA 19103  
Telephone: (215) 985-9177  
Facsimile: (215) 985-4169  
rgolomb@golombhonik.com  
kgrunfeld@golombhonik.com

Aaron Rihn, Esq. (PA Bar No: 85752)  
**ROBERT PEIRCE & ASSOCIATES**  
707 Grant Street, Suite 125  
Pittsburgh, PA 15219

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Telephone: (412) 281-7229  
Facsimile: (412) 281-4229

W. Daniel "Dee" Miles, III (Ala. Bar ID:7656M75W)  
Rachel N. Boyd (Ala. Bar ID: 6320342)  
Paul W. Evans (AL Bar ID: 9270Z18F)  
**BEASLEY, ALLEN, CROW, METHVIN,  
PORTIS & MILES, P.C.**  
P.O. Box 4160  
Montgomery, AL 36103  
Telephone: (334) 269-2343  
Facsimile: (334) 954-7555

*Counsel for Plaintiff*