

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

**MT. HAWLEY INSURANCE COMPANY**

**Plaintiff,**

**v.**

**KUSUM HOSPITALITY MANAGEMENT,  
INC. d/b/a KUSUM MANAGEMENT  
COMPANY**

**Defendant.**

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**Case No. CIV-20-811-J**

**ORIGINAL COMPLAINT FOR DECLARATORY RELIEF**

Mt. Hawley Insurance Company (“Mt. Hawley”) would respectfully show the Court the following:

**I.  
PARTIES**

1. Plaintiff Mt. Hawley Insurance Company (“Mt. Hawley”) is a corporation organized under the laws of the State of Illinois, with its principal place of business in Peoria, Illinois, and is, therefore, a citizen of Illinois, as defined by 28 U.S.C. §1332. Thus, Mt. Hawley is a citizen of the State of Illinois, and is not a citizen of the State of Oklahoma.

2. Kusum Hospitality Management, Inc. (“the Insured”) is a corporation organized under the laws of the State of Oklahoma with its principal place of business in Oklahoma.

3. Thus, the Insured is a citizen of the State of Oklahoma and not a citizen of the State of Illinois. Service of process may be accomplished on the Insured by serving

this Complaint and Summons on its registered agent for service in the State of Oklahoma, Hasmukh K. Patel 300 Meline Drive, Edmond, OK 73034. The Insured is subject to this Court's personal jurisdiction pursuant to 28 U.S.C. § 1391(c)(2), in that it maintains a place of business and conducts regular business activities at seven (7) hotel locations within this Court's jurisdiction at the following addresses (the "Property"):

- a. 2715 W. Owen K. Garriott Road in Enid, OK 73703;
- b. 2740 NW 138<sup>th</sup> Street, Oklahoma City, OK 73134;
- c. 4200 W-140 Service Road, Oklahoma City, OK 73108
- d. 3840 E. 2<sup>nd</sup> Street, Edmond, OK 73034;
- e. 2300 Conference Center Drive, Norman, OK 73069;
- f. 1511 NW Expressway, Oklahoma City, OK 73118; and
- g. 1701 N. Moore Avenue, Moore, OK 73160.

## **II.** **JURISDICTION AND VENUE**

4. The Court has jurisdiction over this lawsuit pursuant to 28 U.S.C. §1332(a)(1) because Mt. Hawley and the Insured are citizens of different states, and the amount in controversy exceeds \$75,000.00, excluding interest and costs.

5. The Court also has jurisdiction over this declaratory judgment action pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. §2201. An actual and substantial controversy exists between the parties. By this action, Mt. Hawley seeks a declaration that an insurance policy issued to the Insured does not provide coverage for the insurance claim made by the Insured as described herein. This suit is necessary because the Insured has expressed disagreement

regarding Mt. Hawley's coverage position and has, in fact, already sued Mt. Hawley in this court in connection with this COVID-19 based claim involving the same Property and same Mt. Hawley policy.

6. Venue is proper in the Western District of Oklahoma pursuant to 28 U.S.C. §1391(b)(1) and (2).

### **III.** **FACTUAL BACKGROUND**

7. Mt. Hawley issued Commercial Property Policy No. MCP0169828 to the Insured effective 12/15/2019 to 12/15/2020 (hereinafter the "Policy", a certified copy of which is attached hereto as **Exhibit 1**). The Policy provides potential coverage for direct physical loss of or damage to the Covered Locations—the Property—as well as business income and extra expense loss, civil authority, and extended business income, subject to all terms, conditions, limitations, and exclusions therein.

8. On May 19, 2020, the Insured presented a claim to Mt. Hawley under the Policy for business income loss, extra expense, interruption by civil authority, and extended business income interruption associated with the Coronavirus ("COVID-19") pandemic (the "Claim").

9. The Insured claimed a March 15, 2020 date of loss based upon a declaration pertaining to COVID-19 issued by Governor J. Kevin Stitt on that date. Neither that declaration, nor any other proclamation, order, or declaration issued by Governor Stitt or the State of Oklahoma did or has ever required the suspension or cessation of the Insured's

hotel operations or prevented access to the Property. *See* Executive Order 2020-07, a true and correct copy of which is attached hereto as **Exhibit 2**.

10. Indeed, on March 25, 2020, Governor Stitt issued Amended Executive Memorandum 2020-01, which provided that certain businesses that had been identified as critical infrastructure sectors could remain open during the COVID-19 pandemic. *See* Amended Executive Memorandum 2020-01a true and correct copy of which is attached hereto as **Exhibit 3**.

11. Hotels, such as the Insured's Property, were identified as critical infrastructure which were permitted to remain open. *See* **Exhibit 3**, pp. 1, 4.

12. Upon information and belief, the hotel location at 2300 Conference Center Drive, Norman, OK 73069 had yet to open by the claimed date of loss, or at the time any of the executive orders and memorandums discussed above and identified as **Exhibits 2** and **3** were issued.

13. Despite Mt. Hawley's request for any additional information the Insured would like Mt. Hawley to consider in connection with its claim, the Insured never submitted any documentation to Mt. Hawley substantiating any direct physical loss of or damage to Covered Property or any business income loss in connection with the Claim.

14. On June 23, 2020, Mt. Hawley denied the Claim.

#### **IV.** **THE POLICY**

15. The Claim was submitted under the Policy, which provides potential coverage for commercial property losses subject to all terms, conditions, limitations, and exclusions therein.

16. The Policy provides, in pertinent part, as follows:

**BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM**

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**A. Coverage**

**1. Business Income**

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We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. . . .

**2. Extra Expense**

**a.** Extra Expense Coverage is provided at the premises described in the Declarations only if the Declarations show that Business Income Coverage applies at that premises.

**b.** Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss.

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**3. Covered Causes of Loss, Exclusions and Limitations**

See applicable Causes of Loss Form as shown in the Declarations.

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## **5. Additional Coverages**

### **a. Civil Authority**

In this Additional Coverage – Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations.

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began.

Civil Authority Coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the described premises and will end:

- (1) Four consecutive weeks after the date of that action; or
- (2) When your Civil Authority Coverage for Business Income ends; whichever is later.

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### **c. Extended Business Income**

#### **(1) Business Income Other Than “Rental Value”**

If the necessary “suspension of your “operations” produces a Business Income loss payable under this policy, we will pay for the actual loss of Business Income you incur during the period that:

(a) Begins on the date property (except “finished stock”) is actually repaired, rebuilt or replaced and “operations” are resumed; and

(b) Ends on the earlier of:

(i) The date you could restore your “operations”, with reasonable speed, to the level which would generate the business income amount that would have existed if no direct physical loss or damage had occurred; or

(ii) 30 consecutive days after the date determined in (1)(a) above.

However, Extended Business Income does not apply to loss of Business Income incurred as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the described premises are located.

Loss of Business Income must be caused by direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss.

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## F. Definitions

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2. "Operations" means:

a. Your business activities occurring at the described premises; and

b. The tenantability of the described premises, if coverage for Business Income Including "Rental Value" or "Rental Value" applies.

3. "Period of restoration" means the period of time that:

a. Begins:

(1) 72 hours after the time of direct physical loss or damage for Business Income Coverage; or

(2) Immediately after the time of direct physical loss or damage for Extra Expense Coverage;

caused by or resulting from any Covered Cause of Loss at the described premises; and

**b.** Ends on the earlier of:

(1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or

(2) The date when business is resumed at a new permanent location.

"Period of restoration" does not include any increased period required due to the enforcement of any ordinance or law that:

(1) Regulates the construction, use or repair, or requires the tearing down, of any property; or

(2) Requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants".

The expiration date of this policy will not cut short the "period of restoration".

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**6.** "Suspension" means:

**a.** The slowdown or cessation of your business activities...

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## **CAUSES OF LOSS - SPECIAL FORM**

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### **A. Covered Causes Of Loss**

When Special is shown in the Declarations, Covered Causes of Loss means Risks Of Direct Physical Loss unless the loss is:

1. Excluded in Section **B.**, Exclusions; or
  2. Limited in Section **C.**, Limitations;
- that follow.

....

## **B. Exclusions**

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

### **a. Ordinance Or Law**

The enforcement of any ordinance or law:

- (1) Regulating the construction, use or repair of any property; or
- (2) Requiring the tearing down of any property, including the cost of removing its debris.

This exclusion, Ordinance Or Law, applies whether the loss results from:

- (a) An ordinance or law that is enforced even if the property has not been damaged; . . . .

2. We will not pay for loss or damage caused by or resulting from any of the following:

....

**b.** Delay, loss of use or loss of market.

....

3. We will not pay for loss or damage caused by or resulting from any of the following, **3.a.** through **3.c.** But if an excluded cause of loss that is listed in **3.a.** through **3.c.** results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

....

b. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

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### **ABSOLUTE POLLUTION EXCLUSION**

This endorsement replaces any existing terms and/or exclusions regarding pollution liability within this policy.

We will not pay for loss, damage, cost or expense caused directly or indirectly by any of the following. Such loss, damage, cost or expense is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss:

**A.** Property damage arising out of the actual, alleged or threatened discharge, dispersal, release or escape of "pollutants," or contaminants;

1. At or from premises owned, leased, rented or occupied by you,

2. At or from any site or location used by or for you or others for the handling, storage, disposal, processing or treatment of waste,

3. Which are at any time transported, handled, stored, treated, disposed of or processed as waste by or for you or any person or organization for whom you may be legally responsible, or,

4. At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations;

a. If the "pollutants" are brought on or to the site or location in connection with such operations, or

b. If the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the "pollutants."

**B.** Any loss, damage, cost or expense arising out of any governmental direction or request that you test for, monitor, clean up, treat, remove, detoxify or neutralize "pollutants" or in any way respond to or assess the effects of "pollutants."

This includes loss or damage caused by or resulting from contributing to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of contaminants and/or pollutants, all of which direct or indirect, proximate or remote, or in whole or in part, caused by, contributed to, or aggravated by any damage insured by the policy.

**"Pollutants"** means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. In addition to "pollutants" to be disposed of, waste also includes materials to be recycled, reconditioned or reclaimed. It also includes any material which after its release, dispersal or discharge, can cause or threaten damage to human health and/or human welfare, or causes or threatens damage, deteriorations, loss of value, marketability and/or loss of use, to insured property; including, but not limited to bacteria, fungi, virus, or hazardous substances as listed in the Federal Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976 and/or Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency.

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**V.**  
**DECLARATORY JUDGMENT**  
**Count I – COVID-19 Claim**

17. Mt. Hawley incorporates by reference the allegations in the paragraphs stated above.

18. The circumstances of the Claim and the provisions of the Policy conclusively establish that there simply is no coverage under the Policy for the Claim because the Insured has not sustained direct physical loss of or damage to Covered Property from any Covered Cause of Loss.

19. The Business Income coverage provided by the Policy applies to the actual loss of Business Income sustained due to the necessary "suspension" of the Insured's "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to property at the described premises as a result of a Covered Cause of Loss. Here, there was no direct physical loss of or damage to property at the

premises and no “suspension” of the Insured’s “operations.” Accordingly, the Insured has not sustained direct physical loss of or damage to any property that would trigger its Business Income coverage.

20. The Civil Authority Coverage does not apply because access to the insureds premises was not prohibited by an order of a civil authority specifically prohibiting such access. In addition, the orders from civil authorities were not the direct result of physical loss or damage by a peril insured by the Policy to property away from the Insured’s premises and within one mile from same. Accordingly, there is no coverage for the COVID-19 Claim under the Civil Authority Coverage.

21. The Extended Business Income coverage provided by the Policy applies to the actual loss of Business Income sustained due to the necessary “suspension” of the Insured’s “operations” for a Business Income loss payable under the policy. The “suspension” must be caused by direct physical loss of or damage to property at the described premises as a result of a Covered Cause of Loss. Here, there was no direct physical loss of or damage to property at the premises and no “suspension” of the Insured’s “operations.” Furthermore, there is no underlying Business Income loss payable under the policy. Accordingly, the Insured has not sustained direct physical loss of or damage to any property that would trigger its Business Income coverage.

22. Additionally, the Policy specifically provides that Mt. Hawley will not pay for loss or damage caused directly or indirectly by the enforcement of any ordinance or law regulating the use of any property, and such loss or damage is excluded regardless of any

other cause or event that contributes concurrently or in any sequence to the loss. Accordingly, there is no coverage for the COVID-19 Claim under the Policy.

23. Additionally, the Policy specifically provides that Mt. Hawley will not pay for loss or damage caused by or resulting from any delay, loss of use and loss of market. Accordingly, there is no coverage for the COVID-19 Claim under the Policy.

24. Additionally, the Policy specifically provides that Mt. Hawley will not pay for loss or damage caused by the acts or decisions of any person, group, organization or governmental body. Accordingly, there is no coverage for the COVID-19 Claim under the Policy.

25. Additionally, the Absolute Pollution Exclusion Endorsement specifically excludes coverage for loss or damage caused directly or indirectly by the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants or contaminants, including virus, and such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. Accordingly, coverage for the COVID-19 Claim is excluded under the Absolute Pollution Exclusion Endorsement.

26. Accordingly, Mt. Hawley requests that this Court declare the rights of the parties regarding the actual controversies existing between them as set forth herein and enter judgment finding and declaring that there is no coverage under the Policy for the Insured's COVID-19 Claim and that Mt. Hawley does not owe the Insured any sums under the Policy in connection with the COVID-19 Claim.

**VI.**  
**JURY DEMAND**

27. Mt. Hawley hereby requests that to the extent this court finds that any fact issues exist, that such fact issues in this civil action be tried before a jury.

WHEREFORE, Plaintiff Mt. Hawley Insurance Company prays that this Court enter judgment finding and declaring: (1) that there is no coverage under the Policy for the Insured's COVID-19 Claim; (2) that Mt. Hawley Insurance Company does not owe the Insured any sums under the Policy in connection with the COVID-19 Claim; and (3) for such other and further relief as it deems just and fit under the circumstances.

Respectfully submitted,

*/s/ Gary C. Crapster*

GARY C. CRAPSTER, OBA #22452

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**ATTORNEY FOR DEFENDANT**

**MT. HAWLEY INSURANCE COMPANY**