

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

ROBERTO & CESARE PICONE DBA LA DOLCE CASA	:	
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	:	
	:	CIVIL ACTION NO.:
	:	
PLAINTIFF,	:	
	:	
V.	:	
	:	
NATIONWIDE MUTUAL INSURANCE COMPANY	:	
	:	
	:	
DEFENDANT	:	COMPLAINT
	:	JURY TRIAL DEMANDED

PLAINTIFF’S COMPLAINT

Plaintiff, Roberto & Cesare Picone DBA La Dolce Casa (hereinafter, “La Dolce Casa” or “Plaintiff”), by way of Complaint, brings this action against Defendant, Nationwide Mutual Insurance Company, and alleges as follows:

NATURE OF THE CASE

1. Plaintiff owns and operates Roberto & Cesare Picone DBA La Dolce Casa, a restaurant in Pennsylvania.

2. To protect the business from property damage and the loss of income in the event of a sudden suspension of operations for reasons outside of its control, Plaintiff purchased commercial multiple peril insurance from Defendant, Nationwide Mutual Insurance Company, including specialty property coverage. Plaintiff’s insurance policy is an “all-risk” policy that provides coverage for all non-excluded business losses. A copy of the policy is attached as Exhibit

1.

3. The policy expressly includes “Business Income” coverage which promises to pay for loss due to the necessary suspension of operations following loss to property and “Civil Authority” coverage which promises to pay for losses caused by a civil or governmental authority that prohibits access to the covered property.

4. The policy also provides “Extra Expense” coverage which promises to pay for expenses incurred to minimize losses during the suspension of business operations.

5. On or about March 15, 2020, Plaintiff was forced to suspend or reduce business operations following an order from Pennsylvania Governor Tom Wolf mandating the closure of all non-life sustaining businesses in the Commonwealth in an effort to protect the public from the global pandemic caused by COVID-19, a highly contagious respiratory virus that has upended daily life, infected more than 24,000,000 individuals throughout the United States, and caused the death of over 400,000 individuals throughout the United States.

6. Having faithfully paid the policy premiums, Plaintiff made a claim for business interruption, civil authority and/or extra expense coverage to recoup substantial, ongoing financial losses directly attributed to a series of COVID-19 closure orders.

7. By letter dated June 12, 2020, Defendant wrongfully denied Plaintiff’s claim. The letter is attached as Exhibit 2.

8. Through this action, Plaintiff seeks a declaratory judgment pursuant to 28 U.S.C. §2201 that the subject policy covers Plaintiff’s financial losses. Plaintiff further seeks damages for breach of contract on the basis that Defendant’s denial of coverage runs afoul of the language of the policy and/or the public policy of this state.

THE PARTIES

9. Plaintiff, Roberto & Cesare Picone DBA La Dolce Casa, is a professional organization, organized and existing under the laws of the Commonwealth of Pennsylvania, with a physical address and/or principal place of business at 16 W. Broad Street, Tamaqua, Pennsylvania 18252.

10. Defendant, Nationwide Mutual Insurance Company (hereinafter “Defendant”), an Ohio corporation, maintained a principal place of business at One Nationwide Plaza, Columbus, Ohio 43215.

JURISDICTION

11. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1332 because a complete diversity of citizenship exists between Plaintiff and Defendant and the amount in controversy is greater than \$75,000.

12. Plaintiff is a citizen of Pennsylvania.

13. Defendant is a citizen of Ohio.

14. This Court has personal jurisdiction over Defendant because at all relevant times Defendant engaged in substantial business activities in and derived substantial revenue from business activities within the Commonwealth of Pennsylvania, including soliciting, transacting and conducting insurance business (including the subject policy) and administering claims within the Commonwealth. Defendant purposely availed itself of the privilege of conducting business in this forum by maintaining continuous and systematic contacts with this forum.

15. Venue is proper in this District pursuant to 28 U.S.C. §1391(b)(2) because a substantial portion of the acts which gave rise to this lawsuit occurred in this District. Venue is also proper pursuant to 28 U.S.C. §1391(b)(3) because Defendant is subject to personal jurisdiction in this District.

FACTUAL BACKGROUND

A. PLAINTIFF'S INSURANCE COVERAGE

16. On or about April 19, 2019, Defendant entered into a contract of insurance with the Plaintiff, whereby Plaintiff agreed to make payments to Defendant in exchange for Defendant's promise to indemnify Plaintiff for losses, including, but not limited to, business income losses at the Covered Property, which is owned, managed and/or controlled by Plaintiff.

17. On or about April 19, 2020, Defendant entered into a contract of insurance with the Plaintiff, whereby Plaintiff agreed to make payments to Defendant in exchange for Defendant's promise to indemnify Plaintiff for losses, including, but not limited to, business income losses at the Covered Property, which is owned, managed and/or controlled by Plaintiff.¹

18. The Covered Property is insured under Policy number ACP BPFM 3057142334, issued by Defendant (hereinafter the "Policy").

19. Plaintiff did not participate in the drafting or negotiation of the words used in the Policy.

20. As the insured, Plaintiff had no leverage or bargaining power to alter or negotiate the terms of the Policy.

21. The Policy provides (among other things) property, business personal property, business income and extra expense, civil authority order, and additional coverages.

22. Plaintiff faithfully paid the Policy premiums and reasonably expected that the business interruption, extra expense and/or civil authority coverage provided by Defendant would protect against losses in the event of loss of or damage to the Covered Property, including loss or

¹ When Plaintiff first suffered their loss, the Policy attached hereto as Exhibit 1 was in effect as its policy period was April 2019 through April 2020. Attached hereto as Exhibit 3 is the Policy that is currently in effect April 19, 2020 through April 19, 2021. The Policy attached as Exhibit 3 was issued by the same Defendant and is the same in all material respects. The two policies will hereinafter be noted as "Policy" throughout this Complaint.

damage related to a pandemic, or if state or local officials ordered the closure of its business due to public safety concerns.

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

24. Defendant agreed to “pay for direct physical loss of or damage to Covered Property at the described premises...caused by or resulting from any Covered Cause of Loss”. Exh. 1, p. 2 of 42, Premier Businessowners Property Coverage Form

25. The policy defines Covered Causes of Loss as direct physical loss “unless the loss is...limited or excluded”. Exh. 1, p. 3 of 42, Premier Businessowners Property Coverage Form.

26. A “partial slowdown or complete cessation” of business activities at the Covered Property is a “suspension” under the policy, for which Defendant agreed to pay for loss of Business Income. Exh. 1, p. 26 of 42, Premier Businessowners Property Coverage Form.

27. “Business income” is defined in the Policy as “net income...before the direct physical loss or damage occurred”. Exh. 1, p. 31 of 42, Premier Businessowners Property Coverage Form.

28. “Extra expense” is defined in the Policy as “all necessary expenses that reduce the ‘business income’ loss that otherwise would have been incurred”. Id.

29. Within the insurance industry, and unknown to Plaintiff, the word “loss” and the word “damage” have a customary usage more expansive than “loss” and “damage” as used in Defendant’s denial letter and includes “contamination”.

30. The words “loss” and/or “damage” are not defined in the policy, are used for different purposes within the policy, and have more than one potential meaning.

31. “Loss” and/or “damage” are not synonymous.

32. In this policy “damage” is used with the disjunctive “or” when paired with “loss” and therefore must have a different meaning than “loss”.

33. The Policy’s use of the disjunctive “or” means coverage under the term “loss” provides different and/or additional coverage than coverage provided under “damage.”

34. The Policy does not limit coverage to physical damage.

35. The words “loss” and “damage” are ambiguous as used by Defendant.

36. The word “damage” should be interpreted to have its normal and ordinary meaning—physical harm that impairs the value, usefulness or normal function of something.²

37. The COVID-19 virus causes direct physical damage, as well as indirect non-physical damage, as that word is commonly used.

38. The word “loss” should be interpreted to have its normal and ordinary meaning.

39. Loss has been defined as follows:

- a. Loss is the fact of no longer having something or having less of it than before.³
- b. Loss is the disadvantage you suffer when a valuable and useful thing is taken away.⁴
- c. Decrease in amount, magnitude or degree.⁵
- d. The amount of an insured’s financial detriment by death or damage that the insurer is liable for.⁶

² <https://www.lexico.com/definition/damage>

³ <https://www.collinsdictionary.com/us/dictionary/english/loss>

⁴ <https://www.collinsdictionary.com/us/dictionary/english/loss>

⁵ <https://www.merriam-webster.com/dictionary/loss>

⁶ <https://www.merriam-webster.com/dictionary/loss>

40. Loss, as that word is commonly used, need neither be direct nor physical.

41. The Business Income, Extra Expense and Civil Authority provisions of the Policy were triggered by damage and loss caused by COVID-19, the related closure orders issued by local, state and federal authorities, and Plaintiff's inability to use and/or restricted use of the Covered Property.

B. THE COVID-19 PANDEMIC

42. On March 11, 2020, the World Health Organization officially declared COVID-19 a global pandemic.

43. COVID-19 is a cause of real physical loss and damage to the Covered Property.

44. COVID-19 is a physical substance.

45. COVID-19 remains stable and transmittable in aerosols for up to three hours, up to 24 hours on cardboard and up to two to three days on plastic and stainless steel.⁷

46. The ability of the deadly virus to physically infect and remain on surfaces of objects or materials, i.e. "fomites," for up to twenty-eight (28) days has prompted health officials in countries like China, Italy, France and Spain to disinfect and fumigate public areas before reopening them.

47. To avoid the increased risk of contracting the virus in congregate environments, the U.S. Centers for Disease Control and Prevention ("CDC") advised against gatherings of more than 10 people.

48. As of the date of this filing, every state has enacted measures to mitigate the spread of COVID-19.

C. THE COVERED CAUSE OF LOSS

⁷ See e.g. <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last accessed May 23, 2020).

1. Physical Loss

49. Plaintiff suffered direct physical loss of or damage to the Covered Property.

50. The direct physical loss of or physical damage to the Covered Property was the result of a Covered Cause of Loss.

51. Losses due to the COVID-19 pandemic are a Covered Cause of Loss under the Policy.

52. The Policy's disjunctive use of "or" when pairing "loss" or "damage" means coverage under physical loss does not require physical damage to the Covered Property.

53. Although damage is not required for coverage, the presence of virus or disease can constitute physical damage to property, as the insurance industry has recognized since at least 2006. When preparing so-called "virus" exclusions to be placed in some policies, but not others, the insurance industry's drafting arm, Insurance Services Office, Inc. ("ISO"), circulated a statement to state insurance regulators that stated as follows:

Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses. Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage.

54. The COVID-19 pandemic caused direct physical loss of or damage to the Covered Property under the policy.

55. The risk of COVID-19 entering the Property and contaminating the surfaces is direct physical loss of and damage to the Covered Property.

56. Due to COVID-19, Plaintiffs lost full use, or suffered limited use, of the physical space of the Covered Property.

57. COVID-19 imposed a physical limit on Plaintiff's Covered Property.

58. COVID-19 rendered the Covered Property unsafe, uninhabitable, damaged, and/or otherwise unfit for its intended use as a restaurant.

59. The COVID-19 pandemic caused direct physical loss of or damage to the property within one mile of the Covered Property.

60. Plaintiff's loss of use of the Covered Property constitutes direct physical loss.

61. Plaintiff's restriction of use of the Covered Property constitutes direct physical loss.

62. The "COVID-19 Effect" also produces physical loss of and damage to the property.

63. Social anxiety over public health and society's change in perception that indoor establishments are unsafe due to COVID-19 creates "physical loss and damage" for purposes of commercial property coverage.

64. The public's, and Plaintiffs' customers', change in perception is the functional equivalent of damage of a material nature or an alteration in physical composition, which renders the Covered Property damaged for its intended use.

65. Plaintiff's business income loss coverage within the Policy was triggered.

2. Civil Authority Orders

66. The presence of COVID-19 has prompted civil authorities throughout the country to issue orders mandating the suspension of non-essential businesses across a wide range of industries, including civil authorities with jurisdiction over Plaintiff's business.

67. On March 6, 2020, Pennsylvania Governor Tom Wolf signed an emergency disaster declaration triggering a public health state of emergency in the Commonwealth due to COVID-19. *See* the Declaration attached as Exhibit 4.

68. On March 19, 2020, Pennsylvania Governor Tom Wolf issued an Order requiring all non-life sustaining businesses in the Commonwealth to cease operations and close all physical locations until further notice. Life-sustaining businesses that were permitted to remain open were required to follow “social distancing practices and other mitigation measures defined by the Centers for Disease Control.” *See* the Order attached as Exhibit 5.

69. On March 23, 2020, Governor Wolf issued a Stay-at-Home Order for residents of Philadelphia, Allegheny, Bucks, Chester, Delaware, Monroe and Montgomery Counties. *See* the Order attached as Exhibit 6.

70. On April 1, 2020, Governor Wolf extended the Stay-At-Home Order to the entire Commonwealth of Pennsylvania. *See* the Order attached as Exhibit 7.

71. These orders and proclamations (collectively referred to as “Closure Orders”), as they relate to the closure of all “non-essential 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 such as Plaintiff’s businesses where the requisite contact and interaction causes a heightened risk of the property becoming contaminated by COVID-19.

72. Plaintiff had a reasonable expectation that the Policy’s business interruption coverage applied where a civil authority forced closure, thereby barring access to the business due to an issue of public safety within one mile of the Covered Property.

73. Plaintiff’s business income loss was triggered with each restrictive civil authority action and Closure Order which prohibited access to the Covered Property.

74. COVID-19 caused direct physical loss of or damage to property in the area immediately surrounding and within one (1) mile of the Covered Property.

75. COVID-19 rendered property within one (1) mile of the Covered Property unsafe, uninhabitable, damaged, and/or otherwise unfit for its intended use.

76. The Civil Authority Closure Orders were implemented to prevent the spread of COVID-19 by prohibiting and/or limiting people from entering the Covered Property because of (a) actual and immediate risk of loss of and damage to the Property and other property in the immediate vicinity, (b) characteristics of the Covered Property, and (c) the high probability that further contamination and damage would occur if access to the Property was not limited.

77. Further, Plaintiff's Covered Property suffered "direct physical loss or damage" due to the Closure Orders mandating that Plaintiff discontinue its primary use of the Covered Property. The Governor's Order to cease operations, in and of itself, constitutes a Covered Cause of Loss within the meaning of the Policy.

78. Plaintiff did not have the ability or right to ignore the Governor's Orders (or other Closure Orders) as doing so would expose Plaintiff to fines and sanctions and expose Plaintiff to further loss or damage.

D. IMPACT ON PLAINTIFF

79. On or about March 15, as a direct result of the COVID-19 pandemic and Closure Orders referenced herein, Plaintiff was forced to close the doors of its "non-life sustaining" business.

80. Because people — employees, customers, and the public — frequent all areas of Plaintiff's property, the Covered Property is contaminated and would continue to be contaminated if the business remained open to the public.

81. Because business is conducted in an enclosed building, the Covered Property is a contamination zone and sustained physical loss and damage, as respiratory droplets are more likely to remain in the air or infect surfaces within the Covered Property for far longer or with significantly increased frequency as compared to facilities with open-air ventilation.

82. Plaintiff's business is also a contamination zone due to rapid person-to-property transmission of the virus, and vice-versa, because the activities of the employees and the customers require them to interact in close proximity to the property and to one another.

83. Plaintiff's business owner and several staff members contracted COVID-19.

84. The COVID-19 exposure and infections required Plaintiff's business to undergo additional closure.

85. The COVID-19 pandemic is physically impacting the Covered Property. Any effort by the Defendants to deny the reality that the pandemic has caused physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger the Plaintiff and the public.

86. The actual or suspected physical presence of COVID-19 prevents Plaintiff's full use or limits use of the Covered Properties.

87. The risk of actual or suspected physical presence of COVID-19 constitutes physical loss or damage to Plaintiffs' Covered Properties.

88. Alternatively, to the extent the virus was not present on the Covered Properties, Plaintiffs sustained physical loss or damage as a result of the physical limitations imposed by the Closure Orders themselves.

89. As a direct result of the COVID-19 pandemic and the Closure Orders, Plaintiff has incurred, and continues to incur, among other things, direct physical loss of or damage to property, a substantial loss of business income and additional expenses covered under the Policy.

90. The covered losses incurred by Plaintiff and owed under the Policy increase daily.

91. Plaintiff submitted a claim to Defendant under the Policy due to the presence of COVID-19 and the Closure Orders described herein.

92. On June 12, 2020, Defendant wrongfully denied Plaintiff's claim. Exh. 2.

93. A declaratory judgment that the Policy provides coverage will ensure that Plaintiff's reasonable expectations of coverage are met and prevent Plaintiff from being left without vital coverage acquired to ensure the survival of the business.

94. A declaratory judgment that the Policy provides coverage will also further the public policy of this Commonwealth.

E. THE VIRUS EXCLUSION

95. The Policy contains a coverage exclusion for "loss or damage caused directly or indirectly" by "any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease". Exh. 1, p. 23 of 42, Premier Businessowners Property Coverage Form.

96. The term "virus" is not defined in the Policy.

97. The word "virus" should be interpreted to have its normal and ordinary meaning which does not include a pandemic.⁸

98. The Policy's Virus Exclusion does not exclude loss or damage as a result of a pandemic.

⁸ <https://www.merriam-webster.com/dictionary/virus>

99. The Policy's Virus Exclusion does not apply to the loss or damage to Plaintiffs' Covered Properties caused by the COVID-19 pandemic.

100. Alternatively, the Virus Exclusion is inapplicable as the loss or damage to Plaintiff's Covered Property was not caused by the actual or suspected presence of the virus, but by the Closure Orders themselves.

101. Alternatively, the Virus Exclusion is inapplicable as the loss or damage to Plaintiff's Covered Property was not caused by the actual or suspected presence of the virus, but because of Civil Authority themselves

102. Even if it were applicable, the Virus Exclusion does not exclude payment of expenses. By its very terms, the Virus Exclusion in the policy only applies to "loss or damage" and not expenses.

103. The Business Income, Civil Authority, and Extra Expense coverage forms specifically refer to recovery under the policy for "expenses" as distinct from loss of income.

104. Because the Virus Exclusion only excludes coverage for "loss or damage" and does not exclude coverage for "expense", the exclusion does not apply to the expenses incurred and covered under the policy due to the suspension of operations related to both the damage caused by the presence of the virus or the suspension of operations caused by the civil authority orders.

105. The insurance industry, through the ISO, and including Defendants, understood that the presence of a virus caused damage to property which would trigger coverage under the business income or Civil Authority coverage forms.

106. Nevertheless, through the ISO, the industry represented to the Insurance Department that there was no coverage for damage caused by viruses under the ISO policies, and

therefore, the virus exclusion did not change the policy or reduce coverage. No premium reduction was associated with the addition of the virus exclusion.

107. Plaintiff did not negotiate for the inclusion of the Virus Exclusion.

108. Plaintiff did not receive any premium reduction for the inclusion of the Virus Exclusion.

109. Plaintiff did not receive any benefit or consideration for the inclusion of the Virus Exclusion.

110. Plaintiff did not receive the benefit of any bargain related to the Virus Exclusion.

111. Defendant received the unilateral benefit of excluding coverage for a risk while also receiving the same or even greater premium for lesser coverage to the insured.

112. A business and/or property owner aware of the Virus Exclusion would reasonably conclude that the exclusion related to liability claims against the insured for transmitting the virus, not property damage claims.

113. As worded, Plaintiff could reasonably interpret the Virus Exclusion to only specifically exclude loss or damage caused by physical manifestations of a virus (distress, illness, disease), not any and all causes of loss or damage remotely connected to viruses.

114. Defendant should be estopped from enforcing the Virus Exclusion on principles of regulatory estoppel as well as general public policy.

115. In 2006, two insurance industry trade groups, Insurance Services Office, Inc. (“ISO”) and the American Association of Insurance Services (“AAIS”), represented hundreds of insurers in a national effort to seek approval from state insurance regulators for the adoption of the Virus Exclusion.

116. In their filings with the various state regulators, on behalf of the insurers, ISO and AAIS represented that the adoption of the Virus Exclusion was only meant to “clarify” that coverage for “disease-causing agents” has never been in effect, and was never intended to be included, in the property policies.

117. Specifically, in its “ISO Circular” dated July 6, 2006 and entitled “New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria,” ISO represented to the state regulatory bodies that:

While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage to create sources of recovery for such losses, contrary to policy intent.

118. Similarly, AAIS, in its “Filing Memorandum” in support of the Virus Exclusion, represented:

Property policies have not been, nor were they intended to be, a source of recovery for loss, cost or expense caused by disease-causing agents. With the possibility of a pandemic, there is concern that claims may result in efforts to expand coverage to create recovery for loss where no coverage was originally intended . . .

This endorsement clarifies that loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress is excluded...

119. The foregoing representations made by the insurance industry were false.

120. By 2006, the time of the state applications to approve the Virus Exclusion, courts had repeatedly found that property insurance policies covered claims involving disease-causing

agents and had held on numerous occasions that any condition making it impossible to use property for its intended use constituted “physical loss or damage to such property.”

121. Upon information and belief, the insurance department relied on the industry’s and Defendant’s representation when the department approved the Virus Exclusion for inclusion in standard comprehensive policies without a reduction in premiums to balance a reduction in coverage.

122. The foregoing assertions by the insurance industry (including Defendants), made to obtain regulatory approval of the Virus Exclusion, were misrepresentations and for this reason, among other public policy concerns, Defendant should now be estopped from enforcing the Virus Exclusion to avoid coverage of claims related to the COVID-19 pandemic.

123. In securing approval for the adoption of the Virus Exclusion by misrepresenting to the state regulators that the Virus Exclusion would not change the scope of coverage, Defendant effectively narrowed the scope of the insuring agreement without a commensurate reduction in premiums charged.

124. Defendants’ Form Virus Exclusion is essentially the same exclusion as the exclusion promoted by ISO and AAIS.

125. Under the doctrine of regulatory estoppel, the Court should not permit Defendant to benefit from this type of duplicitous conduct before the state regulators.

126. Upon information and belief, Defendant has denied, or will deny, all claims for coverage under their “all-risk” property damage policies issued by Defendant.

127. Defendant’s denial of lost business income claims left Plaintiff and similarly-situated businesses without vital coverage acquired to ensure the survival of their businesses during a suspension of operations.

128. Meanwhile, Defendant receive the benefit of an exclusion for which Plaintiff and similarly situated insureds received no bargain, reduction of premiums or any benefit whatsoever.

CAUSES OF ACTION

COUNT I
DECLARATORY RELIEF

129. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

130. 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).

131. Declaratory relief is intended to minimize “the danger of avoidable loss and unnecessary accrual of damages.” 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2751 (3d ed. 1998).

132. Plaintiff requests a Declaratory Judgment to affirm that the Policy provides business income coverage due to losses attributable to civil authority actions, and because the denial violates public policy.

133. Plaintiff’s interest in the Policy and the declaratory relief sought is direct, substantial, quantifiable, and immediate.

134. An actual controversy has arisen between Plaintiff and Defendant as to the rights, duties, responsibilities and obligations of the parties under the Policy to reimburse Plaintiff for its business income loss. Plaintiff contends and, upon information and belief, Defendant disputes and denies that:

- a. The closure orders described herein constitute a prohibition of access to the Covered Property;
- b. The prohibition of access by the closure orders described herein has specifically prohibited access as defined in the Policy;
- c. The Closure Orders described herein trigger coverage;
- d. Plaintiff sustained direct physical loss of or damage to the Covered Property under the Policy;
- e. The Policy provides coverage to Plaintiff for any current and future closures due to physical loss or damage directly or indirectly resulting from COVID-19 pandemic under the Civil Authority Coverage;
- f. The Policy provides business income coverage in the event that COVID-19 has directly or indirectly caused a loss or damage at the insured premises or immediate area of the Covered Property;
- g. The Virus Exclusion is void as against public policy as it pertains to the civil authority orders described herein;
- h. The Virus Exclusion does not apply to business income loss or losses from an order of a civil authority; and
- i. Defendant is estopped from enforcing the Virus Exclusion.

135. Resolution of the duties, responsibilities and obligations of the Parties is necessary as no adequate remedy at law exists and a judicial declaration is required to resolve the dispute and controversy.

COUNT II
BREACH OF CONTRACT - COMPENSATORY RELIEF

136. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

137. At all times relevant hereto, Plaintiff was an insured under the Policy with Defendants.

138. Plaintiff purchased, elected, and paid premiums to Defendant for the property, business income and extra expense, civil authority, and additional coverages applicable to the losses claimed in this action.

139. All the information regarding the insured's business and risks thereof was known to the Defendants when the Policy was issued.

140. Plaintiff is entitled to recover all losses caused by COVID-19 pandemic and/or civil authority orders.

141. Defendant was advised of Plaintiff's claims and demand for coverage under the Policy.

142. Plaintiff complied with all requirements of the Policy.

143. Defendant is duty-bound and obligated to act in good faith towards the insured under the Policy to make fair and reasonable efforts and offers to resolve Plaintiff's claim.

144. Defendant breached the terms and provisions of the Policy by denying the claims of Plaintiff for all losses caused by COVID-19 and the civil authority orders.

145. The breach of the indemnification obligations under the Policy by Defendant has caused Plaintiff to suffer loss and harm.

146. Defendant is required to pay Plaintiff all covered losses caused by COVID-19 pandemic and Closure Orders including business income, extra expense, contamination, civil authority and other coverages under the Policy.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that the Court enter judgment against Defendant and declare, as a matter of law, the following:

- a. The Closure Orders prohibit access to Plaintiff's Covered Property;

- b. The civil authority Closure Orders “prohibit access” as defined in the Policy;
- c. The civil authority coverage applies to Plaintiff due to physical loss or damage at the insured premises or other premises in the immediate area of the Covered Property;
- d. The Plaintiff is entitled to coverage for business income loss caused by the referenced Closure Orders;
- e. Plaintiff sustained direct physical loss of or damage to the Covered Property under the Policy;
- f. Plaintiff’s loss of use of the insured premises amounts to a physical loss or damage as defined in the Policy;
- g. Defendant’s denial of coverage for losses caused by the referenced civil authority Closure Orders violates public policy;
- h. Defendant’s denial of coverage for losses caused by the referenced civil authority Closure Orders amounts to a breach of contract;
- i. The Virus Exclusion is void as against public policy as it pertains to the closure orders described herein;
- j. The Virus Exclusion does not apply to business income loss, losses from an order of a civil authority, or extra expense; and
- k. Defendant is estopped from enforcing the Virus Exclusion.

Plaintiff further seeks an Order requiring Defendant to pay Plaintiff all covered losses caused by loss of access to the Insured Premises including business income, extra expense, contamination, civil authority and other coverages under the Policy; and such other relief as the Court deems appropriate.

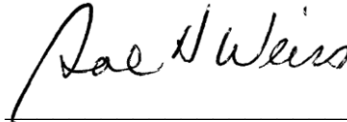
JURY TRIAL DEMANDED

Plaintiff demands a trial by jury on all issues so triable.

Dated: April 15, 2021

Respectfully submitted,

ANAPOL WEISS

A handwritten signature in cursive script that reads "Sol H. Weiss". The signature is written in black ink and is positioned above a horizontal line.

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