

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA**

**HOMESTATE SEAFOOD LLC d/b/a  
AUTOMATIC SEAFOOD &  
OYSTERS**, individually and behalf of all  
others similarly situated,

Plaintiff,

**CLASS ACTION**

v.

**JURY TRIAL DEMANDED**

**THE CINCINNATI INSURANCE  
COMPANY,**

Defendant.

**CLASS ACTION COMPLAINT**

Plaintiff Homestate Seafood LLC d/b/a Automatic Seafood & Oysters (“Automatic” or “Plaintiff”), both individually and on behalf of all others similarly situated, files this class action Complaint against Defendant The Cincinnati Insurance Companies (“Defendant” or “Cincinnati”), and in support states the following on information and belief based on further reasonable investigation and discovery, except where specifically identified as being based on personal knowledge:

**INTRODUCTION**

1. On personal knowledge, Plaintiff Automatic is a restaurant located at 2824 5<sup>th</sup> Avenue South in Birmingham, Alabama. Automatic is a 2020 James Beard Award Finalist, the restaurant has been recognized by *Esquire*, *GQ* and *Thrillist* as

a Best New Restaurant in America for 2019, and *Southern Living* named it a “Best Restaurant” in the South.

2. To protect the restaurant and the income from operation of the restaurant, Automatic purchased a general liability policy issued by Defendant with policy number ECP 052 79 23 (the “Policy”).

3. The Policy was issued by Defendant The Cincinnati Insurance Companies. Under the Policy, Cincinnati is responsible for receiving and managing claims and loss notices, responding to questions about insurance and coverage, and receiving process served on Cincinnati’s designated agent, among other things.

4. The Policy is a bilateral contract: Plaintiff agreed to pay monthly premiums to Defendant, in exchange for Defendant’s promises of coverage for certain losses.

5. Among other types of coverage, the Policy protects Plaintiff against a loss of business income due to a Suspension of the restaurant’s operations. This type of coverage is often referred to as business interruption coverage.

6. The Policy also provides “Extra Expense” coverage, under which Defendant promised to pay expenses incurred to minimize the Suspension of business. Additionally, the Policy provides “Civil Authority” coverage, under which Defendant promised to pay for loss of business income caused by the action of a civil authority prohibiting access to the restaurant.

7. Plaintiff duly complied with its obligations under the Policy, and paid the requisite premiums.

8. Beginning in March 2020, Plaintiff was forced to suspend business operations at the restaurant due to risk of infection of COVID-19 and/or actions of civil authorities prohibiting access to and occupancy of the restaurant. This Suspension, which is ongoing, has caused Plaintiff to suffer significant losses and incur significant expenses.

9. Under the Policy, Defendant promised to cover these losses and expenses, and is obligated to pay for them. But in blatant breach of its contractual obligations, Defendant has failed to pay for these losses and expenses.

10. According to published reports, Defendant has failed to pay for similar losses and expenses of other insureds holding policies that are, in all material respects, identical.

### **THE PARTIES**

11. On personal knowledge, Plaintiff Homestate Seafood LLC is an Alabama limited liability corporation organized to business and doing business as Automatic Seafood & Oysters. This restaurant is located at 2824 5<sup>th</sup> Avenue South in Birmingham, Alabama. Plaintiff Homestate Seafood LLC leases the space that houses the restaurant.

12. Defendant The Cincinnati Insurance Companies is a foreign corporation organized under the laws of Ohio, with its principal place of business in the state of Ohio. Its registered agent for the State of Alabama is identified as Scott Tyra located at 2001 Park Place North, Suite 200 in Birmingham, Alabama. The Cincinnati Insurance Companies is the issuer of the Policy.

13. At all times material, Defendant engaged in substantial and not isolated activity on a continuous and systematic basis in the state of Alabama, namely by issuing and selling insurance policies in Alabama and by contracting to insure property located in Alabama.

14. Under the applicable law and the terms of the Policy, service of process on Defendant may be effectuated by serving its Registered Agent, Scott Tyra.

### **JURISDICTION AND VENUE**

15. This Court has subject matter jurisdiction over the claims asserted in this action under 28 U.S.C. § 1332 because there is complete diversity between Defendant and at least one member of each class; there are more than one hundred members of each class; and the amount in controversy exceeds \$5,000,000 exclusive of interest and costs. This Court also has subject matter jurisdiction under 28 U.S.C. §§ 2201 and 2202 and is authorized to grant declaratory relief under these statutes.

16. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events and/or omissions giving rise to the claims

occurred within the Northern District of Alabama, a substantial part of property that is subject of the action is situated in this District, and Defendant's registered agent has an office in this district located at 2001 Park Place North, Suite 200, Birmingham, Alabama 35203.

17. This Court has personal jurisdiction over the Defendant because Plaintiffs' claims arise out of, among other things, the Defendant conducting, engaging in, and/or carrying on business in Alabama; Defendant's maintenance of an office in Alabama; Defendant breaching a contract in this state by failing to perform acts required by contract to be performed in this state; and Defendant contracting to insure property in Alabama, including but not limited to the premises insured under the Policy. Defendant also purposefully availed itself of the opportunity of conducting activities in the state of Alabama by marketing its insurance policies and services within the state, and intentionally developing relationships with brokers, agents, and customers within the state to insure property within the state, all of which resulted in the policies at issue in this action.

## **FACTUAL BACKGROUND**

### **The Policy**

18. In March 2020, Plaintiff Automatic renewed the Policy, a property insurance policy issued by Defendant. The Policy has a policy period of March 11,

2020 to March 11, 2021. The insured property under the Policy is 2824 5<sup>th</sup> Avenue South in Birmingham, Alabama.<sup>1</sup>

19. The Policy is an all-risk insurance policy. In an all-risk insurance policy, all risks of loss are covered unless they are specifically excluded.

20. Consistent with the all-risk nature of the Policy, Defendant specifically agreed to pay for all losses caused by “Covered Causes of Loss,” defined as “direct ‘loss’ unless the ‘loss’ is excluded or limited in this Coverage Part”. In the Policy, Defendant also promised to pay for losses of business income sustained as a result of perils not excluded under the Policy. Specifically, Defendant promised to pay for losses of business income sustained as a result of a Suspension of business operations during the Period of Restoration.

21. One type of coverage provided by the Policy is for loss of business income, often called business interruption insurance. This coverage is specifically provided for in a section of the Policy titled “Business Income and Extra Expense.”

22. Pursuant to this section of the Policy, Defendant promised to pay for “the actual loss of ‘Business Income’ and ‘Rental Value’ you sustain due to the necessary ‘suspension’ of your ‘operations’ during the ‘period of restoration’.”

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<sup>1</sup> A true and correct copy of the Policy is attached to this complaint as Exhibit “A” and incorporated herein by reference.

23. Each of the operative terms of this coverage provision is defined as follows.

24. “Business Income” means the net profit that the business would have earned absent the Suspension of operations, plus any continuing normal operating expenses, including payroll:

**"Business Income" means the:**

- a. Net Income (net profit or loss before income taxes) that would have been earned or incurred; and**
- b. Continuing normal operating expenses sustained, including payroll.**

25. “Suspension” means, among other things, a slowdown or cessation of the insured’s business activities:

**"Suspension" means:**

- a. The slowdown or cessation of your business activities; and**
- b. That a part or all of the "premises" is rendered untenable.**

26. “Period of Restoration” means the period of time beginning at the time of direct “loss” and ending on the date when the property is repaired or the date when business is resumed at a new location, whichever is earlier.

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

- a. Begins at the time of direct "loss".
- b. Ends on the earlier of:
  - (1) The date when the property at the "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.

27. Additionally, under the Policy, Defendant also promised to cover "Extended Business Income." This coverage requires Defendant to pay for loss of business income beyond the Period of Restoration under certain conditions.

28. Specifically, Defendant promised to pay for the actual loss of Business Income during the period that begins on the date that the insured property is open, and ends either 60 days thereafter or on the date when operations are restored to the level which would generate business income to normal levels, whichever is earlier.

29. In addition to promising to pay for loss of Business Income, under the Policy, Defendant also promised to pay for certain necessary "Extra Expense." Extra Expense means expenses that the policyholder incurs to, for example, minimize the Suspension of business.

30. The Policy also provides "Civil Authority" coverage. Under this type of coverage, Defendant promised to pay for the loss of Business Income and Extra

Expense that the Plaintiff sustained as a result of “action of civil authority that prohibits access to the premises.”

**(3) Civil Authority**

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

- (a) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and
- (b) 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.

This Civil Authority coverage for "Business Income" will begin immediately after the time of that action and will apply for a period of up to 30 days from the date of that action.

This Civil Authority coverage for Extra Expense will begin immediately after the time of that action and will end:

- 1) 30 consecutive days after the time of that action; or
- 2) When your "Business Income" coverage ends;

whichever is later.

31. This Civil Authority provision is an independent basis for business interruption coverage. That is, it can be triggered even when the standard business interruption coverage is not.

32. Parts of the Policy, including the “Business Income (and Extra Expense) Coverage Form,” are standardized forms drafted by the Insurance Services Office (ISO). The ISO is a company that drafts standard policy language for use in insurance contracts.

33. In 2006, the ISO drafted a new endorsement, CP 01 40 07 06, acknowledging that claims for business interruption losses would be filed under existing policy language for losses resulting from the presence of disease-causing agents. Endorsement CP 01 40 07 06, which other insurers have since incorporated in policies, provides that the insurer “will not pay for 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.” Significantly, Defendant chose to not include this endorsement in Plaintiff’s Policy.

34. Plaintiff’s Policy does not contain any exclusion which would apply to allow Defendant to deny coverage for losses caused by the interruption of Plaintiff’s business and the actions of civil authorities.

35. Accordingly, because the Policy is an all-risk policy and does not specifically exclude the losses that Plaintiff has suffered, those losses are covered.

**Plaintiff's covered losses**

36. On March 13, 2020, the Governor of Alabama, Kay Ivey, declared a public health emergency in response to the appearance of COVID-19 in the State of Alabama.

37. As of March 27, 2020, according to the Alabama Department of Public Health, COVID-19 was present a majority of Alabama's counties. As of April 29, 2020, Jefferson County, where Automatic is located, had 828 cases of COVID-19, with at least 33 deaths.

38. The presence of COVID-19 and the public health emergency it has created has prompted actions by civil authorities throughout the United States ("Civil Authority Actions"), including but not limited to civil authorities with jurisdiction over the restaurant: the City of Birmingham, County of Jefferson, and the state of Alabama.

39. Consistent with the actions of all states nationwide, On March 27, 2020, the State Health Officer of Alabama issued a Statewide Order Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19. This Order, which expressly covers Jefferson County, requires all restaurants to close except for curbside or take-out orders.

40. On March 24, 2020, the City of Birmingham issued Ordinance No. 20-48 establishing a "Shelter In Place Order." Among other things, this Order required

businesses within the city of Birmingham to comply with the Order of the Jefferson County Health Officer, requiring the closure of all businesses, including restaurants. Ordinance No. 20-48 was expressly issued in response to “an emergency of unprecedented size resulting from the natural cause of community spread of a novel human coronavirus disease, COVID-19, [having] occurred in the City of Birmingham.”<sup>2</sup> Page 3, Section (c) of the Ordinance specifically states: “(c) All public and private gatherings of 10 or more persons or of any size where a consistent distance of at least six feet cannot be maintained are prohibited, except as to those exempted activities further provided in this ordinance.”

41. On April 3, 2020, the State Health Officer signed an Order Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19, as Amended, ordering Jefferson County, among other counties, “to stay at his or her place of residence except as necessary to perform ... “essential activities”.”<sup>3</sup>

42. In response to the State Health Officer’s April 3, 2020 Order, the City of Birmingham amended its March 24, 2020 “Shelter In Place Order” (Ordinance No. 20-50) to continue through April 30, 2020.

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<sup>2</sup> <https://www.birminghamal.gov/wp-content/uploads/2020/03/2020.3.24.City-of-Birmingham.Shelter-In-Place-Ordinance.pdf>

<sup>3</sup> [https://governor.alabama.gov/assets/2020/04/2020\\_04\\_03\\_20-Revised-SOE.pdf](https://governor.alabama.gov/assets/2020/04/2020_04_03_20-Revised-SOE.pdf)

43. On April 28, 2020, the State Health Officer signed an Order (the “Safer at Home Order”) reopening certain portions of the State’s economy, but still requiring restaurants to remain closed until a later date.<sup>45</sup>

44. There has been a direct physical loss of and/or damage to the covered premises under the Policy by, among other things, damaging the property, denying access to the property, preventing customers from physically occupying the property, causing the property to be physically uninhabitable by customers, causing its function to be nearly eliminated or destroyed, and/or causing a Suspension of business operations on the premises. Plaintiff has only been able to operate on a limited take out basis. In addition, food purchased by Plaintiff prior to the Civil Authority Actions became spoiled and unusable, and thus had to be discarded.

45. Plaintiff’s restaurant has suffered a Suspension of normal business operations in terms of a significant slowdown of business activities and a cessation of all restaurant dining operations on the premises.

46. Additionally, Plaintiff’s restaurant has suffered a Suspension of normal business operations in terms of a significant slowdown of business activities and a cessation of all restaurant dining operations on the premises, sustained losses of business income, and incurred extra expenses.

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<sup>4</sup> <https://governor.alabama.gov/assets/2020/04/Safer-At-Home-Order-Signed-4.28.20.pdf>

<sup>5</sup> The Orders and Ordinances referenced in paragraphs 36-43 are collectively referred to as the “Civil Authority Actions.”

47. These losses and expenses have continued through the date of filing of this action. Indeed, as of the date of filing, the restaurant premises remain closed to the general public.

48. These losses and expenses are not excluded from coverage under the Policy. And because the Policy is an all-risk policy, and Plaintiff has complied with its contractual obligations, Plaintiff is entitled to payment for these losses and expenses.

49. Accordingly, on or about March 30, 2020, Plaintiff provided notice of its losses and expenses to Defendant, consistent with the terms and procedures of the Policy.

50. But contrary to the plain language of the Policy, and to Defendant's corresponding promises and contractual obligations, on or about April 29, 2020 Defendant has refused to pay for Plaintiff's losses and expenses under the terms of the Policy.

51. This appears to be consistent with the position Defendant has taken nationwide, even though on its website ([cinfin.com/covic-19](http://cinfin.com/covic-19)) Defendant publicly represents: "Cincinnati puts the health and safety of our associates, agents and customers at the top of our priorities. That's why we've put our business continuity plans in action, ensuring we do our part to help prevent the spread of COVID-19 while continuing to deliver the outstanding service you deserve. *We know it's*

*important to keep our business running, ready to serve you and fulfill the promises we've made to you.* (emphasis added).

### **CLASS ACTION ALLEGATIONS**

52. The class claims all derive directly from a single course of conduct by Defendant: their systematic and uniform refusal to pay insureds for covered losses and the actions taken by civil authorities to suspend business operations.

53. Plaintiff brings this action pursuant to Rules 23(a), 23(b)(1), 23(b)(2), and/or 23(b)(3), as well as 23(c)(4), of the Federal Rules of Civil Procedure, individually and on behalf of all others similarly situated. This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of those provisions.

54. Plaintiff seeks to represent an Alabama class and such other states as the Court may deem appropriate defined as:

a) All persons and entities with Business Income coverage and/or Extended Business Income coverage under a property insurance policy issued by Defendant that suffered a Suspension of business operations and for which Defendant has either actually denied or stated it will deny a claim for the losses or have otherwise failed to acknowledge, accept as a covered loss, or pay for the covered losses (“the Business Income Coverage Class”).

b) All persons and entities with Extra Expense coverage under a property insurance policy issued by Defendant that suffered a Suspension of business operations and for which Defendant has either actually denied or stated it will deny a claim for the expenses or has otherwise failed to acknowledge, accept as a covered expense, or pay for the covered expenses (“the Extra Expense Coverage Class”).

c) All persons and entities with Civil Authority coverage under a property insurance policy issued by Defendant that suffered an actual loss of Business Income and/or Extra Expense caused by an action of a civil authority that prohibited access to the premises, and for which Defendant has either actually denied or stated it will deny a claim for the losses or has otherwise failed to acknowledge, accept as a covered loss, or pay for the covered losses (“the Civil Authority Coverage Class”).

55. Excluded from each defined proposed Classes are Defendant and any of their members, affiliates, parents, subsidiaries, officers, directors, employees, successors, or assigns; governmental entities; Class Counsel and their employees; and the judicial officers and Court staff assigned to this case and their immediate family members.

56. Plaintiff reserves the right to modify, expand, or amend the definitions of the proposed Classes, as appropriate, during the course of this litigation.

57. This action has been brought and may properly be maintained on behalf of each Class proposed herein under the criteria of Rule 23 of the Federal Rules of Civil Procedure.

**Numerosity and Ascertainability**

58. This action satisfies the requirements of Fed. R. Civ. P. 23(a)(1). The members of each proposed Class are so numerous that individual joinder of all Class members is impracticable. There are, at a minimum, thousands of members of each proposed Class, and these individuals and entities are spread out across the State and the United States.

59. The identity of Class members is ascertainable, as the names and addresses of all Class members can be identified in Defendant's or its agents' books and records. Class members may be notified of the pendency of this action by recognized, Court-approved notice dissemination methods, which may include U.S. mail, electronic mail, internet postings, and/or published notice.

**Predominance of Common Issues**

60. This action satisfies the requirements of Fed. R. Civ. P. 23(a)(2) and 23(b)(3) because this action involves common questions of law and fact that predominate over any questions affecting only individual Class members. Defendant issued all-risk policies to all the members of each proposed Class in exchange for

payment of premiums by the Class members. The questions of law and fact affecting all Class members include, without limitation, the following:

- a) Whether Plaintiff and the Class members suffered a covered loss under the policies issued to members of the Class;
- b) Whether Defendant wrongfully denied all claims based on the facts set forth herein; any Suspension of business being attributable to COVID-19;
- c) Whether Defendant's Business Income coverage applies based on the facts set forth herein;
- d) Whether Defendant's Civil Authority coverage applies to a loss of Business Income based on the facts set forth herein;
- e) Whether Defendant's Extra Expense coverage applies to efforts to avoid or minimize a loss caused by the Suspension of business based on the facts set forth herein;
- f) Whether Defendant has breached its contracts of insurance through a uniform and blanket denial of all claims for business losses based on the facts set forth herein;
- g) Whether Plaintiff and the Class members suffered damages as a result of Defendant's actions; and

h) Whether Plaintiff and the Class members are entitled to an award of reasonable attorneys' fees, interest, and costs.

**Typicality**

61. This action satisfies the requirements of Fed. R. Civ. P. 23(a)(3) because Plaintiff's claims are typical of the claims of the Class members and arise from the same course of conduct by Defendant. Plaintiff and the other Class members are all similarly affected by Defendant's refusal to pay under their property insurance policies. Plaintiff's claims are based upon the same legal theories as those of the other Class members. Plaintiff and the other Class members sustained damages as a direct and proximate result of the same wrongful practices in which Defendant engaged. The relief Plaintiff seeks is typical of the relief sought for the absent Class members.

**Adequacy of Representation**

62. This action satisfies the requirements of Fed. R. Civ. P. 23(a)(4) because Plaintiff will fairly and adequately represent and protect the interests of Class members. Plaintiff has retained counsel with substantial experience in prosecuting complex class action litigation.

63. Plaintiff and its counsel are committed to vigorously prosecuting this action on behalf of the Class members and have the financial resources to do so. Neither Plaintiff nor its counsel has interests adverse to those of the Class members.

**Inconsistent or Varying Adjudications and the Risk of Impediments to Other Class Members' Interests**

64. This action satisfies the requirements of Fed. R. Civ. P. 23(b)(1). Plaintiff seeks class-wide adjudication as to the interpretation and scope of Defendant's property insurance policies that use the same language and terms as the Policy. The prosecution of separate actions by individual members of the proposed Classes would create an imminent risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for Defendant.

**Final Injunctive and/or Corresponding Declaratory Relief with respect to the Class is Appropriate**

65. This action satisfies the requirements of Fed. R. Civ. P. 23(b)(2) because Defendant acted or refused to act on grounds generally applicable to Plaintiff and the members of the Classes, thereby making appropriate final injunctive and/or corresponding declaratory relief with respect to the Class members. The class claims all derive directly from Defendant's systematic and uniform refusal to pay insureds for losses suffered due to actions taken by civil authorities to suspend or interrupt business operations in response to the COVID-19 pandemic. Defendant's actions or refusal to act are grounded upon the same generally applicable legal theories.

### **Superiority**

66. This action satisfies the requirements of Fed. R. Civ. P. 23(b)(3) because a class action is superior to other available methods for the fair and efficient group-wide adjudication of this controversy. The common questions of law and of fact regarding Defendant's conduct and the interpretation of the common language in their property insurance policies predominate over any questions affecting only individual Class members.

67. Because the damages suffered by certain individual Class members may be relatively small, the expense and burden of individual litigation would make it very difficult for all individual Class members to redress the wrongs done to each of them individually, such that many Class members would have no rational economic interest in individually controlling the prosecution of specific actions, and the burden imposed on the judicial system by individual litigation by even a small fraction of the Class would be enormous, making class adjudication the superior alternative under Fed. R. Civ. P. 23(b)(3)(A).

68. The conduct of this action as a class action presents far fewer management difficulties, far better conserves judicial resources and the parties' resources, and far more effectively protects the rights of each Class member than would piecemeal litigation. Compared to the expense, burdens, inconsistencies, economic infeasibility, and inefficiencies of individualized litigation, the challenges

of managing this action as a class action are substantially outweighed by the benefits to the legitimate interests of the parties, the Court, and the public of class treatment in this Court, making class adjudication superior to other alternatives, under Fed. R. Civ. P. 23(b)(3)(D).

69. Plaintiff is not aware of any obstacles likely to be encountered in the management of this action that would preclude its maintenance as a class action. Rule 23 provides the Court with authority and flexibility to maximize the efficiencies and benefits of the class mechanism and reduce management challenges. The Court may, on motion of Plaintiff or on its own determination, certify nationwide, statewide and/or multistate classes for claims sharing common legal questions; utilize the provisions of Rule 23(c)(4) to certify any particular claims, issues, or common questions of fact or law for class-wide adjudication; certify and adjudicate bellwether class claims; and utilize Rule 23(c)(5) to divide any Class into subclasses.

## **CAUSES OF ACTION**

### **COUNT I:**

#### **DECLARATORY JUDGMENT**

##### **(On behalf of the Business Income Coverage Class)**

70. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

71. Plaintiff brings this Count both individually and on behalf of the other members of the Business Income Coverage Class.

72. Under 28 U.S.C. §§ 2201 and 2202, this Court has jurisdiction to declare the rights and other legal relations of the parties in dispute.

73. Plaintiff's Policy, as well as the policies of other Business Income Coverage Class members, are insurance contracts under which Defendant was paid premiums in exchange for promises to pay Class members' losses for claims covered by the Policy.

74. In the Policy, Defendant promised to pay for losses of business income sustained as a result of perils not excluded under the Policy. Specifically, Defendant promised to pay for losses of business income sustained as a result of a Suspension of business operations during the Period of Restoration.

75. Plaintiff and Class members suffered direct physical loss of and damage to Plaintiff's restaurant and other Class members' insured premises, resulting in interruptions or suspensions of business operations at the premises. These suspensions and interruptions have caused Plaintiff and Class members to suffer losses of business income.

76. These suspensions and interruptions, and the resulting losses, triggered business income coverage under the Policy and other Class members' policies.

77. Plaintiff and the other Class members have complied with all applicable provisions of their respective policies, including payment of premiums.

78. Defendant, without justification, dispute that the Policy and other Class members' policies provide coverage for these losses.

79. Plaintiff seeks a Declaratory Judgment that its Policy and other Class members' policies provide coverage for the losses of business income attributable to the facts set forth above.

80. An actual case or controversy exists regarding Plaintiff's and other Class members' rights and Defendant's obligations to reimburse Plaintiff and other Class members for the full amount of these losses. Accordingly, the Declaratory Judgment sought is justiciable.

WHEREFORE, Plaintiff requests that this Court enter a Declaratory Judgment declaring that the Policy and other Class members' policies provide coverage for Class members' losses of business income.

**COUNT II: BREACH OF CONTRACT**

**(On behalf of the Business Income Coverage Class)**

81. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

82. Plaintiff brings this Count both individually and on behalf of the other members of the Business Income Coverage Class.

83. Plaintiff's Policy, as well as the policies of other Business Income Coverage Class members, are insurance contracts under which Defendant was paid

premiums in exchange for promises to pay Class members' losses for claims covered by the Policy.

84. In the Policy, Defendant promised to pay for losses of business income incurred as a result of perils not excluded under the Policy. Specifically, Defendant promised to pay for losses of business income sustained as a result of a Suspension of business operations during the Period of Restoration.

85. Plaintiff and Class members have suffered a direct physical loss of and damage to Plaintiff's restaurant and other Class members' insured premises as a result of interruptions or suspensions of business operations at these premises. These interruptions and suspensions have caused Class members to suffer losses of business income.

86. These losses triggered business income coverage under both the Policy and other Class members' policies.

87. Plaintiff and the other Class members have complied with all applicable provisions of their respective policies, including payment of premiums.

88. Defendant, without justification and in bad faith, has denied coverage and refused performance under the Policy and other Class members' policies by denying coverage for these losses and expenses. Accordingly, Defendant is in breach of the Policy and other Class members' policies.

89. As a result of Defendant's breaches of the Policy and other Class members' policies, Plaintiff and other Class members have suffered actual and substantial damages for which Defendant is liable.

WHEREFORE, Plaintiff, both individually and on behalf of other Class members, seeks compensatory damages resulting from Defendant's breaches of the Policy and other Class Members' policies and seek all other relief deemed appropriate by this Court.

**COUNT III:**

**DECLARATORY JUDGMENT**

**(On behalf of the Extra Expense Coverage Class)**

90. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

91. Plaintiff brings this Count both individually and on behalf of the other members of the Extra Expense Coverage Class.

92. Under 28 U.S.C. §§ 2201 and 2202, this Court has jurisdiction to declare the rights and other legal relations of the parties in dispute.

93. Plaintiff's Policy, as well as the policies of other Extra Expense Coverage Class members, are insurance contracts under which Defendant was paid premiums in exchange for promises to pay Class members' losses for claims covered by the Policy.

94. Specifically, Defendant promised to pay for Extra Expenses incurred by Plaintiff and other Class members during the Period of Restoration that the insureds would not have incurred if there had been no loss or damage to the insured premises. These Extra Expenses include expenses to avoid or minimize the Suspension of business, continue operations, and to repair or replace property.

95. Plaintiff and Class members suffered direct physical loss of and damage to Plaintiff's restaurant and other Class members' insured premises, resulting in suspensions or interruptions of business operations at these premises. As a result, Plaintiff and other Class members have incurred Extra Expenses, as defined in the Policy and other Class members' policies.

96. These Expenses triggered Extra Expense coverage under the Policy and other Class members' policies.

97. Plaintiff and the other Class members have complied with all applicable provisions of their respective policies, including payment of premiums.

98. Defendant, without justification, disputes that the Policy and other Class members' policies provide coverage for these Extra Expenses.

99. Plaintiff, both individually and on behalf of the other members of the Extra Expense Coverage Class, seeks a Declaratory Judgment that its Policy, and those of other members of the Extra Expense Coverage Class, provides coverage for these Extra Expenses.

100. An actual case or controversy exists regarding Class members' rights and Defendant's obligations under Class members' policies to reimburse Class members for these Extra Expenses. Accordingly, the Declaratory Judgment sought is justiciable.

WHEREFORE, Plaintiff requests that this Court enter a Declaratory Judgment declaring that the Policy and other Class members' policies provide coverage for Class members' Extra Expenses.

**COUNT IV: BREACH OF CONTRACT**

**(On behalf of the Extra Expense Coverage Class)**

101. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

102. Plaintiff brings this Count individually and on behalf of the other members of the Extra Expense Coverage Class.

103. Plaintiff's Policy, as well as the policies of other Extra Expense Coverage Class members, are insurance contracts under which Defendant was paid premiums in exchange for promises to pay Class members' losses for claims covered by the Policy.

104. Specifically, Defendant promised to pay for Extra Expenses incurred by Plaintiff and other Class members during the Period of Restoration that the insureds would not have incurred if there had been no loss or damage to the insured

premises. These Extra Expenses include expenses to avoid or minimize the Suspension of business, continue operations, and to repair or replace property.

105. Plaintiff and Class members suffered direct physical loss of and damage to the Plaintiff's restaurant and other Class members' insured premises, resulting in suspensions and interruptions of business operations at these premises. These suspensions and interruptions have caused Class members to incur Extra Expenses.

106. These Expenses triggered Extra Expense coverage under the Policy and other Class members' policies.

107. Plaintiff and the other Class members have complied with all applicable provisions of the Policy, including payment of premiums.

108. Defendant, without justification and in bad faith, has denied coverage and refused performance under the Policy and other Class members' policies by denying coverage for these Extra Expenses. Accordingly, Defendant is in breach of the Policy and other Class members' policies.

109. As a result of Defendant's breaches of the Policy and other Class members' policies, Plaintiff and other Class members have suffered actual and substantial damages for which Defendant is liable.

WHEREFORE, Plaintiff, individually and on behalf of other Class members, seeks compensatory damages resulting from Defendant's breaches of the Policy and

other Class Members' policies and seek all other relief deemed appropriate by this Court.

**COUNT V: DECLARATORY JUDGMENT**

**(On behalf of the Civil Authority Coverage Class)**

110. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

111. Plaintiff brings this Count both individually and on behalf of the other members of the Civil Authority Coverage Class.

112. Under 28 U.S.C. §§ 2201 and 2202, this Court has jurisdiction to declare the rights and other legal relations of the parties in dispute.

113. Plaintiff's Policy, as well as the policies of other Civil Authority Coverage Class members, are insurance contracts under which Defendant was paid premiums in exchange for promises to pay Class members' losses for claims covered by the policies.

114. In the Policy and other Class members' policies, Defendant promised to pay for losses of business income sustained and extra expenses incurred when, among other things, a Covered Cause of Loss causes damage to property near the insured premises, the civil authority prohibits access to property near the insured premises, and the civil authority action is taken in response to dangerous physical conditions.

115. Plaintiff and other Class members have suffered losses and incurred expenses as a result of actions of civil authorities that prohibited access to insured premises under the Policy and Class members' policies.

116. These losses satisfied all requirements to trigger Civil Authority coverage under the Policy and other Class members' policies.

117. Plaintiff and the other Class members have complied with all applicable provisions of the Policy, including payment of premiums.

118. Defendant, without justification, disputes that the Policy provides coverage for these losses.

119. Plaintiff seeks a Declaratory Judgment that its Policy and other Class members' policies provide coverage for the losses that Class members have sustained and extra expenses they have incurred caused by actions of civil authorities.

120. An actual case or controversy exists regarding Class members' rights and Defendant's obligations under Class members' policies to reimburse Class members for these losses and extra expenses. Accordingly, the Declaratory Judgment sought is justiciable.

WHEREFORE, Plaintiff, both individually and on behalf of other Class members, requests that this Court enter a Declaratory Judgment declaring that the

Policy provides Civil Authority coverage for the losses and extra expenses incurred by Plaintiff and the other Class members.

### **COUNT VI: BREACH OF CONTRACT**

#### **(On behalf of the Civil Authority Coverage Class)**

121. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

122. Plaintiff brings this Count individually and on behalf of the other members of the Civil Authority Coverage Class.

123. Plaintiff's Policy, as well as the policies of other Civil Authority Coverage Class members, are insurance contracts under which Defendant was paid premiums in exchange for promises to pay Class members' losses and expenses covered by the Policy.

124. In the Policy and other Class members' policies, Defendant promised to pay for losses of business income sustained and extra expenses incurred when a Covered Cause of Loss causes damage to property near the insured premises, the civil authority prohibits access to property near the insured premises, and the civil authority action is taken in response to dangerous physical conditions.

125. Plaintiff and other Class members have suffered losses and incurred expenses as a result of actions of civil authorities that prohibited access to insured premises under the Policy and Class members' policies.

126. These losses satisfied all requirements to trigger Civil Authority coverage under the Policy and other Class members' policies.

127. Plaintiff and the other Class members have complied with all applicable provisions of the Policy, including payment of premiums.

128. Defendant, without justification and in bad faith, has refused performance under the Policy and other Class members' policies by denying coverage for these losses and expenses. Accordingly, Defendant is in breach of the Policy and other Class members' policies.

129. As a result of Defendant's breaches of the Policy and other Class members' policies, Plaintiff and other Class members have suffered actual and substantial damages for which Defendant is liable.

WHEREFORE, Plaintiff seeks compensatory damages resulting from Defendant's breaches of the Policy and other Class members' policies, and seek all other relief deemed appropriate by this Court.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in its favor and against Defendant, as follows:

- A. Entering an order certifying the proposed Classes, designating Plaintiff as Class representative, and appointing Plaintiff's undersigned attorneys as Counsel for the Classes;

- B. Entering declaratory judgments on Counts I, III, and V in favor of Plaintiff and the members of the Business Income Coverage Class, Extra Expense Coverage Class and Civil Authority Coverage Class as follows:
- i. That all Business Income, Civil Authority and Extra Expense losses and expenses incurred and sustained based on the facts and circumstances set forth above are insured and covered losses and expenses under Plaintiff's and Class members' policies; and
  - ii. Defendant The Cincinnati Insurance Companies is obligated to pay for the full amount of the Business Income, Civil Authority and Extra Expense losses and expenses sustained and incurred, and to be sustained and incurred, based on the facts and circumstances set forth above are insured and covered losses and expenses under Plaintiff and Class members' policies;
- C. Entering judgments on counts II, IV, and VI in favor of Plaintiff and the members of the Business Income Coverage Class, Extra Expense Coverage Class and Civil Authority Coverage Class, and awarding damages for breach of contract in an amount to be determined at trial;
- D. An order requiring Defendant to pay both pre- and post-judgment interest on any amounts awarded;

- E. An award of costs and attorneys' fees; and
- F. Such other or further relief as may be appropriate.

**DEMAND FOR JURY TRIAL**

The undersigned hereby demands a trial by jury as to all issues so triable.

Dated: May 8, 2020

**WHATLEY KALLAS, LLP**

*/s/ Joe R. Whatley, Jr.*

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