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8 DBA FOOTWEAR ETC

9 **SUPERIOR COURT OF CALIFORNIA**
10 **COUNTY OF SAN DIEGO**

11 DANELI SHOE COMPANY DBA
12 FOOTWEAR ETC, a California corporation,

13 Plaintiff,

14 vs.

15 VALLEY FORGE INSURANCE COMPANY, a
16 Pennsylvania corporation; and DOES 1-10,
17 inclusive,

18 Defendants.

CASE NO. 37-2020-00018134-CU-IC-CTL

COMPLAINT FOR:

1. **BREACH OF CONTRACT;**
2. **BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING;**
3. **DECLARATORY RELIEF**

19 COMES NOW, Plaintiff DANELI SHOE COMPANY DBA FOOTWEAR ETC
20 (hereinafter "Footwear etc" or "Plaintiff"), by and through its counsel of record, and complains as
21 follows:

22 **THE PARTIES**

23 1. Footwear etc is a California corporation doing business in California with offices in
24 San Diego County and Santa Clara County.

25 2. Defendant VALLEY FORGE INSURANCE COMPANY (hereinafter "Valley
26 Forge" or as part of the collective "Defendants") is incorporated under the laws of the
27 Commonwealth of Pennsylvania, and is authorized to do business as an insurance company and is
28 regularly doing business as an insurance company in the State of California.

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1 In exchange for issuing the Policy, Defendants charged Footwear etc a premium for the Policy,
2 and Footwear etc paid that premium in full.

3 8. The Policy contains a Businessowners Special Property Coverage Form. By
4 endorsement, "Business Income and Extra Expense" coverage is added to the Businessowners
5 Special Property Coverage Form. The Business Income and Extra Expense Endorsement states, in
6 part:

7 We will pay for the actual loss of Business Income you sustain due to the
8 necessary "suspension" of your "operations" during the "period of
9 restoration." The "suspension" must be caused by direct physical loss of or
10 damage to property at the described premises. The loss or damage must be
11 caused by or result from a Covered Cause of Loss.

12 10. By endorsement, "Civil Authority" coverage is added to the Businessowners
13 Special Property Coverage Form. The Civil Authority Endorsement states, in part:

14 When the Declarations show that you have coverage for Business Income
15 and Extra Expense, you may extend that insurance to apply to the actual loss
16 of Business Income you sustain and reasonable and necessary Extra
17 Expense you incur caused by action of civil authority that prohibits access to
18 the described premises. The civil authority action must be due to direct
19 physical loss of or damage to property at locations, other than described
20 premises, caused by or resulting from a Covered Cause of Loss.

21 11. The Policy's Declarations state that Footwear etc has coverage for Business Income
22 and Extra Expense, with the limits for such coverage stated as "12 Months Actual Loss
23 Sustained."

24 12. The Policy defines "suspension" as follows:

25 "Suspension" means:

- 26 a. The partial or complete cessation of your business activities; or
- 27 b. That a part or all of the described premises is rendered untenable.

28 13. The Policy defines "operations" as follows: "'Operations' means the type of your
business activities occurring at the described premises and tenantability of the described
premises."

14. The Policy's Businessowners Special Property Coverage Form specifies Covered
Causes of Loss as follows:

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1 RISKS OF DIRECT PHYSICAL LOSS unless the loss is:

- 2 a. Excluded in section B. EXCLUSIONS;
- 3 b. Limited in paragraph A.4. Limitations; or
- 4 c. Excluded or limited by other provisions of this policy.

5 15. The Policy’s Declarations identify 14 locations covered by the Policy, including the
6 locations of Footwear etc’s 11 retail stores.

7 16. On March 4, 2020, California Governor Gavin Newsom proclaimed a State of
8 Emergency to exist in California as a result of the threat of the Coronavirus and COVID-19.

9 17. On March 16, 2020, Santa Clara County, San Mateo County, and Contra Costa
10 County issued “Shelter in Place” Orders requiring all non-essential businesses “to cease all
11 activities at facilities located within the County...” Although Footwear etc is a successful
12 business that provides important goods and services to the community in the form of footwear,
13 Footwear etc’s business does not qualify as one that these three Counties characterized as
14 providing “essential” services in the Orders. Footwear etc was therefore required to close its
15 seven retail stores in Santa Clara County, San Mateo County, and Contra Costa County effective
16 March 17, 2020.

17 18. On March 19, 2020, Governor Newsom issued Executive Order N-33-20. This
18 Executive Order acknowledged that, “in a short period of time, COVID-19 has rapidly spread
19 throughout California, necessitating updated and more stringent guidance from federal, state, and
20 local public health officials.” The Executive Order mandated that all individuals living in the
21 State of California stay home or at their place of residence except as needed to maintain continuity
22 of operations of the federal critical infrastructure sectors. As a consequence, all businesses except
23 those providing essential services were ordered closed. Although Footwear etc is a successful
24 business that provides important goods and services to the community in the form of footwear,
25 Footwear etc’s business does not qualify as one that the State of California characterized as
26 providing “essential” services for purposes of this Executive Order. Footwear etc was therefore
27 required to close the four retail stores in San Diego County, in addition to the seven retail stores it
28 had already closed in Santa Clara County, San Mateo County, and Contra Costa County. All 11

1 of Footwear etc’s retail stores remained closed until May 2020, when the State began modifying
2 its various Orders.

3 19. Effective May 8, 2020, the State of California moved to what it calls “Stage 2” of
4 its four-stage framework. This permitted some retail stores to re-open, including clothing and
5 shoe stores, but only for delivery or curbside pickup. Under Stage 2, customers for such
6 businesses are not permitted inside the stores.

7 20. Footwear etc thereafter began opening its stores to the limited extent permitted by
8 the State of California. Its retail stores are currently open and operating to the full extent
9 permitted by the State of California, but because of the State’s limitations, Footwear etc’s
10 operations are limited, and Footwear etc continues to suffer a substantial loss of business income.
11 Footwear etc’s loss of business income is ongoing and continuing, and is certain to continue into
12 the foreseeable future.

13 21. Prior to the closure of its 11 retail stores, Footwear etc operated a thriving retail
14 business in its stores. As a direct consequence of the above, Footwear etc has lost and been
15 deprived of substantial business income. Because the partial suspension of its operations in its 11
16 retail stores remains in effect, the amount of the lost business income continues to increase
17 significantly on a daily basis. Although Footwear etc has been able to continue online sales,
18 income from sales through the online store, alone, after the government-ordered closures did not
19 rise anywhere near to the level of business income, before the government-ordered closures, from
20 the combination of the 11 retail stores and online sales.

21 22. While some rogue media outlets have called the 2019-2020 Coronavirus an
22 exaggerated mass hysteria that will unlikely create significant physical damage, the scientific
23 community, and those personally affected by the virus, recognize the Coronavirus as a cause of
24 real physical loss and damage.

25 23. A growing body of scientific evidence indicates that the Coronavirus physically
26 infects and stays on surfaces normally considered inhospitable to viruses, such as doorknobs,
27 faucets, and other hard surfaces in buildings, and other objects or materials known as “fomites”
28 (objects or materials which are likely to carry infection, such as furniture) for up to 28 days. The

1 presence of a contaminant, whether a chemical constituent or a contagion such as the Coronavirus,
2 constitutes insured physical loss of or damage to property. China, Italy, France, and Spain have
3 implemented the cleaning and fumigating of public areas prior to allowing them to re-open
4 publicly due to the intrusion of microbials.

5 24. The government-ordered closures of non-essential businesses were based in part on
6 the increasing likelihood of occurrence of COVID-19 throughout the State, and the physical
7 damage to property caused by the Coronavirus. The United States Centers for Disease Control
8 (CDC) has determined that a person may contract COVID-19 by touching a surface or object that
9 has the virus on it, and then by touching his or her mouth, nose, or eyes.

10 25. On March 17, 2020, Footwear etc submitted a claim to Defendants for lost business
11 income under the Policy's Businessowners Special Property Coverage Form, and specifically the
12 Business Income and Extra Expense and Civil Authority Endorsements.

13 26. On April 21, 2020, Defendants wrote to Footwear etc and denied the claim.
14 Defendants stated that their denial was based on an "investigation" it contends to have conducted,
15 and that as part of this supposed "investigation," Defendants "relied upon information provided by
16 [Footwear etc], including oral discussions of the circumstances of the claimed loss as well as
17 email correspondence in which you provided additional documentation related to your claim."

18 **FIRST CAUSE OF ACTION**

19 **BREACH OF CONTRACT**

20 **(As to All Defendants)**

21 27. Plaintiff hereby incorporates paragraphs 1 through 26, above, as though set forth in
22 full herein.

23 28. Footwear etc and Defendants entered into a valid contract in the form of the Policy.

24 29. Defendants have breached that contract in that they have wrongfully denied
25 Footwear etc's claim for lost business income resulting from the need to suspend operations (in
26 full or in part) in its 11 retail stores, and failed and refused to pay benefits under the Policy when it
27 had a contractual obligation to do so. Defendants contend wrongly that the retail there is no
28 indication that Footwear etc's operations were suspended as a result of direct physical loss or

1 damage due to a Covered Cause of Loss to property at any of the 14 locations listed on the
2 Policy's declarations. Footwear etc's operations were suspended at its 11 retail stores in part
3 because of the presence of the Coronavirus on property in the retail stores. The presence of
4 Coronavirus on property impairs the property because of the direct and serious threat that
5 employees and customers may touch the property and thereby transfer the Coronavirus to their
6 hands, then touch their mouth, nose, and face and contract COVID-19. The presence of
7 Coronavirus on property is a physical loss of or damage to property and is a Covered Cause of
8 Loss, meaning the suspension of operations at the 11 retail stores is covered under the Policy.

9 30. Defendants also contend wrongly that the Orders of the various Counties and the
10 Governor's Executive Orders were not issued due to direct physical loss of or damage to property
11 and did not prohibit access to the premises. The various Orders of governmental authorities were
12 issued in part because of the presence of the Coronavirus on property items in various public
13 spaces such as retail stores. The governmental authorities issued their Orders so as to prevent
14 people from touching such property, transferring the Coronavirus to their hands and then
15 contracting COVID-19 by touching their mouth, nose and face. Coronavirus is a dangerous, life-
16 threatening, highly contagious virus for which there is presently no vaccine. For that reason,
17 property items with the Coronavirus on them constitute a threat to the health, safety, and well-
18 being of people and of society in general. Governmental authorities acknowledged this and issued
19 orders closing all non-essential business in part out of this concern that people would touch
20 Coronavirus-laced property items at business locations throughout the State of California and
21 thereby infect themselves and then infect others, spreading COVID-19 uncontrollably. Property
22 items with Coronavirus on them are therefore dangerous to human beings, are impaired, and the
23 presence of Coronavirus on property items throughout the state are a physical loss of or damage to
24 such property. The orders of the various governmental authorities were therefore indeed issued
25 because of physical loss of or damage to property. Moreover, the orders of the governmental
26 authorities did indeed prohibit access to the premises because the premises of all non-essential
27 businesses were ordered closed to the public, and the owners and employees of all non-essential
28 businesses were ordered to stay home and not go to the premises of non-essential businesses.

1 Footwear etc's claim for lost business income was covered under the Policy, and specifically the
2 Civil Authority Endorsement, and Defendants breached the insurance-policy contract by denying
3 the coverage owed.

4 31. Footwear etc has fully performed its obligations under the Policy, and Defendants'
5 performance under the Policy was not excused.

6 32. As a direct and proximate result of Defendants' breach of the Policy, Footwear etc
7 has been damaged in that, among other things, it has been deprived of insurance coverage for lost
8 business income to which it is entitled under the Policy. Footwear etc currently estimates its
9 damages from Defendants' conduct as \$1.6 million, but that number is increasing on a daily basis,
10 and Footwear etc reserves the right to amend the damages figure according to proof, according to
11 information revealed in discovery, and as those damages continue to increase.

12 **SECOND CAUSE OF ACTION**

13 **BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

14 **(As to All Defendants)**

15 33. Plaintiff hereby incorporates paragraphs 1 through 32, above, as though set forth in
16 full herein.

17 34. Footwear etc and Defendants entered into a valid contract in the form of the Policy.

18 35. Footwear etc suffered a loss that, as explained in greater detail above, is covered
19 under the Policy, and Defendants were notified of that loss.

20 36. Like all contracts, the Policy contains an implied covenant of good faith and fair
21 dealing providing that no party to the contract will do anything that would deprive another party of
22 the benefits of the contract.

23 37. Defendants breached this covenant of good faith and fair dealing by, among other
24 things:

25 a. Defendants acted unreasonably in that they denied Footwear etc's claim for
26 lost business income arbitrarily and without proper cause. Defendants unreasonably ignored the
27 evidence of the presence of Coronavirus on property items throughout the State of California, the
28 evidence that governmental authorities ordered closure of all non-essential business in part based

1 on the fact that the presence of Coronavirus on property items could lead to the uncontrolled
2 spread of the dangerous and deadly COVID-19, and evidence that the presence of Coronavirus on
3 property items does constitute physical loss of or damage to property.

4 b. Defendants acted unreasonably and without proper cause in that, based on
5 information and belief, Defendants accepted the payment of Policy premiums from Footwear etc
6 with no intention of providing any coverage under the Business Income and Extra Expense and
7 Civil Authority Endorsements due to a loss and shutdown from a virus pandemic.

8 c. Defendants acted unreasonably, arbitrarily, and without proper cause in
9 that, based on information and belief, as soon as governmental authorities starting issuing orders
10 closing non-essential businesses, Defendants made the decision to deny any and all claims for lost
11 business incomes under policy like the Policy here – regardless of whether the facts showed that
12 there was indeed coverage – in order to avoid negative financial affects to the insurance company.
13 Defendants knew that providing the coverage owed would be detrimental to their financial well-
14 being and decided to deny all claims for lost business income so as to avoid that detriment, even if
15 the facts demonstrated the coverage exists for the loss.

16 d. Defendants acted unreasonably and without proper cause in that they
17 provided reasons for denial of Footwear etc’s claims that they knew or, through use of any
18 reasonable care should have known, were factually inaccurate and contrary to law.

19 38. Defendants’ conduct was a substantial factor in causing harm and damage to
20 Defendants, in that Footwear etc. has been deprived of policy benefits to which it is entitled for its
21 lost business income, and in that they have had to incur attorney’s fees to seek and recover policy
22 benefits that have been tortiously denied. Footwear etc’s damages as a result of Defendants’
23 wrongful conduct is currently approximately \$1.6 million but are increasing on a daily basis.
24 Footwear etc reserves the right to amend the damages figure according to proof, according to
25 information revealed in discovery, and as those damages continue to increase.

26 39. As set forth above, Defendants acted with oppression, fraud, or malice. Defendants
27 conduct was despicable and so vile, base, contemptible, miserable, wretched or loathsome that it
28 would be looked down upon and despised by ordinary decent people. Defendants ignored facts

1 they knew or should have known supported the existence of coverage for Footwear etc's claim so
2 that they could avoid loss of profits by paying the claim and the claims of other insureds have
3 suffered similar losses. Defendants also accepted premium payments from Footwear etc knowing
4 they would never honor a valid claim for lost business income resulting from physical loss of or
5 damage to property because of a global pandemic virus. Defendants are therefore subject to
6 punitive or exemplary damages.

7 **THIRD CAUSE OF ACTION**

8 **DECLARATORY RELIEF**

9 **(As to All Defendants)**

10 40. Plaintiff hereby incorporates paragraphs 1 through 39, above, as though set forth in
11 full herein.

12 41. An actual, present controversy exists between the parties in that: 1) Footwear etc
13 contends it is entitled to coverage under the Policy for its past, ongoing and continuing lost
14 business income resulting from the suspension of its operations due to the damage from the
15 Coronavirus and the orders of the governmental authorities relating to the Coronavirus and the
16 damages stemming from the Coronavirus; and 2) Defendants contend that coverage is not owed
17 under the Policy for Footwear etc's claim for lost business income.

18 42. Footwear etc seeks a judicial declaration of the rights and obligations of the parties,
19 and specifically that there is coverage under the Policy for Footwear etc's claim for lost business
20 income, and that Defendants have a duty to provide and pay Policy benefits to Footwear etc for
21 this claim.

22 WHEREFORE, Plaintiff DANELI SHOE COMPANY DBA FOOTWEAR ETC prays for
23 judgment as follows:

24 1. For actual and compensatory damages in an amount to be proven at trial, in the
25 current approximate amount of \$1.6 that is continuing to increase on a daily basis;

26 2. For a judicial declaration that Footwear etc is entitled to coverage under the Policy
27 for loss of business income as a result of the Coronavirus and the orders of civil authorities
28 suspending Footwear etc's operations;

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- 3. For punitive and/or exemplary damages;
- 4. For costs of suit; and
- 5. For such other and further relief as the Court may deem proper.

Dated: June 1, 2020

WORTHINGTON LAW

By: s/ Brian P. Worthington
Brian P. Worthington, Esq.
Attorneys for Plaintiff DANELI SHOE
COMPANY DBA FOOTWEAR ETC