

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA**

CALI FRESH, LLC, d/b/a
CHRONIC TACOS

Plaintiff,

v.

THE HARTFORD FINANCIAL SERVICES
GROUP, INC. and TWIN CITY FIRE
INSURANCE COMPANY,

Defendants.

Case No.: 1:20-cv-00522

COMPLAINT

DEMAND FOR JURY TRIAL

Plaintiff Cali Fresh, LLC d/b/a Chronic Tacos (“Plaintiff” or “Cali Fresh”) brings this case against Defendants The Hartford Financial Services Group, Inc. and Defendant Twin City Fire Insurance Company (collectively, “Defendants”), and alleges as follows:

NATURE OF THE ACTION

1. Cali Fresh is a franchisee of a fast-causal restaurant. Like many businesses, including restaurants in North Carolina, Cali Fresh was forced to significantly curtail its services due to the COVID-19 Pandemic (also known as the “Coronavirus” or “SARS-CoV-2”), the executive orders issued by the Governor of North Carolina as described below.

2. Cali Fresh sought to protect itself – and reasonably believed that it had protected itself – in the event that its operations were suspended or reduced for reasons outside of its control beyond just damage to the physical premises (such as fire), by purchasing an “all-risk” property Spectrum Business Owner’s Policy through Defendants (the “Special Property Coverage Form”). *See* Exhibit A. An “all-risk” property policy provides broad coverage for losses resulting from any cause unless expressly excluded.

3. Among other coverages, the Special Property Coverage Form specifically includes coverage for Business Income for twelve (12) months of actual loss sustained. The policy also provides coverage for Action of Civil Authority for thirty (30) days. The Special Property Coverage Form (by way of endorsement) also provides Limited Fungi, Bacteria or Virus coverage for thirty (30) days.

4. The Business Income, and Civil Authority coverages purchased by Plaintiff are not subject to any relevant exclusion for losses caused by pandemics like COVID-19. But even to the extent a virus exclusion would apply, Defendants have rendered this exclusion inapplicable by expressly providing for limited Time Element Coverage when a cessation of business operations is caused by a “virus”.

5. Notwithstanding this coverage, when Plaintiff suffered an actual loss of Business Income as a result of a covered cause of loss and needed its Business Income coverage, Defendants wrongfully – and in contravention of the policy – denied Plaintiff’s insurance claim. *See Exhibit B.*

6. Plaintiff is not alone. Defendants have systematically refused to pay all their insureds under their Business Income and Civil Authority coverages for losses suffered due to COVID-19 (and related civil authority orders), regardless of whether the implicated insurance policy has an applicable pandemic exclusion or not, and regardless of whether the policy had applicable “Limited Fungi, Bacteria Or Virus Coverage[.]”

PARTIES

7. Plaintiff Cali Fresh LLC d/b/a Chronic Tacos is a limited liability corporation registered in North Carolina with places of business in Chapel Hill, Raleigh, and Wake Forest, North Carolina. Cali Fresh is a fast-casual restaurant serving Southern California-inspired Mexican food.

8. Defendant The Hartford Financial Services Group, Inc. (“The Hartford”) is a Delaware company with its principal place of business in Hartford, Connecticut. The Hartford is a financial holding company for a group of insurance and non-insurance subsidiaries.

9. Defendant Twin City Fire Insurance Company (“Twin City”) is a Connecticut company with its principal place of business in Hartford, Connecticut. Twin City is a wholly owned subsidiary of The Hartford. At all relevant times, Twin City sold and issued insurance policies in the State of North Carolina, including, without limitation, to Cali Fresh.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(d) because Plaintiff and Defendants are citizens of different states and the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

11. This Court has personal jurisdiction over Defendants, because a substantial portion the alleged wrongdoing occurred in the state of North Carolina, and Defendants have sufficient contacts with the state of North Carolina. Venue is proper in this District under 28 U.S.C. § 1391(b) because a substantial portion of the acts, conduct, and property giving rise to the claims occurred within the District.

FACTUAL BACKGROUND

12. Plaintiff paid an annual premium of \$7,055.00 to Defendants, who issued to Plaintiff a Policy No. 22 SBA AD9655 SA, for the annual period beginning October 1, 2019. Plaintiff performed all its obligations under the Policy, including the payment of premiums. The Covered Properties are at 9424 Falls of Neuse Rd Ste 100, Raleigh NC 27615; 1000 Forestville Rd, Wake Forest NC 27587; and 504 Meadowmont Village Cir, Chapel Hill NC 27517.

13. Some insurance policies cover specific and identified risks, such as tornadoes, hurricanes, or fires. However, most property policies in the United States of America, including

those sold by Defendants, are “all-risk” policies. These types of policies cover all risks of loss, and only exclude narrow and specifically enumerated risks.

14. In the Special Property Coverage Form (the policy issued to Plaintiff), Defendants agreed to pay “for direct physical loss of or physical damage to Covered Property ... caused by or resulting from a Covered Cause of Loss.” A Covered Cause of Loss is defined as all “RISKS OF DIRECT PHYSICAL LOSS” except those that are expressly and specifically listed in the Limitations or Exclusions sections of the policy. *See* Exhibit A, Special Property Coverage Form, at A.3.

15. Losses due to the COVID-19 Pandemic and the Closure Orders (defined below) are a Covered Cause of Loss under Defendants’ policies with the Special Property Coverage Form because they constitute RISKS OF DIRECT PHYSICAL LOSS and are not otherwise excluded.

16. In the Special Property Coverage Form, apart from general coverage, as part of additional coverages, Defendants agreed to pay for Plaintiff’s actual loss of Business Income sustained due to the suspension of Plaintiff’s operations caused by direct physical loss of *or* physical damage to property. Specifically, the policy provides:

o. Business Income
(1) We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration". The suspension must be caused by direct physical loss of or physical damage to property at the "scheduled premises", including personal property in the open (or in a vehicle) within 1,000 feet of the "scheduled premises", caused by or resulting from a Covered Cause of Loss.

(4) Business Income means the:
(a) Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred if no direct physical loss or physical damage had occurred; and
(b) Continuing normal operating expenses incurred, including payroll.

See Exhibit A, Special Property Coverage Form, at A.5.o.

17. The Special Property Coverage Form also includes Civil Authority coverage, under which Defendants agreed to pay for the actual loss of Business Income sustained when access to the scheduled premises is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area. *See* Exhibit A, Special Property Coverage Form, at A.5.q (“This insurance is extended to apply to the actual loss of Business Income you sustain when access to your ‘scheduled premises’ is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your ‘scheduled premises’”).

18. The Special Property Coverage Form also includes Time Element Coverage when business operations are suspended because of “loss or damage to property caused by ‘fungi’, wet or dry rot, bacteria or virus[.]” *See* Exhibit A, Limited Fungi, Bacteria or Virus Coverage, Form SS 40 93 07 05, at B.1.f. (If a “suspension is necessary due to loss or damage to property caused by “fungi”, wet or dry rot, bacteria or virus, then our payment under the Time Element Coverage is limited to the amount of loss and expense sustained in a period of not more than 30 days[.]”)

19. As explained below, the COVID-19 Pandemic throughout the State of North Carolina and within the Research Triangle Park where Plaintiff’s locations are situated, and the related shut down orders issued by local, state, and federal authorities constitute a Covered Cause of Loss triggering the Business Income and Civil Authority provisions of the Special Property Coverage Form.

A. Covered Cause of Loss

1. COVID-19 Pandemic

20. On January 30, 2020, the World Health Organization (“WHO”) declared the COVID-19 outbreak a “Public Health Emergency of International Concern.”¹ Later, on March 11, 2020, the WHO declared COVID-19 a global health pandemic. On March 13, 2020, President Trump declared a national emergency in the face of a growing public health and economic crisis due to the global COVID-19 Pandemic.

21. In the State of North Carolina alone, there have been over 38,171 confirmed cases of COVID-19 as of June 10, 2020.²

22. In Orange and Wake Counties, in which Cali Fresh has business locations, there have been over 2,863 confirmed cases of COVID-19, and 81 deaths.³

23. According to published research, the virus that causes COVID-19 remains stable and transmittable for up to three hours in aerosols, up to four hours on copper, up to twenty-four hours on cardboard, and up to two to three days on plastic and stainless steel.⁴

2. The Closure Orders

24. COVID-19 has caused civil authorities nationwide, including civil authorities with jurisdiction over Plaintiff’s business, to issue orders requiring the suspension of businesses to slow down the spread of the virus.

25. Nearly every state in the country has or had an order restricting the operation of non-essential businesses and requiring social distancing. At the peak “the number of Americans under instructions to stay at home has persisted at an astonishing level...accounting for a

¹[https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)) (last visited June 11, 2020).

² <https://covid19.ncdhhs.gov/dashboard> (last visited June 11, 2020).

³*Id.*

⁴<https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days> (last visited June 11, 2020).

stunning 95 percent of the population.” See <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>.

26. On March 10, 2020, North Carolina Governor Roy Cooper issued Executive Order No. 116 declaring a state of emergency due to COVID-19⁵

27. On March 17, 2020, Governor Cooper issued Executive Order No. 118, entitled “Limiting Operations of Restaurants and Bars and Broadening Unemployment Insurance Benefits in Response to COVID-19”. The March 17 Order found that “COVID-19 has caused and will continue to cause substantial economic disruption in North Carolina, including disruptions to employees and employers”. Accordingly, the March 17 Order limited “the sale of food and beverages to carry-out, driver-through, and delivery only in order to abate the hazard.”⁶

28. On March 27, 2020, Governor Cooper issued Executive Order No. 121, entitled “Stay At Home Order and Strategic Directions for North Carolina in Response to Increasing COVID-19 Cases”.⁷ The March 27 Order found that “to mitigate community spread of COVID-19 and to reduce the burden on the state’s health care providers and facilities, it is necessary to limit unnecessary person-to-person contact in workplaces and communities”. Accordingly, the March 27 Order stated “[a]ll individuals currently in the State of North Carolina are ordered to stay at home...except as allowed in this Executive Order” and that “individuals may leave their residence only to perform any of the following Essential Activities...” The Essential Activities included activities related to health, safety, to obtain necessary supplies and services, outdoor activity, essential work, to take care of others, travel to and from a place of worship, to receive

⁵ <https://files.nc.gov/governor/documents/files/EO116-SOE-COVID-19.pdf> (last visited June 11, 2020).

⁶ <https://files.nc.gov/governor/documents/files/EO118.pdf> (last visited June 11, 2020).

⁷ <https://files.nc.gov/governor/documents/files/EO121-Stay-at-Home-Order-3.pdf> (last visited June 11, 2020).

goods and services provided by an Essential Business, to travel to a place of residence, or to volunteer. Businesses could operate but only if they maintained “Social Distancing Requirements” between employees and customers. Social Distancing Requirements required “maintaining at least six (6) feet distancing from other individuals”, “washing hands using soap and water for at least twenty (20) seconds as frequently as possible or the use of hand sanitizer”, “regularly cleaning high-touch surfaces” and “facilitating online or remote access by customers if possible.”⁸

29. The purpose of the Closure Orders⁹ was to slow the physical spread of COVID-19 to reduce illness and death. The Closure Orders specifically prohibited Plaintiff’s business from being open and specifically prohibited access to Plaintiff’s business.

3. Impact of the COVID-19 Pandemic and Closure Orders

30. Cali Fresh has suffered an actual loss of Business Income due to the suspension of operations. In the case of Cali Fresh, it had been forced to cease the vast majority of its operations.

31. The COVID-19 Pandemic and the Closure Orders (and similar civil authority orders) constitute a Covered Cause of Loss, as they constitute “RISKS OF DIRECT PHYSICAL LOSS.”

32. The suspension of Plaintiff’s operations was caused by “direct physical loss of *or* physical damage to property” in the form of both a loss of access to the insured properties for business purposes caused by COVID-19, and the Closure Orders or the actual damage in the form of the likely physical presence of COVID-19 on or within the properties.

⁸ *Id.*

⁹ The March 17 and March 27 Orders are collectively referred to herein as the “Closure Orders”.

33. The COVID-19 Pandemic and the Closure Orders separately implicated the Civil Authority coverage, because access to the scheduled premises was prohibited by order of a civil authority as the direct result of a “RISK[] OF DIRECT PHYSICAL LOSS” to property in the immediate area of the scheduled premises from the COVID-19 Pandemic.

34. Having suffered a necessary suspension of operations, Plaintiff submitted a claim to Defendants under the policy. Defendants denied Plaintiff’s claim. *See* Exhibit B.

35. Defendants based this denial primarily on:

- a. The purported lack of “any direct physical loss to any property at a scheduled premises...caused by or resulting from a Covered Cause of Loss”;
- b. A purported lack of “information to indicate that a civil authority issued an order as a direct result of a covered cause of loss to property in the immediate area of the scheduled premises”;
- c. A purported lack of “direct physical loss or damaged caused by or resulting from a Covered Cause of Loss [that] has occurred at a Dependent Property”;
- d. A “pollution” exclusion that excludes losses “caused by or resulting from the discharge, dispersal, seepage, migration, release or escape of “pollutants and contaminants” under which pollution and contaminants are defined as “solid, liquid, gaseous or thermal irritant or contaminant[s]....”;
- e. A “consequential losses” exclusion that excludes “loss of use or loss of market”;
- f. An “Acts or Decisions” exclusion that excludes “loss or damage caused by or resulting from the decision of a person, group, organization or governmental body”;
- g. A “‘fungi’, wet rot, dry rot, bacteria and virus” exclusion that excludes the “presence, growth, proliferation, spread or any activity of ‘fungi’, wet rot, dry rot, bacteria, or virus”.

As summarized by Defendants:

We have completed a review of your loss and have determined that since the coronavirus did not cause property damage at your place of business or in the immediate area, this business income loss is not covered. Even if the virus did cause damage, it is excluded from the policy, and the limited coverage available for losses caused by virus does not apply to the facts of your loss.

As we understand the facts, you are suffering from a loss of business income because you, or a business you depend on, have had to close or limit your business to help prevent the spread of COVID-19, the disease caused by the novel coronavirus.

36. None of these purported reasons are true bases for Defendants' denial of Plaintiff's claim.

37. First, as described above, in the context of COVID-19 and the Closure Orders, there was a suspension of operations caused by "physical loss or damage caused by or resulting from" a "Covered Cause of Loss" to property at a scheduled premises.

38. Second, it strains credibility for Defendants to assert that they were unaware of the Closure Orders, implicating the Civil Authority coverage. Defendants cannot provide Civil Authority Coverage only to take it completely away through an ambiguous "Acts or Decisions" exclusion.

39. Third, to the extent that the coronavirus was present at the scheduled premise, a virus *is not* a solid, liquid, gaseous or thermal irritant or contaminant under the policy and, therefore, does not implicate the pollution exclusion.

40. Finally, the policy does not exclude coverage for a national state of disaster like the current pandemic, which is more akin to a tornado than to proliferation of wet rot. The "virus" exclusion as written like the "wet rot" and "dry rot" exclusion (to which it is conjoined) would be understood by insureds to exclude "the presence, growth, proliferation, spread or any activity" of virus akin to rot -- not to exclude coverage in the context of a global pandemic.

41. But even if the "virus" exclusion is understood to implicate the current COVID-19 pandemic then the policy would provide separate coverage for a suspension of operations caused by a virus when a Time Element Coverage applies. As set forth in the policy:

f. The following applies only if a Time Element Coverage applies to the "scheduled premises" and only if the suspension of "operations" satisfies all the terms and conditions of the applicable Time Element Coverage.

(1) If the loss which resulted in "fungi", wet or dry rot, bacteria or virus does not in itself necessitate a suspension of "operations", but such suspension is necessary due to loss or damage to

property caused by "fungi", wet or dry rot, bacteria or virus, then our payment under the Time Element Coverage is limited to the amount of loss and expense sustained in a period of not more than 30 days unless another number of days is indicated in the Declarations. The days need not be consecutive. If a covered

42. Here there is a suspension of operations necessary due to loss or damage to property caused by a virus. And while "Time Element Coverage" is not defined in the policy, "Time Element" is a broad term used in the insurance industry to include both business interruption and civil authority coverage.¹⁰ Because the policy provides coverage for both Business Income and Civil Authority, there is limited Time Element Coverage.

43. The simple truth is that Defendants pre-determined their intent to deny coverage for any business interruption claim related to the COVID-19 Pandemic and related civil authority orders.

44. Boiled to its essence, the subject matter of this case is simple. Defendants have, on a widespread basis, refused to provide Business Income and Civil Authority coverage related

¹⁰ See, e.g., <https://www.irmi.com/term/insurance-definitions/time-element-loss> (last visited June 11, 2020) (defining "Time Element Loss" as "loss resulting from in ability to use a property. Examples are business interruption, extra expense, rental income, etc.")

to the COVID-19 Pandemic and the resultant executive orders by civil authorities that have required the suspension of practice *no matter* the language or scope of coverage in any particular insurance policy.

CLAIMS FOR RELIEF

CLAIM I: BREACH OF CONTRACT - Business Income Coverage

45. Plaintiff hereby realleges and incorporates by reference all allegations raised in the preceding paragraphs as if fully stated herein.

46. Plaintiff's insurance policy is a contract under which premiums were paid to Defendants in exchange for promises to pay Plaintiff's losses for claims covered by Defendants' all-risk policy.

47. The Special Property Coverage Form states that Defendants "will pay for the actual loss of Business Income you sustain due to the necessary suspension of your 'operations' during the 'period of restoration'... The suspension must be caused by direct physical loss of or physical damage to property at the 'scheduled premises'...caused by or resulting from a Covered Cause of Loss."

48. "Operations" is defined as "business activities occurring at the 'scheduled premises' and tenability of the 'scheduled premises.'"

49. Suspension is defined (in relevant part) as "The partial slowdown or complete cessation of your business activities[.]"

50. "Business Income" is defined as "Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred if no direct physical loss or physical damage had occurred" and "[c]ontinuing normal operating expenses incurred, including payroll."

51. The COVID-19 Pandemic, and/or orders of civil authority related to the COVID-19 Pandemic (like the Closure Orders) caused “direct physical loss of or damage to” the “Covered Property” under the Plaintiff’s policy by denying use of and damaging the Covered Properties, and by causing a necessary suspension and reduction of operations during a period of restoration.

52. Losses caused by the COVID-19 Pandemic, and/or orders of civil authority related to the COVID-19 Pandemic (like the Closure Orders) thus triggered the Business Income provision of Plaintiff’s insurance policy.

53. Plaintiff has complied with all applicable provisions of its policy.

54. Plaintiff made a timely claim under its property insurance policy issued by Defendants.

55. Defendants have breached their coverage obligations under Plaintiff’s policy by denying coverage for any Business Income losses incurred in connection with the COVID-19 and/or orders of civil authority related to COVID-19 (like the Closure Orders).

56. As a direct and proximate result of Defendants’ breaches, Plaintiff has sustained damages for which Defendants are liable, in an amount to be established at trial.

CLAIM II: BREACH OF CONTRACT – Civil Authority Coverage

57. Plaintiff hereby realleges and incorporates by reference all allegations raised in the preceding paragraphs as if fully stated herein.

58. Plaintiff’s policy is a contract under which premiums were paid to Defendants in exchange for promises to pay Plaintiff’s losses for claims covered by the policy.

59. Plaintiff's policy is extended to apply to losses "sustain[ed] when access to your 'scheduled premises' is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your 'scheduled premises.'"

60. The COVID-19 Pandemic caused civil authorities to issue the Closure Orders, which specifically prohibited access to Plaintiff's scheduled premises based on "RISKS OF DIRECT PHYSICAL LOSS" to property in the immediate area of the scheduled premise.

61. Losses caused by the COVID-19 Pandemic thus triggered the Civil Authority provision of Plaintiff's insurance policy.

62. Plaintiff has complied with all applicable provisions of its policy.

63. Plaintiff a made timely claim under its property insurance policy issued by Defendants.

64. Defendants have breached their coverage obligations under Plaintiff's policy by denying coverage for any Civil Authority losses incurred in connection with the COVID-19 Pandemic and/or orders of civil authority related to the COVID-19 Pandemic (like the Closure Orders).

65. As a direct and proximate result of Defendants' breaches, Plaintiff has sustained damages for which Defendants are liable, in an amount to be established at trial.

CLAIM III: DECLARATORY JUDGMENT – Business Income Coverage

66. Plaintiff hereby realleges and incorporates by reference all allegations raised in the preceding paragraphs as if fully stated herein.

67. Plaintiff's policy is a contract under which premiums were paid to Defendants in exchange for promises to pay losses for claims covered by it insurance policy.

68. Plaintiff has complied with all applicable provisions of the policy.

69. Defendants have uniformly denied claims related COVID-19 and/or orders of civil authority related to COVID-19 (like the Closures Orders) without individual bases or investigations, such that the Court can render declaratory judgment.

70. An actual case or controversy exists regarding Plaintiff's rights and Defendants' obligations under the policy to provide reimbursements for the full amount of losses incurred by Plaintiff in connection with the COVID-19 and/or orders of civil authority related to COVID-19 (like the Closure Orders).

71. Pursuant to 28 U.S.C. § 2201, Plaintiff seeks a declaratory judgment from this Court declaring the following:

- a. Plaintiff's Business Income losses incurred in connection with necessary interruption of its business due to the presence of the COVID-19 Pandemic and/or orders of civil authority related to the COVID-19 Pandemic (like the Closure Orders) are insured losses under its policy; and
- b. Defendants are obligated to pay Plaintiff for the amount of the Business Income losses incurred in connection with the period of restoration and the necessary interruption of its business at its insured properties stemming from the presence of COVID-19 and/or orders of civil authority related to COVID-19 (like the Closure Orders).

72. Pursuant to 28 U.S.C. § 2201, Plaintiff seeks a declaratory judgment from this Court declaring the following:

- a. Plaintiff's Business Income losses caused by an order of a civil authority that specifically prohibited access to the premises covered by its property insurance policy as the direct result of the risks caused by COVID-19 to property in the immediate area of the insured covered properties are insured losses under its policy; and
- b. Defendants are obligated to pay Plaintiff for the amount of the Business Income losses incurred and to be incurred caused by an order of a civil authority that specifically prohibited access to the premises covered by its property insurance policy as the direct result of the risks caused by COVID-19 to property in the immediate area of the insured covered properties.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment against Defendants as follows:

- i. Entering judgment on Counts I, and II in favor of Plaintiff, and awarding damages for breach of contract in an amount to be determined at trial;
- ii. Entering declaratory judgments on Count III in favor of Plaintiff;
- iii. Ordering Defendants to pay both pre- and post-judgment interest on any amounts awarded;
- iv. Ordering Defendants to pay reasonable attorneys' fees and costs of suit; and
- v. Ordering such other and further relief as may be just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all claims so triable.

Respectfully submitted on this 11th day of June, 2020.

/s/ Scott C. Harris

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