

1 Reza Sina (SBN 250428)
2 **SINA LAW GROUP**
3 3727 W. Magnolia Blvd, #277
4 Burbank, California 91505
5 Telephone: (310) 957-2057
6 reza@sinalawgroup.com

Attorneys for Plaintiff,
Sky Flowers, Inc. DBA Sky Events and Production

7 **UNITED STATES DISTRICT COURT**
8 **CENTRAL DISTRICT OF CALIFORNIA**
9 **(Western)**

10
11 SKY FLOWERS, INC. dba SKY
12 EVENTS AND PRODUCTION,
California Corporation,
13 Plaintiff,
14 vs.
15 HISCOX INSURANCE COMPANY,
16 INC., a Illinois Corporation; and Does
1-10, inclusive,
17 Defendants.

CASE NO.
COMPLAINT FOR:
1. BREACH OF WRITTEN CONTRACT; AND
2. BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING
JURY TRIAL DEMANDED

18
19 Plaintiff, based on information and belief, states as follows for its complaint:

20 **NATURE OF THE ACTION**

21 1. Plaintiff Sky Flowers, Inc. dba Sky Events and Production (“Plaintiff”)
22 brings this breach of contract and bad faith action against Defendant Hiscox
23 Insurance Company (“Hiscox”) for its failure to pay Plaintiff amounts due for a
24 covered loss under an “all risk” general liability insurance policy. Plaintiff complied
25 with governmental orders mandating that Plaintiff close its business to mitigate
26 against the insurmountable damages (to both health and property) caused by
27 COVID-19.
28

1 2. Specifically, on March 11, 2020 World Health Organization declared
2 the COVID-19 outbreak a worldwide pandemic: “WHO has been assessing this
3 outbreak around the clock and we are deeply concerned both by the alarming levels
4 of spread and severity, and by the alarming levels of inaction. We have therefore
5 made the assessment that COVID-19 can be characterized as a pandemic.”¹

6 3. On March 16, 2020, the Centers for Disease Control and Prevention,
7 and members of the national Coronavirus Task Force issued to the American public
8 guidance, styled as “30 Days to Slow the Spread” for stopping the spread of COVID-
9 19. This guidance advised individuals to adopt far-reaching social distancing
10 measures, such as working from home, avoiding shopping trips and gatherings of
11 more than 10 people, and staying away from bars, restaurants, and food courts.”²

12 4. The result of these far-reaching restrictions and prohibitions has been
13 catastrophic for most non-essential businesses that have been forced to close,
14 furlough employees, and endure a sudden shutdown of cash flow that threatens their
15 survival.

16 5. Most businesses insure against such catastrophic events like the current
17 unforeseen COVID-19 pandemic through all-risk commercial property insurance
18 policies. These policies promise to indemnify the policyholder for actual business
19 losses incurred when business operations are involuntarily suspended, interrupted,
20 curtailed, when access to the premises is prohibited because of direct physical loss or
21 damage to the property, or by a civil authority order that restricts or prohibits access
22 to the property. This coverage is commonly known as “business interruption
23 coverage” and is standard in most all-risk commercial property insurance policies.

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¹ See <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-COVID-19-11-march-2020>.

27
28
² See https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus_guidance_8.5x11_315PM.pdf.

1 reference in this complaint to "defendants," "Defendant," or a specifically named
2 defendant refers also to all Defendants sued under fictitious names.

3 11. Plaintiff is informed and believes and thereon alleges that each of the
4 defendants designated herein as DOE took part in and participated with Defendants
5 in all matters referred to herein and was in some manner responsible for the injuries
6 and losses suffered by Plaintiff.

7 12. Plaintiff is informed and believes and thereon alleges that at all times
8 herein mentioned each of the Defendants was the agent, servant and/or employee or
9 occupied other relationships with each of the other named Defendants and at all
10 times herein mentioned acted within the course and scope of said agency and/or
11 employment and/or other relationship and each other Defendant has ratified,
12 consented to, and approved the acts of his agents, employees, and representatives,
13 and that each actively participated in, aided and abetted, or assisted one another in
14 the commission of the wrongdoing alleged in this Complaint.

15 **JURISDICTION AND VENUE**

16 13. This action is filed pursuant 28 U.S.C. § 1332(a)(1), as there is complete
17 diversity of citizenship between Plaintiff and Defendants. The matter in controversy
18 exceeds, exclusive of interest and costs, the sum of Seventy-Five Thousand Dollars
19 (\$75,000).

20 14. Venue is proper in this Judicial District under 28 U.S.C. § 1391(b)(2)
21 because a substantial part of the events or omissions giving rise to Plaintiff's claims
22 occurred in this Judicial District, and/or a substantial part of property that is the
23 subject of the action is situated here.

24 **FACTS COMMON TO ALL CAUSES OF ACTION**

25 ***Plaintiff Purchases An "All Risk" Policy***

26 15. Plaintiff is the business of high-end flower arrangements and event
27 planning. Plaintiff has many accounts with hotels and the hospitality business for the
28 delivery of its flowers.

1 16. Prior to March 19, 2020, Plaintiff purchased a policy of insurance from
2 Hiscox. Attached as **Exhibit A** is a true and correct copy of the policy (the
3 “Policy”).

4 17. The Policy is an all-risk policy, insofar as it provides that covered
5 causes of loss under the Policy means direct physical loss or damage unless the loss
6 is specifically excluded or limited in the policy.

7 18. The Policy is currently in full effect, providing property, business
8 personal property, business income and extra expense, and additional coverages
9 between the periods January 24, 2020 to January 24, 2021.

10 19. Plaintiff dependably paid policy premiums to Hiscox, specifically to
11 provide additional coverages for losses due to:

12 **A. Business Income.** We will pay for the actual loss of Business
13 Income you sustain due to the necessary suspension of your "operations" during the
14 "period of restoration". The suspension must be caused by direct physical loss of or
15 damage to property at the described premises. The loss or damage must be caused by
16 or result from a Covered Cause of Loss. (Ex. A, Policy at pp. 5-6.)

17 **B. Extra Expense.** We will pay necessary Extra Expense you incur
18 during the "period of restoration" that you would not have incurred if there had been
19 no direct physical loss or damage to property at the described premises. (Ex. A,
20 Policy at pp. 6-7.)

21 **C. Civil Authority.** When a Covered Cause of Loss causes damage
22 to property other than property at the described premises, we will pay for the actual
23 loss of Business Income you sustain and necessary Extra Expense caused by action
24 of civil authority that prohibits access to the described premises. (Ex. A, Policy at
25 pp. 7-8.)

26 **D. Business Income From Dependent Property.** We will pay for
27 the actual loss of Business Income you sustain due to physical loss or damage at the
28 premises of a dependent property caused by or resulting from any Covered Cause of

1 Loss. “Dependent property means property owned by others whom you depend on
2 to: . . . (b) Accept your products or services.” (Ex. A, Policy at pp. 9-10.)

3 20. Under the Policy, insurance is extended to apply to the actual loss of
4 business income sustained and the actual, necessary and reasonable extra expenses
5 incurred when access to the scheduled premises is specifically prohibited by order of
6 civil authority as the direct result of a covered cause of loss to property.

7 21. Based on information and belief, Hiscox accepted the policy premiums
8 with no intention of providing any coverage under the Business Income with Extra
9 Expense part of the Policy or the Civil Authority extension due to a loss and
10 shutdown from a global pandemic.

11 22. In sum, the policy required Hiscox to indemnify Plaintiff in the event of
12 a covered loss, and required it to act in accordance with Insurance Code § 790.03(h)
13 and § 2071, the 1993 Department of Insurance Regulations and the implied covenant
14 of good faith and fair dealing.

15 ***COVID-19 and the Closure Orders***

16 23. COVID-19 is an infectious disease caused by a recently discovered
17 novel coronavirus known as SARS-CoV-2 (“Coronavirus” or “COVID-19”). The
18 first instances of the disease spreading to humans were diagnosed in or around
19 December 2019. Those personally affected by the virus recognize the coronavirus as
20 a global pandemic causing real physical loss and damage.

21 24. The global pandemic is exacerbated by the fact that the deadly virus
22 physically infects and stays on surfaces of objects or materials, “fomites,” for up to
23 twenty-eight days according to scientific research.

24 25. China, Italy, France, and Spain have implemented the cleaning and
25 fumigating of public areas prior to allowing them to re-open publicly due to the
26 intrusion of microbials.

1 Hiscox to deny the reality that COVID-19 causes physical loss and damage would
2 constitute a false and potentially fraudulent misrepresentation that could endanger
3 policyholders and the public.

4
5 32. The Order was given in part, because COVID-19 is physically causing
6 property loss or damage due to its tendency to attach to surfaces for prolonged
7 periods of time. Cities across the country, including Los Angeles, have also provided
8 that the closures are in part due to the COVID-19's propensity to attach to surfaces,
9 which is a dangerous property condition that causes property loss or damage.

10 33. For the purposes of determining physical loss or damage of property,
11 California and neighboring courts have found that coverage is triggered when there
12 is an alteration to the property, even if invisible to the naked eye or not structural,
13 that prevents the ordinary intended use of the property. *See Oregon Shakespeare*
14 *Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-cv-01932-CL, 2016 WL 3267247, at
15 *5-6 (D. Or. June 7, 2016). *See also MRI Healthcare Ctr. of Glendale, Inc. v. State*
16 *Farm Gen. Ins. Co.*, 187 Cal. App. 4th 76 (2010).

17 34. For example, bacterial contamination via E-Coli to a water well located
18 on a restaurant's property has been held to constitute physical loss or damage to
19 property. *See e.g. Cooper v. Travelers Indem. Co. of Illinois*, 2002 WL 32775680
20 (N.D. Cal. 2002).

21 35. The word 'physical' has been defined by California courts as 'having
22 material existence' or 'perceptible through the sense and subject to the laws of
23 nature.' *Ward General Ins. Services, Inc. v. Employers Fire Ins. Co.*, 114
24 Cal.App.4th 548 (2003).

25 ***There is No Exclusion for Pandemic and***

26 ***The Losses Are The Efficient Proximate Cause of the Closure Orders***

27 36. Insurance policies are not one size fits all. Some policies have clear
28 exclusions for viral 'pandemics,' while others do not exclude pandemics and only

1 include exclusionary language for ‘virus.’ On the other end, some policies do not
2 contain any exclusion for virus or pandemic and even extend coverage for losses
3 caused by a virus and/or pandemic.

4 37. Although the Policy contains a virus exclusion, it does not contain a
5 pandemic exclusion. Insurance companies could have included a pandemic
6 exclusion but specifically failed to do so.

7 38. In any event, the virus exclusion does not exclude Plaintiff’s losses
8 because the efficient proximate cause of its losses was precautionary measures taken
9 by the State to prevent the spread of COVID-19 in the future, not because
10 coronavirus was found on or around Plaintiff’s insured properties.

11 39. In order for an exclusionary clause to effectively exclude coverage, it
12 must be conspicuous, plain, and clear. *See e.g. MacKinnon v. Truck Ins. Exchange*,
13 73 P.3d 1205, 1213 (2003). This rule applies with particular force when the coverage
14 portion of an insurance policy would lead an insured to reasonably expect coverage
15 for the claim purportedly excluded. *Id.*

16 40. The insurer bears the burden of establishing the claim comes within an
17 exclusion. *Id.* To prevail, the insurer must establish its interpretation of the policy is
18 the only reasonable one. *Id.* at 1218. Even if the insurer’s interpretation is
19 reasonable, the court must interpret the policy in the insured’s favor if any other
20 reasonable interpretation would permit coverage for the claim. *Id.* Any ambiguous
21 terms within the Policy are resolved in favor of the insureds, consistent with the
22 insureds’ reasonable expectations. *Safeco Ins. Co. v. Roberts.*, 28 P.3d 889 (2001).

23 41. Hiscox did not specifically exclude losses from a global viral pandemic
24 and no reasonable insured would reasonably expect that any exclusion, let alone a
25 “virus” exclusion, in the Policy would preclude coverage for same.

26 42. The insurance industry is well aware of and utilizes both “virus” and
27 “pandemic” exclusions. For example, the Liberty Mutual Fire Insurance Company
28 policy in question in *Meyer Natural Foods, LLC v. Liberty Mutual Fire Insurance*

1 *Company*, provided an exclusion for “the actual or suspected presence or threat of
2 any virus, organism or like substance that is capable of inducing disease, illness,
3 physical distress or death, whether infectious or otherwise, ***including but not limited***
4 ***to any epidemic, pandemic, influenza, plague, SARS, or Avian Flu.***” See 218 F.
5 Supp. 3d 1034 (D. Neb. 2016) (emphasis added).

6 43. At the time Hiscox produced the Policy, Hiscox knew that they could
7 have clearly and unambiguously included exclusions for pandemics and chose not to.

8 44. Plaintiff, as an insured in the sale of flowers and event planning, did not
9 reasonably expect that any exclusion in its Policy would prevent coverage from
10 physical loss or damage caused by a global pandemic that results in suspension of
11 their entire businesses and threatens its very existence.

12 ***Wholesale Failure to Investigate***

13 45. As a result of the civil authority shutdown, Plaintiff had to completely
14 suspend and close their business operations. As a further direct and proximate result
15 of the Order, Plaintiff has been forced to furlough and/or lay off multiple employees
16 due to a prohibition of access to the its property.

17 46. Plaintiff gave immediate notice of claim.

18 47. In less than 24 hours, Hiscox took the position that none of the claim
19 was covered, and did so over the phone without any investigation or inspection. A
20 “denial” email was sent to Plaintiff denying all coverage.

21 48. By choosing to forego an investigation, Hiscox has waived any right to
22 inspect those premises, deny coverage for any reason related to conditions at those
23 locations, or raise any defense related to conditions at those locations or facts
24 specific to Plaintiff.

25 49. The sheer speed with which Hiscox denied Plaintiff’s claims indicates
26 that Hiscox could not have engaged in a good faith or reasonable investigation of the
27 claims which included assessment of facts or issues relevant to Plaintiff.

SECOND CAUSE OF ACTION
BREACH OF IMPLIED COVENANT OF
GOOD FAITH AND FAIR DEALING

(Against Hiscox and Does 1 through 10, inclusive)

58. The preceding paragraphs of this Complaint are realleged and incorporated by reference.

59. Included in the insurance contract as a matter of or by operation of law were is the implied covenant of good faith and fair dealing and applicable Regulations and Statutes of the California Insurance Code (Section 2695, *et seq.*)

60. Defendants breached their duty of good faith and fair dealing owed to Plaintiff in the following respects:

a. Unreasonably acting or failing to act in a manner that deprives Plaintiff of the benefits of the Policy;

b. Unreasonably engaging in a pattern and practice of acting or failing to act in a manner that deprives their insureds of the benefits of policies they issue;

c. Unreasonably failing to conduct a prompt, fair, balanced and thorough investigation of all of the bases of Plaintiff's claim;

d. Unreasonably engaging in a pattern and practice of failing to conduct a prompt, fair, balanced and thorough investigation of all of the bases of claims made under policies they issue;

e. Unreasonably failing to diligently search for and consider evidence that supports coverage of Plaintiff's claim;

f. Unreasonably engaging in a pattern and practice of failing of failing to diligently search for and consider evidence that supports coverage of claims;

g. Unreasonably failing to conduct an investigation to determine the efficient proximate cause (predominant cause) of Plaintiff's loss;

1 h. Unreasonably engaging in a pattern and practice of failing to
2 conduct an investigation to determine the efficient proximate cause (predominant
3 cause) on claims made by insureds;

4 i. Unreasonably failing to give at least as much consideration to the
5 interests of Plaintiff as they give to their own interests;

6 j. Unreasonably engaging in a pattern and practice of failing to give
7 at least as much consideration to the interests of their insureds as they give to their
8 own interests;

9 k. Unreasonably placing their own financial interests above the
10 interests of Plaintiff;

11 l. Unreasonably engaging in a pattern and practice of placing their
12 own financial interests above the interests of their insureds;

13 m. Unreasonably failing to comply with the Regulations, including §
14 2695.7(b)(1);

15 n. Unreasonably failing to apply the Policy's definitions and terms
16 to determine whether Plaintiff's claim was covered; and

17 o. Unreasonably compelling Plaintiff to institute this action to
18 obtain benefits due under the Policy.

19 61. As a proximate result of the aforementioned breaches and wrongful
20 conduct of Defendants, Plaintiff has suffered injury, damage and harm of both an
21 economic and non-economic nature, including loss of insurance benefits, incidental
22 and out-of-pocket expenses, *Brandt* fees, loss of use and interest on withheld funds,
23 emotional distress, worry and anxiety and other general damages. Plaintiff's
24 damages are continuing and ongoing.

25 62. Defendants acted with malice, oppression, and fraud by engaging in,
26 *inter alia*, the following conduct:

1 a. Defendants purposefully and despicably devised a plan to mislead
2 Plaintiff as to the nature and extent of the loss provided for under the policy in order
3 to dissuade Plaintiff from pursuing his claim;

4 b. Defendants knew that Plaintiff's claim was covered but attempted
5 to conceal that fact from Plaintiff for the purposes of avoiding its obligations under
6 the policy to fully and fairly investigate and pay the claim;

7 c. Defendants at all times pursued its own interests to the detriment
8 of the interests of Plaintiff; and

9 d. Defendants engaged in the wrongful acts and omissions described
10 above.

11 63. Defendants' conduct described above was intended to cause injury or
12 was despicable conduct carried on by its corporate officers, directors or managing
13 agents with a willful and conscious disregard of the rights of Plaintiff, subjecting
14 Plaintiff to cruel and unjust hardship in conscious disregard of Plaintiff's rights. And
15 such conduct was an intentional misrepresentation, deceit, or concealment of a
16 material fact known to Defendants with the intent to deprive Plaintiff's of property,
17 legal rights, or to otherwise cause injury, such as to constitute malice, oppression, or
18 fraud under California Civil Procedure Code § 3294, thereby entitling Plaintiff to
19 punitive damages in an amount appropriate to punish or set an example of
20 Defendants.

21 **PRAYER FOR RELIEF**

22 WHEREFORE, Plaintiff requests that the Court enter an order or judgment
23 against the Defendants as follows:

- 24 1. Award general and special damages, according to proof;
25 2. Award of punitive damages;
26 3. Award of attorneys' fees and costs; and
27 4. Such other and further relief as the Court may deem just and proper.
28

