

CAUSE NO. 141-321369-20

CERTAIN UNDERWRITERS)	IN THE DISTRICT COURT OF
AT LLOYD’S, LONDON,)	
)	
Plaintiff,)	
)	
v.)	TARRANT COUNTY, TEXAS
)	
MDS WINGS, LP,)	
)	
Defendant.)	___ JUDICIAL DISTRICT

PLAINTIFF’S ORIGINAL PETITION

Plaintiff Certain Underwriters at Lloyd’s, London, a foreign unincorporated association (“Underwriters”), by counsel, complaining of MDS Wings, LP. (“MDS Wings”) respectfully would show as follows:

I.
DISCOVERY TRACK

1. Pursuant to Rule 190 of the Texas Rules of Civil Procedure, this case should proceed under Discovery Control Plan Level 3.

II.
NATURE OF THE ACTION

2. This is an insurance coverage dispute concerning the parties’ rights and obligations under Trade Name Restoration Loss of Business Income and Incident Response Insurance for Food Borne Illness Policy No. TNR 19 8546 that was issued by Underwriters to MDS Wings for the November 15, 2019 to November 15, 2020 **Period of Insurance** (the “Policy”).

3. MDS Wings operates 25 Plucker’s Wing Bar locations throughout Texas, including three locations in Tarrant County. Each of these locations are **Covered Locations** under the Policy for which MDS Wings seeks coverage.

4. The Policy, subject to its terms and conditions, generally provides first-party insurance coverage to restaurants for loss of business income at **Covered Locations** that result directly and solely from an **Incident**, which is defined to mean a **Restaurant Event, Supplier Event, or Extortion Threat**.

5. MDS Wings also elected to purchase a Pandemic Event Endorsement providing coverage for business interruption losses directly and solely caused by a **Pandemic Event**.

6. Following certain stay-at-home and social distancing orders issued by government entities in the wake of the COVID-19 pandemic that precluded in-person dining at MDS Wings' **Covered Locations**, MDS Wings submitted a claim to Underwriters under the Policy for alleged business interruption losses

7. On May 20, 2020, Underwriters agreed to provide coverage for MDS Wings' losses under the Pandemic Event Endorsement up to the \$1 million per **Period of Insurance** limit of indemnity.

8. MDS Wings thereafter submitted a statement of loss to Underwriters indicating that it had experienced more than \$1 million in **Actual Net Loss**. Accordingly, Underwriters promptly paid MDS Wings the entire \$1 million per **Period of Insurance** limit of indemnity under the Pandemic Event Endorsement.

9. Unfortunately, Underwriters' prompt payment of the full \$1 million per **Period of Insurance** limit of indemnity under the Pandemic Event Endorsement has not resolved this matter. Instead, MDS Wings has taken the position that it has also experienced a **Restaurant Event** and is entitled to the remaining \$6 million of the Policy's **Total Aggregate Limit of Indemnity**.

10. For there to be a **Restaurant Event**, MDS Wings must show that it incurred **Actual Net Loss** resulting directly and solely from either 1) "an occurrence of" or 2) a "**Public**

Announcement of an actual, suspected or alleged” **Food Borne Illness, Accidental Contamination, or Malicious Contamination.** MDS Wings argues that it has experienced a **Restaurant Event** due to purported **Public Announcements of Accidental Contamination.**

11. **Public Announcement** means either an announcement by a **Public Health Authority** or an “announcement, publication or broadcast in any media (including but not limited to radio, television, internet, social media, newspapers and magazines).”

12. **Accidental Contamination** means “an error in the production or preparation of the **Insured’s Products**, or of ingredients used in the production or preparation of the **Insured’s Products** which if consumed or used as intended, could lead to or has led to bodily injury, sickness, disease or death of any person(s) which has or would physically manifest itself by way of clear, obvious, or visible symptoms within 365 days of use or consumption.”

13. Specifically, MDS Wings has asserted that it suffered more than \$6 million in **Actual Net Loss** as a result of the following two tweets:

- “@Pluckers was up man y’all still safe @CNN saying wings got the flu?” - @02CarlosGarcia; and
- “@Pluckers two of your employees from a Houston location test positive for COVID-19 and you guys are still open??? Houston ppl please don't eat at any pluckers they are refusing to close to sanitize properly. Be safe out there! I’m disgusted to even add y’all to my resume [emojis omitted]” - @jayav.

14. The foregoing tweets are not **Public Announcements of Accidental Contamination** because MDS Wings has not identified any media announcements or announcement by a **Public Health Authority** that assert actual, suspected or alleged errors in MDS Wings’ production or preparation of food or drink products that could lead to injury if consumed or used as intended at any specific **Covered Location.**

15. Further, MDS Wings has not demonstrated that its losses at any one **Covered Location** resulted “directly and solely” from such **Public Announcement**, nor has MDS Wings provided any information to Underwriters showing that MDS can meet this burden.

16. Underwriters now seek a declaration confirming the rights and obligations of the parties under the Policy – namely that Underwriters’ have no liability under the Policy beyond the \$1 million already paid to MDS Wings under the Pandemic Event Endorsement.

III.
PARTIES

17. Underwriters are unincorporated associations that, through the Lloyd’s of London insurance market located in the United Kingdom, subscribed to and issued the Policy to MDS Wings.

18. MDS Wings is limited partnership organized under the laws of Texas, headquartered at 811 Barton Springs Road, Suite 600, Austin, Texas. MDS Wings may be served through its registered agent: Mark S Greenberg, 811 Barton Springs, Suite 520, Austin, TX 78704.

IV.
JURISDICTION AND VENUE

19. This Court has personal jurisdiction over MDS Wings because it continuously and systematically transacts and continues to transact substantial business in Texas.

20. Venue is proper in Tarrant County, because, pursuant to Tex. Civ. Prac. & Rem. Code § 15.002, Tarrant County is the county in which a substantial part of the events and omissions giving rise to Underwriters’ claims occurred. Specifically, MDS Wings operates three locations in Tarrant County for which it seeks coverage under the Policy.

21. This Court has subject matter jurisdiction in this matter pursuant to Tex. Civ. Prac. & Rem. Code § 37.001, *et seq.* because Underwriters seek a declaratory judgment.

V.
BACKGROUND

A. The Policy

22. Certain Underwriters issued “Trade Name Restoration, Loss of Business Income and Incident Response Insurance for Food Borne Illness” insurance policy number TNR 19 8546, to MDS Wings for the **Period of Insurance** of November 15, 2019 to November 15, 2020 (the “Policy”). A true and correct copy of the Policy is attached hereto as Exhibit A.

23. Pursuant to the Policy Declarations, coverage is potentially available under five discrete coverage grants: **Restaurant Events, Supplier Events, Workplace Violence Events, Incident Response Expenses and Extortion Payments.**

24. The limit of indemnity for **Restaurant Events** is \$7 million, subject to a \$7 million **Total Policy Aggregate Limit of Indemnity** and a \$10,000 Each and Every **Incident** Deductible with respect to **Restaurant Events** and **Supplier Events.**

25. The Policy’s Insuring Agreement states as follows:

In consideration of the foregoing and payment of the Premium, Underwriters agree, subject to all the terms, conditions, limitations and exclusions set forth herein, to indemnify the **Insured** for the following, provided that such result directly and solely from an **Incident** that occurs within the **Period of Insurance** and is reported to Underwriters in accordance with Section 7.1 of this Policy, which in no event shall be later than ninety (90) days following the termination of the **Period of Insurance**: ... **Actual Net Loss** in excess of any **Deductible** sustained by the **Insured** at each **Affected Covered Location** during a **Period of Restoration**...

26. Thus, under the Policy, Underwriters agree to indemnify MDS Wings for **Actual Net Loss** resulting directly and solely from a specified “**Incident.**” The Policy defines “**Incident**” to mean:

...a **Restaurant Event, Supplier Event, or Extortion Threat.** All **Restaurant Events, Supplier Events, or Extortion Threats** arising out of the same common cause shall be considered one **Incident**, regardless of the number of involved persons, **Public Announcements**, or **Covered Locations**, and the **Incident** shall be deemed to have occurred at the time of the earliest occurrence of the **Restaurant Event, Supplier Event, Public Announcement** thereof, or **Extortion Threat.** In the event either a **Restaurant Event** or **Extortion Threat** or both is considered one **Incident** with a **Supplier Event** under this provision, the combined **Incident** shall be considered solely as a **Supplier Event.**

27. **Incident** means, in relevant part, “a **Restaurant Event, Supplier Event, or Extortion Threat.**”

28. As relevant here, the Policy defines “**Restaurant Event**” to mean “an occurrence of, or **Public Announcement** of an actual, suspected or alleged, **Food Borne Illness, Accidental Contamination** or **Malicious Contamination** that resulted from operations at a **Covered Location** or at a **Trade Name Location** and did not result from, directly or indirectly, in whole or in part, a **Supplier Event.**”

29. The Policy defines “**Public Announcement**” to mean “an announcement, publication, or broadcast in any media (including but not limited to radio, television, internet, social media, newspapers and magazines) or a **Public Health Authority.**”

30. The Policy defines “**Public Health Authority**” to mean “any governmental authority having jurisdiction over the Insured’s operations relating to health and hygiene standards for the protection of the public.”

31. The Policy defines “**Food Borne Illness**” to mean “the occurrence of two or more people experiencing similar physical symptoms of bodily injury, sickness, disease or death, resulting from the ingestion of the **Insured’s Products.**”

32. The Policy defines “**Accidental Contamination**” to mean “an error in the production or preparation of the **Insured’s Products**, or of ingredients used in the production or preparation of the **Insured’s Products** which if consumed or used as intended, could lead to or has led to bodily injury, sickness, disease or death of any person(s) which has or would physically manifest itself by way of clear, obvious or visible symptoms within 365 days of use or consumption.”

33. The Policy defines “**Malicious Contamination**” to mean “an intentional, malicious and illegal alteration or adulteration of the **Insured’s Products**, or of ingredients used in the production or preparation of the **Insured’s Products**, that is likely to give the **Insured** and/or the public reasonable cause to believe that such products have been rendered unfit or dangerous for the use for which they were intended by the **Insured.**”

34. The Policy defines “**Covered Location**” or “**Covered Locations**” to mean “the place or places of business of the **Insured** described on the **Covered Location** Endorsement hereto as well as new places of business, operating under the same Trade Name(s) as listed in Section A of the Declarations, opened or acquired by the **Insured** during **the Period of Insurance.**” Twenty-five (25) such **Covered Locations** are identified in the Policy.

35. The Policy defines “**Insured Products**” to mean “those food and drink products furnished at any **Covered Location** or **Trade Name Location** in the regular course of business at such location.”

36. Under Clause 3.1 of the Policy, “Underwriters shall be under no obligation to pay any **Actual Net Loss**...until the **Insured** has submitted a complete **Loss Submission** and Underwriters have had a reasonable opportunity to investigate the cause(s) of any **Incident**, allowing necessary time to receive and review any report(s) from any **Public Health Authority.**”

37. Under Clause 6.1, the Policy excludes coverage for loss that is “directly or indirectly caused by, arising out of, contributed to by, in consequence of, or resulting from ...any cause or reason other than as a direct and sole result of an **Incident.**”

38. MDS Wings elected to expand the scope of coverage available under the Policy by purchasing a Pandemic Event Endorsement.

39. The Pandemic Event Endorsement amends the definition of **Incident** to include a **Pandemic Event.**

40. Section 4.59 of the Pandemic Event Endorsement defines “**Pandemic Event**” to mean either “(a) the actual presence of an **Infected Person** within a **Covered Location**; or, (b) the announcement by a **Public Health Authority** that a specific **Covered Location** is being closed as a result of an **Epidemic** declared by the CDC or WHO.”

B. MDS Wings’ Claim for Coverage and Underwriters’ Payment Under the Pandemic Event Endorsement

41. On March 18, 2020, MDS Wings submitted a claim to Underwriters under the Policy for its alleged business interruption losses caused by certain stay-at-home and social

distancing orders issued by various government entities and health organizations in the wake of the COVID-19 pandemic.

42. On April 21, 2020, Underwriters issued a letter to MDS Wings explaining that it appeared that coverage was not available under the Policy's **Restaurant Event** coverage or the Policy's Pandemic Event Endorsement, but that Underwriters were continuing their investigation.

43. On May 20, 2020, Underwriters issued a letter to MDS Wings agreeing to adjust MDS Wings' claim under the Policy's Pandemic Event Endorsement. Underwriters requested that MDS Wings provide additional information so that Underwriters could complete the adjustment of the claim. Underwriters' May 20, 2020 letter also confirmed that no coverage is available under the Policy's **Restaurant Event** coverage.

44. On August 18, 2020, MDS Wings provided information that showed that MDS Wings has incurred **Actual Net Loss** at its **Covered Location** in excess of the Pandemic Event Endorsement's \$1 million per **Period of Insurance** limit of indemnity.

45. Accordingly, after completing the loss adjustment, Underwriters promptly paid MDS Wings \$1 million on August 28, 2020. Underwriters' \$1 million payment constitutes the entire per **Period of Insurance** Limit of Indemnity available pursuant to Section 2.11 of the Pandemic Event Endorsement.

46. MDS Wings, however, does not consider this claim to be resolved. Rather, MDS Wings now asserts that it is also entitled to the remaining \$6 million of the Policy's **Total Aggregate Limit of Indemnity** because it purportedly experienced a **Restaurant Event**.

47. MDS Wings does not contend that there has been an occurrence of **Accidental Contamination** at a **Covered Location**.

48. Rather, MDS Wings argues that it has suffered losses due to purported **Public Announcements** of suspected **Accidental Contamination**.

49. Specifically, MDS Wings has asserted that it suffered more than \$6 million in **Actual Net Loss** as a result of the following tweets:

- “@Pluckers was up man y’all still safe @CNN saying wings got the flu?” - @02CarlosGarcia; and
- “@Pluckers two of your employees from a Houston location test positive for COVID-19 and you guys are still open??? Houston ppl please don't eat at any pluckers they are refusing to close to sanitize properly. Be safe out there! I’m disgusted to even add y’all to my resume [emojis omitted]” - @jayav

50. Despite having multiple opportunities to do so, MDS Wings has never provided any other examples of purported **Public Announcements** of suspected **Accidental Contamination** to Underwriters beyond these two tweets.

51. The foregoing tweets do not constitute **Public Announcements** of **Accidental Contamination** because neither tweet alleges an actual, suspected, or alleged “error in the production or preparation of the **Insured’s Products**, or of ingredients used in the production or preparation of the **Insured’s Products**”

52. Further, MDS Wings has not and cannot show that it experienced **Actual Net Loss** directly and solely resulting from those tweets.

VI. **CAUSE OF ACTION: DECLARATORY JUDGMENT**

53. Underwriters reiterate and adopt by reference the allegations set forth in paragraphs 1 to 52 above as if fully set forth herein.

54. An actual and justiciable controversy presently exists between the parties, and prompt relief is necessary to preserve Underwriters rights. Pursuant to Texas Civil Practice and

Remedies Code § 37.001, *et seq.*, this Court has authority to declare the obligations and rights of the parties under the Policy.

55. MDS Wings contends that it has experienced a **Restaurant Event** and is thus entitled to the remaining \$6 million of the Policy's **Total Aggregate Limit of Indemnity**.

56. Underwriters contend that MDS Wings has not experienced a **Restaurant Event** and that Underwriters have fulfilled their obligations to MDS Wings under the Policy given that Underwriters have paid MDS Wings \$1 million under the Policy's Pandemic Event Endorsement.

57. MDS has not shown and cannot show that it incurred **Actual Net Loss** directly and solely resulting from a **Restaurant Event**.

58. Underwriters are therefore entitled to a declaratory judgment pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 37.001, *et seq.* that MDS Wings has not experienced a **Restaurant Event** and that Underwriters have no further obligation to MDS Wings in connection with MDS Wings' business interruption losses tendered to Underwriters on March 18, 2020.

VII. **PRAYER FOR RELIEF**

WHEREFORE, Underwriters demand a jury trial on all issues amenable to a jury and respectfully requests that this Court enter judgment against MDS Wings as follows:

1. Declaring that MDS Wings has not experienced a **Restaurant Event** and that Underwriters have no further obligation to MDS Wings in connection with MDS Wings' business interruption losses tendered to Underwriters on March 18, 2020;
2. Awarding Underwriters such other and further relief as it may deem appropriate.

Dated: November 3, 2020

Respectfully submitted,

/s/ Dee J. Kelly, Jr.

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