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 Clerk of the Superior Court  
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Description	Amount
CASE# CV2020-008771	
CIVIL NEW COMPLAINT	333.00
TOTAL AMOUNT	333.00
Receipt# 27881882	

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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
 IN AND FOR THE COUNTY OF MARICOPA**

WHISKEY ROW NASHVILLE, LLC,

Case No. CV2020-008771

*Plaintiff,*

**COMPLAINT**

v.

*[Eligible for Commercial Court]*

MT. HAWLEY INSURANCE COMPANY,

*Defendants.*

Plaintiff Whiskey Row Nashville, LLC ("Whiskey Row") alleges the following claims for breach of contract and bad faith against Defendant Mt. Hawley Insurance Company ("Mt. Hawley"):

**PARTIES, JURISDICTION, AND VENUE**

1. Plaintiff Whiskey Row Nashville, LLC, dba Dierks Bentley's Whiskey Row Nashville, TN, is an Arizona limited liability company with its sole member located in Scottsdale, Arizona.

2. Defendant Mt. Hawley Insurance Company is a corporation organized and existing in the State of Delaware, with its principal place of business in Illinois. Mt. Hawley is authorized to transact business and has transacted substantial business in Arizona, and avails itself of the laws of the State of Arizona. Accordingly, this Court has personal jurisdiction over Mt. Hawley.



1 "a Covered Cause of Loss causes damage to property other than property at the described  
2 premises." [Policy, Ex. 1 hereto at Business Income (And Extra Expense) Coverage Form, §  
3 A(5)(a)].

4 14. Civil Authority coverage applies where: (1) "[a]ccess to the area immediately  
5 surrounding the damaged property is prohibited by civil authority as a result of the damage,  
6 and the described premises are within that area but are not more than one mile from the  
7 damaged property;" and (2) "the action of civil authority is taken in response to dangerous  
8 physical conditions resulting from the damage or continuation of the Covered Cause of Loss  
9 that caused the damage." [*Id.*].

10 15. Covered Cause of Loss is defined very broadly as "Risks of Direct Physical  
11 Loss," unless excluded by the Policy. [*Id.* at Causes of Loss-Special Form, § A].

#### 12 EXECUTIVE ORDER NO. 17 & WHISKEY ROW'S DIRECT LOSSES

13 16. On March 22, 2020, the Governor of Tennessee signed Executive Order No. 17.  
14 Attached as Exhibit 2 hereto is a true and correct copy of Executive Order No. 17.

15 17. The Governor ordered that "[r]estaurants, bars, and similar food or drink  
16 establishments, including nightclubs, shall not be open to persons, except only to offer drive-  
17 through, pickup, carry-out, or delivery service for food or drink."

18 18. The Governor specifically made this order based on authority to "make orders  
19 concerning entry and exit and the occupancy of premises within an emergency area."  
20 [Executive Order No. 17, Ex. 2 hereto at 2, ¶ 4].

21 19. Whiskey Row's premises fall within the "emergency area" due to the presence  
22 of SARS-CoV2 at premises near Whiskey Row, including premises within one mile of  
23 Whiskey Row.

24 20. The Governor of Tennessee extended and modified Executive Order No. 17  
25 through Executive Orders Nos. 21, 27, 29, and 38. Executive Orders Nos. 21, 27, 29, and 38  
26 are attached hereto as Exhibits 3-6, respectively.

27 21. As a result of these Executive Orders, Whiskey Row suffered a direct physical  
28 loss of, and damage to, its premises, including the ability of customers to physically enter the

1 premises, the ability to occupy and otherwise utilize the premises for services, the ability of the  
2 premises to operate and function as intended, and other losses. The Executive Orders, while in  
3 effect, have significantly damaged the premises and caused a loss of the premises.

4 22. As a result of this direct physical loss of, and damage to, the premises, Whiskey  
5 Row has suffered significant and devastating losses to its Business Income and has incurred  
6 significant extra expenses, to the extent that Whiskey Row's very existence is at risk.

#### 7 **MT. HAWLEY'S BAD FAITH REFUSAL TO PAY**

8 23. Given the near-total loss it suffered, Whiskey Row immediately tendered its loss  
9 to Mt. Hawley to recover under the security it purchased.

10 24. Despite the Policy provisions providing for coverage, Mt. Hawley denied  
11 coverage on May 15, 2020, without even conducting a thorough investigation. A true and  
12 correct copy of Mt. Hawley's May 15, 2020 letter denying coverage is attached hereto as  
13 Exhibit 7.

14 25. In its May 15, 2020 letter, Mt. Hawley asserted that Whiskey Row did not  
15 experience a direct physical loss of or damage to property on that sole ground that Whiskey  
16 Row "closed your business solely based upon the guidelines put in place by the Governor of  
17 Tennessee." [May 15, 2020 Letter, Ex. 7 hereto at 6, ¶ 1].

18 26. Mt. Hawley misrepresented the nature of Executive "Order" No. 17 as mere  
19 "guidelines" in order to improperly deny coverage to Whiskey Row.

20 27. Mt. Hawley also failed to acknowledge caselaw making clear that the type of  
21 loss experienced by Whiskey Row is a physical loss of or damage to property, as covered by  
22 the Policy. *See, e.g., Am. Guar. & Liab. Ins. Co. v. Ingram Micro, Inc.*, 2000 WL 726789, \*2  
23 (D. Ariz. Apr. 18, 2000) ("'[P]hysical damage' is not restricted to the physical destruction or  
24 harm[,] but includes loss of access, loss of use, and loss of functionality").

25 28. With respect to Civil Authority coverage, Mt. Hawley glibly stated that "the  
26 order was implemented as a preventative measure in an attempt to minimize the spread of  
27 COVID-19, and not in response to a Covered Cause of Loss causing damage to property other  
28 than at your premises." [May 15, 2020 Letter, Ex. 7 hereto at 6, ¶ 2].

1           29. Mt. Hawley took this cursory position without investigating the presence of  
2 SARS-CoV2 at premises within one mile of Whiskey Row's premises. *See, e.g., Port Auth. Of*  
3 *New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) ("When  
4 the presence of large quantities of asbestos in the air of a building is such as to make the  
5 structure uninhabitable and unusable, then there has been a distinct [physical] loss to its  
6 owner"); *Ingram Micro, Inc.*, 2000 WL 726789 at \*2 ("physical damage' is not restricted to  
7 the physical destruction or harm[,] but includes loss of access, loss of use, and loss of  
8 functionality").

9           30. Public and easily-accessible information made clear that the Executive Orders  
10 were issued in part due to the presence of SARS-CoV2 at premises. The CDC recognizes that  
11 "the virus may spread to hands from a contaminated surface and then to the nose or mouth,  
12 causing infection," and thus that facilities should "[c]lean and disinfect frequently touched  
13 surfaces."

14           31. Mt. Hawley additionally cited to four policy exclusions as potentially applicable  
15 here. The terms of those exclusions, however, makes clear that they do not apply to Whiskey  
16 Row's losses.

17           32. For example, Mt. Hawley asserted that "your policy specifically excludes  
18 coverage for loss, damage, cost, or expense caused directly or indirectly by the actual, alleged  
19 or threatened discharge, dispersal, release or escape of 'pollutants,' including virus, and such  
20 loss or damage is excluded."

21           33. In making this assertion, Mt. Hawley intentionally failed to mention the actual  
22 exclusionary language that such discharge, dispersal, release or escape must be from Whiskey  
23 Row's premises, a site used for handling waste, or a site where Whiskey Row is performing  
24 operations. [See Policy, Ex. 1 hereto at Pollution Exclusion]. Nowhere in the Executive Orders  
25 do they make any reference to, or rely upon, any alleged or actual discharge of pollutants from  
26 Whiskey Row's premises.

27           34. The other references to exclusions similarly lack a valid basis and were simply  
28 asserted in a cursory manner in order to deprive Whiskey Row of the benefits it purchased

1 under the Policy.

2 35. Mt. Hawley's refusal to honor its coverage obligations have caused Whiskey  
3 Row significant and debilitating damages, threatening its very ability to remain in business.

4 36. This matter is eligible for commercial court pursuant to Ariz. R. Civ. P.  
5 8.1(b)(13) because it arises under a commercial insurance policy.

6 **COUNT I**  
7 **(Breach of Contract)**

8 37. Whiskey Row incorporates by reference each and every allegation contained in  
9 paragraphs 1 through 36 of this Complaint.

10 38. The Policy is a valid contract between Whiskey Row and Mt. Hawley.

11 39. The Policy requires Mt. Hawley to pay Whiskey Row for its losses caused by  
12 the Executive Orders issued in Tennessee.

13 40. Mt. Hawley has breached the contract by refusing to pay Whiskey Row the  
14 amounts owing under the Policy.

15 41. Whiskey Row has been damaged by Mt. Hawley's breach in an amount to be  
16 determined at trial.

17 **COUNT II**  
18 **(Breach of the Duty of Good Faith and Fair Dealing)**

19 42. Whiskey Row incorporates by reference each and every allegation contained in  
20 paragraphs 1 through 41 of this Complaint.

21 43. Mt. Hawley has a duty of good faith and fair dealing under the Policy.

22 44. Mt. Hawley has breached its duty of good faith and fair dealing, including as set  
23 forth in paragraphs 23-36 above.

24 45. Mt. Hawley's coverage position lacked a reasonable basis.

25 46. Mt. Hawley failed to conduct a complete investigation prior to denying  
26 coverage.

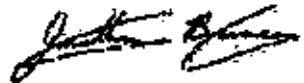
27 47. Mt. Hawley's conduct compelled Whiskey Row to file this lawsuit to recover  
28 the benefits to which it is entitled under the Policy.



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DATED this 28th day of July, 2019.

**POLSINELLI PC**

By:   
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