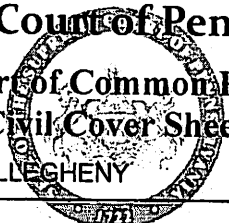


# Supreme Court of Pennsylvania

Court of Common Pleas  
Civil Cover Sheet

ALLEGHENY

County



<i>For Prothonotary Use Only:</i>	
Docket No:	

The information collected on this form is used solely for court administration purposes. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

SECTION A

<b>Commencement of Action:</b> <input checked="" type="checkbox"/> Complaint <input type="checkbox"/> Writ of Summons <input type="checkbox"/> Petition <input type="checkbox"/> Transfer from Another Jurisdiction <input type="checkbox"/> Declaration of Taking	
Lead Plaintiff's Name: Liberty Corner Tavern Inc.	Lead Defendant's Name: Scottsdale Insurance Company
Are money damages requested? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Dollar Amount Requested: <input type="checkbox"/> within arbitration limits (check one) <input checked="" type="checkbox"/> outside arbitration limits
Is this a <i>Class Action Suit</i> ? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Is this an <i>MDJ Appeal</i> ? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Name of Plaintiff/Appellant's Attorney: <u>D. Aaron Rihn, Esquire</u> <input type="checkbox"/> Check here if you have no attorney (are a Self-Represented [Pro Se] Litigant)	

SECTION B

**Nature of the Case:** Place an "X" to the left of the ONE case category that most accurately describes your **PRIMARY CASE**. If you are making more than one type of claim, check the one that you consider most important.

<p><b>TORT</b> (do not include Mass Tort)</p> <input type="checkbox"/> Intentional <input type="checkbox"/> Malicious Prosecution <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Nuisance <input type="checkbox"/> Premises Liability <input type="checkbox"/> Product Liability (does not include mass tort) <input type="checkbox"/> Slander/Libel/ Defamation <input type="checkbox"/> Other: _____ _____	<p><b>CONTRACT</b> (do not include Judgments)</p> <input type="checkbox"/> Buyer Plaintiff <input type="checkbox"/> Debt Collection: Credit Card <input type="checkbox"/> Debt Collection: Other _____ <input type="checkbox"/> Employment Dispute: Discrimination <input type="checkbox"/> Employment Dispute: Other _____ <input checked="" type="checkbox"/> Other: <u>Business Interruption</u> _____ _____	<p><b>CIVIL APPEALS</b></p> Administrative Agencies <input type="checkbox"/> Board of Assessment <input type="checkbox"/> Board of Elections <input type="checkbox"/> Dept. of Transportation <input type="checkbox"/> Statutory Appeal: Other _____ <input type="checkbox"/> Zoning Board <input type="checkbox"/> Other: _____ _____
<p><b>MASS TORT</b></p> <input type="checkbox"/> Asbestos <input type="checkbox"/> Tobacco <input type="checkbox"/> Toxic Tort - DES <input type="checkbox"/> Toxic Tort - Implant <input type="checkbox"/> Toxic Waste <input type="checkbox"/> Other: _____ _____	<p><b>REAL PROPERTY</b></p> <input type="checkbox"/> Ejectment <input type="checkbox"/> Eminent Domain/Condemnation <input type="checkbox"/> Ground Rent <input type="checkbox"/> Landlord/Tenant Dispute <input type="checkbox"/> Mortgage Foreclosure: Residential <input type="checkbox"/> Mortgage Foreclosure: Commercial <input type="checkbox"/> Partition <input type="checkbox"/> Quiet Title <input type="checkbox"/> Other: _____ _____	<p><b>MISCELLANEOUS</b></p> <input type="checkbox"/> Common Law/Statutory Arbitration <input type="checkbox"/> Declaratory Judgment <input type="checkbox"/> Mandamus <input type="checkbox"/> Non-Domestic Relations Restraining Order <input type="checkbox"/> Quo Warranto <input type="checkbox"/> Replevin <input type="checkbox"/> Other: _____ _____
<p><b>PROFESSIONAL LIABILITY</b></p> <input type="checkbox"/> Dental <input type="checkbox"/> Legal <input type="checkbox"/> Medical <input type="checkbox"/> Other Professional: _____ _____		

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA  
CIVIL DIVISION**

LIBERTY CORNER TAVERN INC.,

NO. GD

Plaintiff,

vs.

SCOTTSDALE INSURANCE COMPANY  
and NATIONWIDE MUTUAL INSURANCE  
COMPANY,

Defendants.

**COMPLAINT FOR  
DECLARATORY JUDGMENT  
RELIEF**

Filed on behalf of: Plaintiff, Liberty  
Corner Tavern Inc.

Counsel of Record for this Party:

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**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA  
CIVIL DIVISION**

LIBERTY CORNER TAVERN INC.,                      NO. GD

Plaintiff,

vs.

SCOTTSDALE INSURANCE COMPANY  
And NATIONWIDE MUTUAL  
INSURANCE COMPANY,

Defendants.

**NOTICE TO DEFEND**

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice were served, by entering a written appearance personally or by an attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the Complaint or for any claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

**YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE OR KNOW A LAWYER, THEN YOU SHOULD GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.**

LAWYER REFERRAL SERVICE  
ALLEGHENY COUNTY BAR ASSOCIATION  
11<sup>TH</sup> FLOOR KOPPERS BUILDING  
436 7<sup>th</sup> AVENUE  
PITTSBURGH, PA 15219

TELEPHONE: 412-261-5555

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA  
CIVIL DIVISION**

LIBERTY CORNER TAVERN INC.,                      NO. GD

Plaintiff,

vs.

SCOTTSDALE INSURANCE COMPANY  
And NATIONWIDE MUTUAL  
INSURANCE COMPANY,

Defendants.

**COMPLAINT FOR DECLARATORY JUDGMENT RELIEF**

Plaintiff Liberty Corner Tavern Inc. (“Plaintiff”) bring this Complaint as an Action for Declaratory Judgment, pursuant to Pa.R.C.P. 1601 *et seq.* and 42 P.S. §§ 7532 & 7534, alleging against Defendants Scottsdale Insurance Company and Nationwide Mutual Insurance Company (collectively, “Defendant”) as follows:

**NATURE OF THE CASE**

1.        This is a civil action seeking declaratory relief arising from Plaintiff’s contract of insurance with Defendant.
2.        In light of the Coronavirus global pandemic and state and local orders mandating that all non-essential in-store businesses must shut down, and the suffering of physical harm and impact and damages, within Plaintiff’s business premises and/or within the immediate area surrounding and outside its business premises, Plaintiff shut the doors of his business to customers.
3.        Plaintiff’s insurance policy provides coverage for all non-excluded business losses and thus provides coverage here.

4. As a result, Plaintiff is entitled to declaratory relief that its business is covered for all business losses that have been suffered and sustained.

### **JURISDICTION**

5. This Court has jurisdiction over this action and the matters alleged herein and this is an action for Declaratory Judgment Relief, pursuant to Pa.R.C.P. 1601 *et seq.* and 42 P. S. §§ 7532 & 7534.

6. Venue is proper based on Defendant's substantial insurance operations in Allegheny County. Defendant's policy at issue in this case has been issued to other insured's in Allegheny County.

### **PARTIES**

7. Plaintiff Liberty Corner Tavern Inc. operates, manages and owns a restaurant located at 500 Market Street, Freeport, Armstrong County, Pennsylvania 16229 ("Insured Property"). Plaintiff is a company with its principal place of business in Pennsylvania. Plaintiff is a citizen of Pennsylvania.

8. Defendant Scottsdale Insurance Company is an insurer whose principal place of business is in Arizona. Defendant is headquartered at 8877 North Gainey Center Drive, Scottsdale, Arizona 85258. Defendant is a citizen of Arizona.

9. Defendant Nationwide Mutual Insurance Company is an insurer whose principal place of business is in Ohio. Defendant is headquartered in One Nationwide Plaza, Columbus, Ohio 43215. Defendant is a citizen of Ohio.

10. Defendant transacts the business of insurance in the Commonwealth of Pennsylvania and within Allegheny County.

## FACTUAL ALLEGATIONS

### **I. Insurance Coverage**

11. At all relevant times, Defendant issued an insurance policy with policy number CPS3239836 to Plaintiff for the period July 20, 2019 to July 20, 2020 (“Policy”). *See* Policy attached hereto as Exhibit 1.

12. The Policy is currently in full effect in providing, among other things, personal property, business income loss and extra expense, civil authority, and other coverage.

13. Plaintiff submitted a claim for a loss pursuant to its Policy seeking coverage under this Policy. Defendant rejected Plaintiff’s claim for coverage for business income loss and extra expense, civil authority, and other claims, contending, *inter alia*, that there was no physical loss or damage to Plaintiff’s Insured Property or surrounding property.

14. Defendant also claimed the Policy does not cover Plaintiff’s losses due to the Virus Exclusion.

15. Plaintiff faithfully paid policy premiums to Defendant, specifically to provide, among other things, additional coverages in the event of business income loss and extra expense or business interruption or closures by order of civil authority.

16. The Policy covers for damages resulting from business interruption when there is property damage, which is standard in most all-risk commercial property insurance policies, along with coverage for extra expenses.

17. The Policy also covers the actual loss of business income sustained and the actual, necessary, and reasonable extra expenses incurred when access to the Insured Property is specifically prohibited by order of civil authority as the direct result of a covered cause of loss to property in the immediate area of Plaintiff’s Insured Property. This additional coverage is identified as coverage under “Civil Authority.”



18. The Policy is an all-risk policy, insofar as it provides that a covered cause of loss, including but not limited to direct physical loss or direct physical damage, triggers coverage unless the loss is specifically excluded or limited in the Policy.

19. An all-risk Policy such as that purchased by Plaintiff is one that protects against catastrophic events, such as the one occurring now, involving the global COVID-19 Pandemic that has resulted in the widespread, omnipresent, and persistent presence of COVID-19 in and around Plaintiff's Insured Property, including adjacent properties.

20. Coverage under an all-risk policy is to be broadly interpreted and provided, and exclusions are to be narrowly construed in favor of coverage.

21. The Virus Exclusion does not apply to this pandemic. The Policy does not identify any exclusions for a pandemic.

22. Based upon information and belief, the Policy provided by Defendant included language that is essentially standardized language adopted from and/or developed by the Insurance Services Office ("ISO"). The ISO, founded in 1971, provides a broad range of services to the property and casualty insurance industry. In addition to form policies, ISO collects and manages databases containing large amounts of statistical, actuarial, underwriting, and claims information, fraud-identification tools, and other technical services. The ISO describes itself as follows: "ISO provides advisory services and information to many insurance companies. . . . ISO develops and publishes policy language that many insurance companies use as the basis for their products." ISO General Questions, Verisk, <https://www.verisk.com/insurance/about/faq/> (last visited June 5, 2020); *see also* Insurance Services Office (ISO), Verisk, <https://www.verisk.com/insurance/brands/iso/> (last visited June 5, 2020).

23. The language in the Policy is “adhesionary” in that Plaintiff was not a participant in negotiating or drafting its content and provisions.

24. Plaintiff was not a participant in negotiating or drafting the Policy’s content and provisions. Plaintiff possessed no leverage or bargaining power to alter or negotiate the terms of the Policy, and more particularly, Plaintiff had no ability to alter, change or modify standardized language derived from a format developed by the Insurance Services Organization (“ISO”).

25. The presence of virus or disease can constitute physical damage to property, as the insurance industry has recognized since at least 2006. When developing endorsement language to include in policies purportedly to exclude coverage for damages and losses relating to the occurrence of a virus at, on or near a property, the ISO circulated a statement to state insurance regulators that included the following, purportedly to explain the concept of the Virus Exclusion:

Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses. Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case.

26. Upon information and belief, the Virus Exclusion in the Policy was developed by the ISO in response to the SARS outbreak that occurred in or around 2002-2004, which was not a pandemic and not a global pandemic like the present COVID-19 Pandemic.

27. Upon information and belief, the Virus Exclusion in the Policy was never intended by the ISO nor Defendant to pertain to a pandemic like the present global COVID-19 Pandemic and therefore does not exclude coverage in this matter.

28. Upon information and belief, the Virus Exclusion in the Policy was never intended by the ISO nor Defendant to pertain to a pandemic like the present global COVID-19 Pandemic because the ISO and Defendant define “virus” and “pandemic” as used in their policies differently than how those terms might be normally used.

29. Upon information and belief, the Virus Exclusion was only intended to cover discrete instances of infection or contamination by a virus as a covered cause of loss, not to direct physical loss or damage caused by a pandemic.

30. Upon information and belief, the ISO and the insurance industry, including Defendant, do not consider the term “virus” as used in the Virus Exclusion to include a pandemic in which there is omnipresent contamination by a virus as a covered cause of loss.

31. In fact, the ISO, when seeking approval for the “Exclusion of Loss Due to Virus or Bacteria,” acknowledged that it was intended for losses and damage associated with “disease” and actual “contamination” of the insured property. *See* ISO Circular LI-CF-2006-175, New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria, ISO (July 6, 2006), <https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf> (“In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.”). Other insurers have been much more specific in drafting and specifically using the “pandemic” language. *See, e.g., Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co.*, 218 F. Supp. 3d 1034, 1038 (D. Neb. 2016) (“The actual or suspected presence or threat of any virus, organism or like substance that is capable of inducing disease, illness, physical distress or death, whether infectious or otherwise, including but not limited to any epidemic, pandemic, influenza, plague, SARS, or Avian Flu.”).

32. The Virus Exclusion was therefore never intended to exclude coverage for a pandemic as presented in this matter.

33. Further, the Virus Exclusion was first permitted by state insurance departments due to misleading and fraudulent statements by the ISO that property insurance policies do not and were not intended to cover losses caused by viruses, and so the Virus Exclusion offers mere clarification of existing law. To the contrary, before the ISO made such baseless assertions, courts considered contamination by a virus to be physical damage. Defendant's use of the Virus Exclusion to deny coverage here shows that the Virus Exclusion was fraudulently adopted, adhesionary, and unconscionable. See <https://www.propertycasualty360.com/2020/04/07/here-we-go-again-virus-exclusion-for-covid-19-and-insurers/> (last visited June 12, 2020).

34. Plaintiff purchased the Policy with an expectation that it was purchasing a policy that would provide coverage in the event of a business interruption, such as that suffered by Plaintiff as a result of the COVID-19 Pandemic.

35. At no time had Defendant or their agents notified Plaintiff that the coverage that Plaintiff had purchased pursuant to an all-risk policy that included business interruption coverage had exclusions and provisions that purportedly undermined the very purpose of the coverage—to provide benefits in the event of a business interruption.

36. The reasonable expectations of Plaintiff—*i.e.*, an objectively reasonable interpretation by the average Policyholder of the coverage that was being provided—was that the Policy included coverage when a civil authority forced closure of the business for an issue of public safety such as that involving the COVID-19 pandemic in the immediate area surrounding the Insured Property.

37. The purported exclusions of the Policy that Defendant has or is expected to raise in defense of Plaintiff's claim under the Civil Authority coverage of the Policy are contradictory to the provision of Civil Authority coverage and violate public policy as a contract of adhesion and hence are not enforceable against Plaintiff.

38. Regulatory estoppel bars Defendant from relying on the Virus Exclusion because of its conduct and any associated conduct of the ISO to inappropriately obtain the permission of state insurance commissioners or departments to include the language of the Virus Exclusion in its policies.

39. The Virus Exclusion has limited applicability as it is intended to apply only to claims based on personal injury that it causes and it is not intended to apply to other types of losses that can be associated with an underlying virus such as those claimed by Plaintiff here involving business losses where no personal injury is claimed to have occurred.

40. The Virus Exclusion does not apply because Plaintiff's losses were not solely caused by a virus. Instead, Plaintiff's losses were caused by the entry of civil authority orders to mitigate the spread of COVID-19.

41. Plaintiff is not seeking coverage because of personal injuries caused by the virus, but rather coverage for property damage, physical loss of use of property, business income loss, and extra expense.

42. The civil authority orders prohibited access to Plaintiff's Insured Property, and the area immediately surrounding the Insured Property, in response to dangerous physical conditions described above resulting from COVID-19. As a result of the presence of COVID-19 and the civil authority orders, Plaintiff suffered physical loss of use of property, business income loss, and incurred extra expenses.

43. The Policy does not exclude the losses suffered by Plaintiff, and therefore, the Policy does provide coverage for the losses incurred by Plaintiff.

44. Based on information and belief, Defendant has accepted the policy premiums with no intention of providing any coverage for property damage, physical loss of use of property, business income loss or extra expense, or Civil Authority orders.

45. Factual issues related to direct physical loss of use or physical damage to Plaintiff's Insured Property and/or surrounding property and the scope and validity of the Virus Exclusion will require development of a factual record through discovery. Plaintiff also intends to serve subpoenas on the ISO and Department of Insurance regarding the development of the Virus Exclusion, including but not limited to statements made by Defendant and by the ISO on behalf of Defendant as to meanings of language in Policies.

## **II. The Coronavirus Pandemic**

46. The scientific community, and those personally affected by the virus, recognize the Coronavirus as a cause of real physical loss and damage. It is clear that contamination of the Insured Property would be a direct physical loss requiring remediation to clean the surfaces of the business.

47. The virus that causes COVID-19 remains stable and transmittable in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard and up to two to three days on plastic and stainless steel. See <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last visited April 9, 2020).

48. The CDC has issued a guidance that gatherings of more than 10 people must not occur. People in congregate environments, which are places where people live, eat, and sleep in close proximity, face increased danger of contracting COVID-19.

49. On March 11, 2020 the World Health Organization (“WHO”) made the assessment that COVID-19 shall be characterized as a pandemic. *See* <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

50. The global Coronavirus pandemic is exacerbated by the fact that the deadly virus physically infects and stays on surfaces of objects or materials, “fomites,” for up to twenty-eight (28) days. Human coronaviruses can remain infectious on inanimate surfaces at room temperature for up to 9 days. At a temperature of 30 degrees Celsius (86 degrees F) or more the duration of persistence is shorter. *See* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7132493/> (last visited July 16, 2020).

51. A particular challenge with the novel coronavirus is that it is possible for a person to be infected with COVID-19 but be asymptomatic. Thus, seemingly healthy people unknowingly spread the virus via speaking, breathing, and touching objects.

52. While infected droplets and particles carrying COVID-19 may not be visible to the naked eye, they are physical objects which travel to other objects and cause harm. Habitable surfaces on which COVID-19 has been shown to survive include, but are not limited to, stainless steel, plastic, wood, paper, glass, ceramic, cardboard, and cloth.

53. The virus is thought to spread mainly from person to person: between people who are in close contact with one another (within about 6 feet); through respiratory droplets produced when an infected person coughs, sneezes or talks; these droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs; and some recent studies have suggested that COVID-19 may be spread by people who are not showing symptoms. *See* <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

54. The CDC has noted that “[i]t may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes, but this is not thought to be the main way the virus spreads.” See <https://www.cdc.gov/foodsafety/newsletter/food-safety-and-Coronavirus.html>.

55. The CDC has said that the best way to prevent illness is to avoid being exposed to this virus and that steps can be taken to slow its spread: Maintain good social distance (about 6 feet). This is very important in preventing the spread of COVID-19; Wash your hands often with soap and water. If soap and water are not available, use a hand sanitizer that contains at least 60% alcohol; Routinely clean and disinfect frequently touched surfaces; and Cover your mouth and nose with a cloth face covering when around others.

56. “The primary and most important mode of transmission for COVID-19 is through close contact from person-to-person. Based on data from lab studies on COVID-19 and what we know about similar respiratory diseases, it may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes, but this isn’t thought to be the main way the virus spreads.” <https://www.cdc.gov/media/releases/2020/s0522-cdc-updates-covid-transmission.html> (last edited May 23, 2020).

57. A number of studies have demonstrated that the coronavirus is “much more resilient to cleaning than other respiratory viruses so tested.” See Nevio Cimolai, *Environmental and decontamination issues for human coronaviruses and their potential surrogates*, 92 J. Med. Virol. 2498 (2020), <https://doi.org/10.1002/jmv.26170>.

58. The measures that must be taken to remove the coronavirus from property are significant and far beyond ordinary or routine cleaning.



59. The mere fact that the coronavirus is known to be on property demonstrates it as impacting physical property, rendering property unsafe pending appropriate, thorough and constant cleaning in an effort to remove the coronavirus from property with which it comes into contact.

60. Efficacy of decontaminating agents for viruses is based on a number of factors, including the initial amount of virus present, contact time with the decontaminating agent, dilution, temperature, and pH, among many others. Detergent surfactants are not recommended as single agents, but rather in conjunction with complex disinfectant solutions. *Id.* Additionally, it can be challenging to accurately determine the efficacy of decontaminating agents. The toxicity of an agent may inhibit the growth of cells used to determine the presence of virus, making it difficult to determine if lower levels of infectious virus are actually still present on treated surfaces. *Id.*

61. In order to be effective, cleaning and decontamination procedures require strict adherence to protocols not necessarily tested under “real life” or practical conditions, where treated surfaces or objects may not undergo even exposure or adequate contact time. *Id.*

62. Studies of coronaviruses have demonstrated viral RNA persistence on objects despite cleaning with 70% alcohol. *See* Joon Young Song et al., *Viral Shedding and Environmental Cleaning in Middle East Respiratory Syndrome Coronavirus Infection*, 47 *J. Infection & Chemotherapy* 252 (Dec. 2015), <https://doi.org/10.3947/ic.2015.47.4.252>.

63. Studies have demonstrated that a virus can survive on fabrics and be transferred to skin and other surfaces, “suggesting it is biologically plausible that . . . infectious diseases can be transmitted directly through contact with contaminated textiles.” Lucy Owen and Katie Laird, *The role of textiles as fomites in the healthcare environment: a review of the infection control risk*, 8 *PeerJ* e9790 (2020), <https://peerj.com/articles/9790/>.

64. This demonstrates that the coronavirus and COVID-19, and the measures required to prevent their spread from surfaces and materials used by the Plaintiff, cause physical loss of or damage to property.

65. Moreover, the aerosolized coronavirus particles and virions cannot be eliminated by routine cleaning. Cleaning surfaces in an indoor space will not remove the aerosolized coronavirus particles from the air that people can inhale and become infected with the coronavirus and develop COVID-19. Mike Ives & Apoorva Mandavilli, *The Coronavirus Is Airborne Indoors. Why Are We Still Scrubbing Surfaces?*, N.Y. Times (Nov. 18, 2020), <https://www.nytimes.com/2020/11/18/world/asia/covid-cleaning.html>.

66. Given the ubiquity and pervasiveness of the coronavirus, no amount of cleaning or ventilation intervention will prevent a person infected with the coronavirus from entering an indoor space and exhaling millions of coronavirus particles and virions into the air, further: (a) filling the air with the aerosolized coronavirus that can be inhaled, sometimes with deadly consequences; and (b) depositing coronavirus particles and virions on the surfaces, physically altering and transforming those surfaces into disease-transmitting fomites.

67. Cleaning of property at a given moment does not assure that the property will not again be impacted by the coronavirus. Much like testing provides essentially only a snapshot in time about whether a person had the coronavirus at the time of the test, but nothing about whether the person contracted COVID-19 after the test was performed, cleaning only sanitizes property (if performed correctly) at any given moment in time until the cleaning “wears off.” This therefore requires businesses to constantly engage in cleaning efforts at cost in order to comply with CDC recommendations.

68. Compliance with the CDC recommendations, along with compliance with the civil authority orders, effectively made it impossible for Plaintiff to operate its business in the usual and customary manner causing the business to suffer business losses and added expenses as provided for and covered under the Policy.

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

70. A French Court has determined that business interruption coverage applies to the COVID-19 Pandemic. *See* <https://www.insurancejournal.com/news/international/2020/05/22/569710.htm>.

71. Similarly, on September 15, 2020, the United Kingdom's High Court found that the 'disease' and/or 'denial of access' clauses in the various insurance policy wordings provide coverage in the circumstances of the COVID-19 pandemic, and that the trigger for coverage caused policyholders' losses. The High Court further noted:

The fact that a provision in a contract is expressed as an exception does not necessarily mean that it should be approached with a pre-disposition to construe it narrowly. Like any other provision in a contract, words of exception or exemption must be read in the context of the contract as a whole and with due regard for its purpose. As a matter of general principle, it is well established that that if one party, otherwise liable, wishes to exclude or limit his liability to the other party, he must do so in clear words; and that the contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed.

<https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-judgment.pdf>.

72. Courts in other countries, including Australia and South Africa, have also ruled in favor of policyholders in similar cases. *See*

<https://www.cliffordchance.com/briefings/2020/11/covid-19--landmark-judgments-in-nsw-->

[australia--and-england-in-b.html](#);

<https://www.insurancejournal.com/news/international/2020/12/17/594368.htm>.

73. These cases are consistent with public policy that during a worldwide pandemic, such as COVID-19, businesses that possess business interruption insurance coverage should recover their losses from the insurance carriers.

### **III. Civil Authority**

74. On March 6, 2020, Pennsylvania Governor Tom Wolf issued a Proclamation of Disaster Emergency, the first formal recognition of an emergency situation in the Commonwealth of Pennsylvania as a result of COVID-19.

75. On March 19, 2020, Governor Wolf issued an Order requiring all non-life-sustaining businesses in the Commonwealth to cease operations and close all physical locations. Businesses that were permitted to remain open were required to follow “social distancing practices and other mitigation measures defined by the Centers for Disease Control.” <https://www.scribd.com/document/452416027/20200319-TWW-COVID-19-Business-Closure-Order> (last visited April 19, 2019).

76. On April 1, 2020, Governor Wolf issued a Stay at Home Order to the entire Commonwealth of Pennsylvania.

77. On, May 8, 2016, Governor Wolf extended the Stay at Home Order for Delaware County until June 4, 2020.

78. The Orders were issued due to the presence of the coronavirus throughout the state, including causing physical loss and damage to property in and around Plaintiff’s Insured Property.

79. The Pennsylvania Supreme Court recently clarified the Governor’s Orders and supported Plaintiff’s position that physical loss and damage exists throughout Pennsylvania. *See Friends of DeVito, et. al v. Wolf*, No. 68 MM 2020 (Pa. April 13, 2020).

80. Further, on April 10, 2020, President Trump seemed to support insurance coverage for business loss like that suffered by the Plaintiff.

REPORTER: Mr. President may I ask you about credit and debt as well. Many American individuals, families, have had to tap their credit cards during this period of time. And businesses have had to draw down their credit lines. Are you concerned Mr. President that that may hobble the U.S. economy, all of that debt number one? And number two, would you suggest to credit card companies to reduce their fees during this time?

PRESIDENT TRUMP: Well it's something that we've already suggested, we're talking to them. Business interruption insurance, I'd like to see these insurance companies—you know you have people that have paid. *When I was in private I had business interruption.* When my business was interrupted through a hurricane or whatever it may be, I'd have business where I had it, I didn't always have it, sometimes I had it, sometimes, I had a lot of different companies. But if I had it I'd expect to be paid. You have people. I speak mostly to the restaurateurs, where they have a restaurant, they've been paying for 25, 30, 35 years, business interruption. They've never needed it. All of a sudden they need it. And I'm very good at reading language. I did very well in these subjects, OK. And I don't see the word pandemic mentioned. Now in some cases it is, it's an exclusion. But in a lot of cases I don't see it. I don't see it referenced. And they don't want to pay up. I would like to see the insurance companies pay if they need to pay, if it's fair. And they know what's fair, and I know what's fair, I can tell you very quickly. But business interruption insurance, that's getting a lot money to a lot of people. And they've been paying for years, sometimes they just started paying, *but you have people that have never asked for business interruption insurance, and they've been paying a lot of money for a lot of years for the privilege of having it, and then when they finally need it, the insurance company says 'we're not going to give it.' We can't let that happen.*

See [https://youtu.be/\\_cMeG5C9TjU](https://youtu.be/_cMeG5C9TjU) (last visited on April 17, 2020).

81. The former President was articulating a few core points:
- a. Business interruption is a common type of insurance.
  - b. Businesses pay in premiums for this coverage and should reasonably expect they'll receive the benefit of the coverage.

- c. This pandemic should be covered unless there is a specific exclusion for pandemics.
- d. If insurers deny coverage, they would be acting in bad faith.

82. These Orders and proclamations, as they relate to the closure of all non-life-sustaining businesses, evidence an awareness on the part of both state and local governments that COVID-19 causes physical damage to property. This is particularly true in places where business is conducted, such as Plaintiff's, as the requisite contact and interaction causes a heightened risk of the property becoming contaminated.

83. Plaintiff did not have the ability or right to ignore these civil authority Orders and proclamations as doing so would expose Plaintiff to fines and sanctions.

84. Plaintiff's adherence to the requirements of these civil authority Orders and proclamations was in furtherance of protecting the public, the public good, public policy in favor of minimizing the risk of spread of COVID-19 and complying with the civil authority Orders.

#### **IV. Impact on Plaintiff**

85. As a result of the Orders referenced herein, Plaintiff and its building was required to suspend and shut its business to customers as of March 16, 2020. On May 26, 2020, Plaintiff was allowed to reopen however it is only able to service an event of 25 people or less. Further, many of Plaintiff's customers are located in counties that are still under shut down orders by Governor Wolf.

86. As a further direct and proximate result of the Orders, Plaintiff has been forced to lay off part-time employees and expects to reduce the salaries of full-time employees.

87. In light of the Plaintiff's inability to safely use or operate its Insured Property due to the COVID-19 Pandemic, as well as state and local civil authority Orders requiring all non-life-sustaining businesses to cease operations and close all physical locations due to physical loss and

damage caused by the COVID-19 Pandemic, Plaintiff was forced to suspend operations of its business.

88. Access to Plaintiff's business was prohibited by civil authority Orders.

89. The civil authority Orders entered by the state and local government were in the exercise of authority to protect the public and minimize the risk of spread of disease.

90. Even with the entry of these civil authority Orders, there remained physical impact not only in and within Plaintiff's business property but in and around the surrounding location of Plaintiff's business property in light of COVID-19 presence not being detectable other than through microscopic means, and occurrence of illness.

91. Plaintiff has suffered "direct physical loss of or damage" to its property due to the COVID-19 Pandemic. Among other things, COVID-19 made the Insured Property unusable in the way that it had been used before the Pandemic, rendered the property substantially unusable and uninhabitable, intruded upon the property, damaged the property, prevented physical access to and use of the property, and caused a suspension of business operations at the property.

92. The COVID-19 Pandemic also caused physical loss and damage to property near Plaintiff's Insured Property.

93. This loss is physical. Instead of being able to operate Plaintiff's business normally, the Insured Property was required to physically alter and drastically reduce operations, and even to close entirely. To do anything else would lead to the emergence or reemergence of COVID-19 at the location. Given the widespread prevalence of COVID-19, even limited use of the Insured Property was not reasonably safe for extended periods. The high probability of illness and contamination prevents the full physical use of the property.

94. Plaintiff's Insured Property is not a closed environment, and because people—staff, customers, community members, and others—constantly cycle in and out, there is an ever-present risk that the Insured Property is contaminated and would continue to be contaminated.

95. Businesses like Plaintiff's are more susceptible to being or becoming contaminated, as both respiratory droplets and fomites are more likely to be retained on the Insured Property and remain for far longer as compared to a facility with open-air ventilation.

96. Plaintiff's Insured Property is also highly susceptible to rapid person-to-property transmission of the coronavirus, and vice-versa, because the service nature of the business places staff and customers in close proximity to the property and to one another and because the nature of the business exposes people to high levels of respiratory droplets and fomites being released into the air of the property.

97. Because of the nature of COVID-19 as described above, relating to its persistence in locations and the prospect of causing asymptomatic responses in some people, the risk of infection to persons is not only high, but could cause persons with asymptomatic responses to then come into contact with others who would not be so fortunate as to suffer merely an asymptomatic response, and instead suffer serious illness.

98. The virus is physically impacting Plaintiff. Any effort by Defendant to deny the reality that the virus causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger Plaintiff and the public.

99. Plaintiff specifically sought coverage for business interruption losses and extra expenses and paid premiums for such coverage with an expectation that the Policy provided such coverage, with no disclosures to the contrary being made to Plaintiff by Defendant or their agents.



100. A declaratory judgment determining that the coverage provided under the Policy exists is necessary so as to prevent Plaintiff from being left without vital coverage acquired to ensure the survival of the business due to the shutdown caused by the civil authority Orders. As a result of these Orders, Plaintiff has incurred, and continues to incur, among other things, a substantial loss of business income and additional expenses covered under the Policy.

**CAUSE OF ACTION**

**DECLARATORY RELIEF**

**Pa.R.C.P. 1601 *et seq.* and 42 Pa.C.S.A. §§ 7532, 7534**

101. Plaintiff realleges and incorporates by reference into this cause of action each and every allegation set forth in each and every paragraph of this Complaint.

102. Under the Pennsylvania Declaratory Judgment Act, the Court has the “power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” 42 Pa.C.S.A. § 7532. A contract for insurance may be interpreted under the Pennsylvania Declaratory Judgments Act before there is a breach or even a claim for coverage. 42 Pa.C.S.A. § 7534.

103. An actual controversy has arisen between Plaintiff and Defendant as to the rights, duties, responsibilities and obligations of the parties in that Plaintiff contends and, on information and belief, Defendant disputes and denies that:

- a. Plaintiff’s Insured Property has experienced direct physical loss of use or property or physical property damage;
- b. The Civil Authority Orders constitute a prohibition of access to Plaintiff’s Insured Property;
- c. The prohibition of access by the Civil Authority Orders has specifically prohibited access as defined in the Policy;
- d. Plaintiff had no choice but to comply with the Civil Authority Orders and suspend operations at the business;

- e. The Policy's Virus Exclusion does not apply to the business losses incurred by Plaintiff here;
- f. The Civil Authority Orders trigger coverage;
- g. The Policy provides coverage to Plaintiff for any current and future civil authority closures of a non-essential businesses due to physical loss of use of property or physical damage from the coronavirus under the Civil Authority coverage parameters; and
- h. The Policy provides business income coverage in the event that the coronavirus has caused a loss or damage at the Insured Property or immediate area of the Insured Property.

104. Resolution of the duties, responsibilities and obligations of the parties is necessary as no adequate remedy at law exists, and a declaration of the Court is needed to resolve the dispute and controversy.

105. Plaintiff seeks a Declaratory Judgment that property in the area of the Insured Property has experienced direct physical loss of use of property or physical property damage.

106. Plaintiff seeks a Declaratory Judgment that the Civil Authority Orders constitute a prohibition of access to Plaintiff's Insured Property.

107. Plaintiff seeks a Declaratory Judgment that the prohibition of access by the Civil Authority Orders has specifically prohibited access as defined in the Policy.

108. Plaintiff seeks a Declaratory Judgment that Plaintiff had no choice but to comply with the Civil Authority Orders and suspend operations at the business.

109. Plaintiff seeks a Declaratory Judgment that the Policy's Virus Exclusion does not apply to the business losses incurred by Plaintiff here.

110. Plaintiff seeks a Declaratory Judgment that the Civil Authority Orders trigger coverage.

111. Plaintiff seeks a Declaratory Judgment that the Policy provides coverage to Plaintiff for any current and future civil authority closures of a non-essential businesses due to physical loss

of use of property or physical property damage from the coronavirus under the Civil Authority coverage parameters.

112. Plaintiff seeks a Declaratory Judgment that the Policy provides business income coverage in the event that the coronavirus has caused a loss or damage at the Insured Property or immediate area of the Insured Property.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff herein prays as follows:

- a. For a declaration that property in the area of the Insured Property has experienced direct physical loss or damage.
- b. For a declaration that the Orders constitute a prohibition of access to Plaintiff's Insured Property.
- c. For a declaration that the prohibition of access by the Orders has specifically prohibited access as defined in the Policy.
- d. For a declaration that Plaintiff had no choice but to comply with the civil authority Orders and suspend operations at the business;
- e. For a declaration that the Policy's Virus Exclusion does not apply to the business losses incurred by Plaintiff here.
- f. For a declaration that the Orders trigger coverage.
- g. For a declaration that the Policy provides coverage to Plaintiff for any current and future civil authority closures of a non-essential businesses due to physical loss or damage from the coronavirus under the Civil Authority coverage parameters.
- h. For a declaration that the Policy provides business income coverage in the event that the coronavirus has caused a loss or damage at the Insured Property or immediate area of the Insured Property.
- i. For such other relief as the Court may deem proper.

**JURY TRIAL DEMANDED**

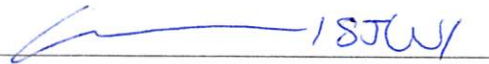
Plaintiff hereby demands trial by jury.

Dated: May 4, 2021

Respectfully submitted,

ROBERT PEIRCE & ASSOCIATES, P.C.

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