

IN THE CIRCUIT COURT OF THE 17TH  
JUDICIAL CIRCUIT IN AND FOR  
BROWARD COUNTY, FLORIDA

CASE NO.

TAPCO RESTAURANT GROUP, LLC,  
TAP 42 MIAMI, LLC, TAP 42 GABLES,  
LLC, TAP 42 BOCA, LLC, TAP 42  
AVENTURA, LLC, TAP 42 CORAL  
SPRINGS, LLC, AND TAP 42 DORAL,  
LLC,

Plaintiffs,

v.

CERTAIN UNDERWRITERS AT LLOYD'S  
LONDON SUBSCRIBING POLICY NO.  
AVS011203702, HDI GLOBAL SPECIALTY SE,  
AND INDIAN HARBOR INSURANCE CO.,

Defendants.

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**COMPLAINT**

Plaintiffs, TAPCO RESTAURANT GROUP, LLC (“Tapco”), TAP 42 MIAMI, LLC (“Tap 42 Miami”), TAP 42 GABLES, LLC (“Tap 42 Gables”), TAP 42 BOCA, LLC (“Tap 42 Boca”), TAP 42 AVENTURA, LLC (“Tap 42 Aventura”), TAP 42 CORAL SPRINGS, LLC (“Tap 42 Coral Springs”), AND TAP 42 DORAL, LLC (“Tap 42 Doral”), (collectively “Plaintiffs”), file this action against Defendants, Certain Underwriters at Lloyd’s London Subscribing Policy No. AVS011203702 (“Lloyd’s”), HDI Global Specialty SE (“HDI”), and Indian Harbor Insurance Co. (“Indian Harbor”) (collectively “Defendants”), and in support states the following:

## THE PARTIES

1.  Plaintiff, TAPCO RESTAURANT GROUP, LLC is the owner of the Tap 42 restaurants listed below, with its principal place of business at 212 Bal Bay Drive, Bal Harbor, FL 33154.
2.  Plaintiff, TAP 42 Miami, LLC, is a restaurant doing business as Tap 42 Craft Kitchen & Bar, located at 3252 NE 1st Ave Suite 101, Miami, FL 33137.
3.  Plaintiff, TAP 42 Gables, LLC, is a restaurant doing business as Tap 42 Craft Kitchen & Bar, located at 301 Giralda Ave, Coral Gables, FL 33134.
4.  Plaintiff, TAP 42 Boca, LLC, is a restaurant doing business as Tap 42 Craft Kitchen & Bar, located at 5050 Town Center Cir, Boca Raton, FL 33486.
5.  Plaintiff, TAP 42 Aventura, LLC, is a restaurant doing business as Tap 42 Craft Kitchen & Bar, located at 19565 Biscayne Blvd, Aventura, FL 33180.
6.  Plaintiff, TAP 42 Coral Springs, LLC, is a restaurant doing business as Tap 42 Craft Kitchen & Bar, located at 3111 N University Dr. Ste. 100, Coral Springs, FL 33065.
7.  Plaintiff, TAP 42 Doral, LLC, is a restaurant doing business as Tap 42 Craft Kitchen & Bar, located at 3535 NW 83rd Ave, Doral, FL 33122.
8.  Defendant, Lloyd's, is a foreign insurance company authorized to do business, and was doing business, in the State of Florida.
9.  Defendant, HDI, is a foreign insurance company authorized to do business, and was doing business, in the State of Florida.
10.  Defendant, Indian Harbor, is a foreign insurance company authorized to do business, and was doing business, in the State of Florida.

11.□ At all times material, Defendants engaged in substantial and not isolated business activity on a continuous and systematic basis in the state of Florida, namely by issuing and selling insurance policies in Florida and by contracting to insure properties located in Florida.

12.□ Under the applicable law and the terms of the Policy, service of process on Defendants may be effectuated by serving their Registered Agent, the Chief Financial Officer of the state of Florida, located at 200 East Gaines Street, Tallahassee Florida 32399.

### **INTRODUCTION**

13.□ Plaintiff, TAPCO RESTAURANT GROUP, LLC is the owner of the Tap 42 locations listed above (the “Restaurants”).

14.□ To protect the Restaurants and the income from operation of the Restaurants, Plaintiffs purchased a property insurance policy, with policy number AVS011203702 (the “Policy”) that covered all of the locations listed above.

15.□ The Policy was issued by Defendants with an effective date of 5/5/2019, through and including 5/5/2020.

16.□ The Policy is a bilateral contract: Plaintiffs agreed to pay monthly premiums to Defendants, in exchange for Defendants’ promises to provide coverage for all losses not excluded.

17.□ Among other types of coverage, the Policy protects Plaintiffs against the loss of business income due to a suspension of the Restaurants’ operations. This type of coverage is usually referred to as “Business Interruption” coverage.

18.□ The policy also provides “Extra Expense” coverage, under which Defendants promised to pay expenses incurred to minimize the suspension of business.

19. □ Additionally, the Policy provides “Civil Authority” Coverage, under which Defendants promised to pay for the loss of business income suffered by Plaintiffs caused by the action of a civil authority prohibiting access to the restaurant.

20. □ Plaintiffs duly complied with all of their obligations under the Policy, and paid the required premiums to Defendants.

21. □ Plaintiffs were forced to suspend business operations at the Restaurants, as a result of damage sustained due to the COVID-19 pandemic. Related actions of civil authorities also prohibited access to and occupancy/operation of the Restaurants, as a result of damage sustained due to the COVID-19 pandemic. This suspension, which is partially ongoing, has caused Plaintiffs to suffer significant losses and incur significant expenses.

22. □ Under the policy, Defendants promised to cover these losses and expenses, and are obligated to pay for them. In blatant breach of the contractual obligations, Defendants failed to pay for these losses and expenses that Plaintiffs incurred at no fault of their own.

23. □ Upon information and relief, Defendants have failed to pay for similar losses and expenses suffered by countless other insureds holding policies that are, in all material respects, identical.

### **JURISDICTION AND VENUE**

24. □ This Court has jurisdiction over the claims as the amount in controversy exceeds \$30,000.00, exclusive of interest, costs, and attorney’s fees.

25. □ Venue is proper in this Court because one of the restaurant business and properties at issue is located within the venue of this Court in Broward County, Florida, Plaintiff entered into the subject insurance policy in Broward County, Florida, the subject insurance policy provides

insurance to Plaintiffs and its property located in Broward County, Florida, and pursuant to the policy, at least one of the insured premises is located in Broward County, Florida.

26.□ This Court has personal jurisdiction over Defendant pursuant to Fla. Stat. § 48.193(1)(a) because Plaintiffs' claims arise out of, among other things, Defendants conducting, engaging in, and/or carrying on business in Florida; Defendants breaching a contract in this state by failing to perform acts required by contract to be performed in this state; and Defendants contracting to insure property in Florida, including but not limited to the premises insured under the Policy. Defendants also purposefully availed itself of the opportunity of conducting activities in the state of Florida by marketing its insurance policies and services within the state, and intentionally developing relationships with brokers, agents, and customers within the state to insure property within the state, all of which resulted in the policy at issue in this action.

27.□ This Court has jurisdiction over this action for declaratory relief pursuant to Chapter 86, Florida Statutes.

28.□ All conditions precedent to the commencement and prosecution of this action, if any, have been performed, waived, satisfied, or excused. Plaintiffs have retained the undersigned counsel and are obligated to pay them a reasonable fee for their services.

## **FACTUAL BACKGROUND**

### **The Policy**

29.□ Defendants issued a Commercial Property Insurance Policy, bearing policy number AVS011203702. The Policy has an effective period of 5/5/2019, through and including 5/5/2020. A copy of the Policy is attached as **Exhibit "A."**

30.□ Plaintiffs faithfully paid all Policy premiums to Defendants.

31.□ At all times material hereto, the Policy was in full force and effect, providing commercial property coverage to the Plaintiffs.

32.□ The Policy provides for coverage for “direct physical loss of or for damage to” covered property.

33.□ The Policy provides coverage for direct physical loss of or damage unless the loss is excluded or limited in the Policy.

34.□ The Policy does **not** provide any exclusion due to losses to business or property caused by a virus or global pandemic that would exclude Plaintiffs’ losses.

35.□ The Policy does not contain any exclusion which would apply to this factual scenario, and allow Defendants to deny coverage for losses caused by COVID-19 and related actions taken in response to COVID-19.

36.□ One type of coverage provided by the Policy is for loss of business income, often called business interruption insurance. This coverage is specifically provided for in a section of the Policy titled “Business Income (and Extra Expense) Coverage Form.”

37.□ Pursuant to this provision in the Policy, Defendant promised to pay for “Loss of Business Income” caused by a Covered Cause of Loss. Specifically, Defendant promised to pay for the loss of Business Income sustained due to the necessary “suspension” of the insured’s “operations” during the “period of restoration.”

We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration".

38.□ Parts of the Policy, including the “Business Income (and Extra Expense) Coverage Form,” are standardized forms drafted by the Insurance Services Office (ISO). The ISO is a company that drafts standard policy language for use in insurance contracts.

39.□ In 2006, the ISO drafted a new endorsement, CP 01 40 07 06, acknowledging that claims for business interruption losses would be filed under existing policy language for losses resulting from the presence of disease-causing agents. Endorsement CP 01 40 07 06, which other insurers have since incorporated in policies, provides that the insurer “will not pay for loss or damage caused by or resulting from any **virus**, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” Significantly, Defendants chose to not include this endorsement in Plaintiffs’ Policy.

40.□ In addition to promising to pay for loss of Business Income, under the Policy, Defendants also promised to pay for certain necessary “Extra Expense[s].” Extra Expense means expenses that the policyholder incurs to, for example, minimize the suspension of business.

41.□ The Policy also provides “Civil Authority” coverage. Under this type of coverage, Defendants promised to pay for the loss of Business Income and Extra Expense that the Plaintiffs sustained as a result of “action of civil authority that prohibits access to the described premises [Dandee Donut].” Plaintiffs’ Policy does not contain any exclusion which would apply to allow Defendants to deny coverage for losses caused by COVID-19 and related actions of civil authorities taken in response to COVID-19.

42.□ This Civil Authority provision is an independent basis for business interruption coverage. That is, it can be triggered even when the standard business interruption coverage is not.

43.□ Accordingly, because the Policy does not specifically exclude the losses that Plaintiffs have suffered, those losses are covered and Defendants wrongfully denied Plaintiffs’ claim.

### Plaintiffs' Covered Losses

44.□ According to the Florida Department of Health, COVID-19 is present in all of Florida's 67 counties. Broward County, where Coral Springs is located, has had more than 210,000 confirmed cases of COVID-19, and at least 2,600 deaths.

45.□ According to the Florida Department of Health, COVID-19 is present in all of Florida's 67 counties. Miami-Dade County has had more than 439,000 confirmed cases of COVID-19, and at least 5,700 deaths.

46.□ According to the Florida Department of Health, COVID-19 is present in all of Florida's 67 counties. Palm Beach County has had more than 129,000 confirmed cases of COVID-19, and at least 2,600 deaths.

47.□ The presence of COVID-19 and the public health emergency it has created have prompted actions by civil authorities throughout the United States ("Civil Authority Actions"), including but not limited to civil authorities with jurisdiction over Plaintiffs: Broward County, Miami-Dade County, Palm Beach County, and the state of Florida. These Civil Authority Actions have restricted and prohibited access to the insured property.

48.□ On March 20, 2020, the Governor of Florida issued Executive Order 20-71. This Order, which covered all other Florida Counties, required all restaurants, bars, pubs, and similar establishments to close on-premises food service.

49.□ On March 26, 2020, Broward County issued Emergency Order 20-03, "Safer at Home Policy" Order. Among other things, this Order required the closure of all non-essential businesses, including restaurants and bars, in compliance with Executive Order 20-70 and 20-71. Emergency Order 20-03 was expressly issued in response to the propensity of COVID-19 "to spread person to person and also because the virus is physically causing property damage." Palm



Beach County and Miami-Dade County issued similar orders.

50.□ On March 30, 2020, the Governor of Florida signed Executive Order 20-89, ordering Broward County, Palm Beach County, and Miami-Dade County “to restrict public access” to non-essential businesses.

51.□ In Florida, violations of an executive order issued by the Governor pursuant to the State Emergency Management Act are second-degree misdemeanors punishable by imprisonment.

52.□ Due to COVID-19, Plaintiffs’ property has suffered “direct physical loss of or damage”—under the plain and ordinary meaning of that term. Any jury would find that the Restaurants have suffered a direct physical loss or damage because COVID-19 impaired the property by making the Restaurants unusable in a way they had been used prior to the outbreak of COVID-19.

53.□ Instead of being able to welcome patrons into its Restaurants, Plaintiffs were forced to drastically reduce its business operations, were required to strictly limit the number of patrons in the Restaurants. Several structural alterations, changes, and/or repairs were also made to the Restaurants. Employees and restaurant patrons must wear masks, remain six feet apart, and follow other social distancing measures.

54.□ The Restaurants’ loss is direct. Plaintiffs are not asking their insurance company to reimburse them after someone obtained a judgment against Plaintiffs for getting patrons/diners sick—which would arguably be an indirect loss. Plaintiffs are asking their insurance company to pay for the loss of business income occasioned directly by COVID-19.

55.□ The Restaurants’ loss is physical. Plaintiffs are unable to use the interior spaces in the manner in which they had previously used those spaces. The probability of illness prevents the use of the space in no less of a way than, on a rainy day, a crumbling and open roof from the

aftermath of a hurricane would make the interior space of a business unusable.<sup>1</sup> Moreover, the SARS-CoV-2 virus that causes COVID-19 is physical—it can be seen, counted, measured, and destroyed; it replicates itself and destroys other cells and organisms. Importantly, it can exist in the air and on surfaces for indeterminate periods of time, and be transferred from the air and surfaces into human bodies. The presence of the virus in a facility is a *physical* presence, and it is a damaging one.

56.□ This is a loss. It is the loss of functionality of the space for business purposes. It is the diminishment of the physical space in the Restaurants. What once could hold many, now can safely hold only a few.

57.□ The impairment of the businesses function is also damage to the Restaurants. These losses constitute damage. A physical object—i.e. a virus that is proven to be both airborne and present on the surfaces of objects—has been present in and around Plaintiffs’ restaurants, impairing their functions for their ordinary and intended uses, forcing their closures, and requiring steps to be taken to physically restore the facilities to a usable state. As a result, Plaintiffs were unable to earn and/or generate revenue to the extent they normally would, causing Plaintiffs to suffer massive losses.

58.□ Insurers around the country now desire for federal and state judges to interpret the words “direct physical loss or damage,” but those words need no interpretation. Insurers would like for courts to alter the meaning of those terms rather than allow for a jury to apply the facts of

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<sup>1</sup> Note, however, that Plaintiffs are not seeking recovery for their loss of use. Plaintiffs are seeking coverage for their loss of business income. Here’s an example that drives home the difference, some law firms have been unable to use their office space because of COVID-19, but nevertheless the law firms’ business income has increased and they thus have faced no loss of business income. A claim by such a law firm for not being able to use its office space would be a “loss of use” claim. The law firm would have no loss of business income claim. Here, Plaintiffs’ business has decreased significantly because of the impairment of the Restaurants, and Plaintiffs are seeking the loss of business income under the business interruption coverage of the insurance policy.

the case to these ordinary words and reach a verdict in the same way a jury would reach a verdict if called upon to answer whether a person was injured or property was damaged—as it was here.

59.□ The Restaurants were forced to partially suspend operations and business due to the direct physical loss or damage caused by COVID-19 and the resultant closure orders issued by civil authorities in Florida.

60.□ The threat and presence of COVID-19 is direct physical loss or damage to property. And here it caused direct physical loss of and/or damage to the covered premises under the Policy by, among other things, causing direct physical loss of or damage to the Covered Property, denying access to/use of and damaging the property, preventing customers from physically occupying the property, causing the property to be physically uninhabitable by customers, causing its function to be nearly eliminated or destroyed, requiring physical repair and/or alterations to the Covered Property, and/or causing a necessary suspension of business operations on the premises.

61.□ The presence of COVID-19 at Plaintiffs' Restaurants has caused "direct physical loss of or damage" to Plaintiffs' property and is further evidence by the numerous recent alterations made to the Restaurants and their business operations.

62.□ For instance, new signage, markings, and decals were placed on the walls, windows, and floors of the restaurants to promote social distancing and offer safety guidelines to visitors. Numerous hand sanitizer stations were erected within the restaurants for employees and guests alike to frequently wash their hands. Tables, chairs, and/or other furniture were completely removed or relocated to eliminate and/or reduce the spread of COVID-19 at the restaurants to permit spacing for social distancing.

63.□ Further, Plaintiffs were forced to implement a strict capacity limit at the Restaurants.

64.□ Thus, there have been many obvious structural alterations, changes and/or repairs made to Plaintiffs Restaurants and the operations in order to continue business after experiencing direct property damage, which was caused by COVID-19, and to avoid imminent threat of further property damage.

65.□ COVID-19 has rendered Plaintiffs' Restaurants unfit for their normal, and intended business functions. Plaintiffs' Restaurants are not functional for their normal and intended business purpose because of the changed physical environment due to COVID-19. COVID-19 also presented an imminent threat of immediate damage or loss to Plaintiffs' Restaurants, which forced Plaintiffs to take costly action to prevent further damage or loss.

66.□ The Civil Authority Actions prohibiting public access to the covered premises and the surrounding area were issued in response to dangerous physical conditions and damage, caused a suspension of business operations on the covered premises.

67.□ As a result of the presence of COVID-19, and the closure orders, Plaintiffs have suffered a suspension of business operations, sustained losses of business income, and incurred extra expenses.

68.□ As a result of the Civil Authority requirements, Plaintiffs have suffered a suspension of business operations, sustained losses of business income, and incurred extra expenses.

69.□ Plaintiffs have incurred reasonable and necessary costs to temporarily protect or preserve the covered property as a result of actual and imminent physical loss or damage to the covered property caused by COVID-19.

70.□ These losses and expenses have continued through the date of filing of this action.

71.□ These losses and expenses are not excluded from coverage under the Policy. And

because Plaintiffs have complied with their contractual obligations, Plaintiffs are entitled to payment for these losses and expenses.

72.□ Accordingly, Plaintiffs provided notice of its losses and expenses to Defendants, as required by the terms and procedures of the Policy.

73.□ But contrary to the plain language of the Policy, and to Defendants' corresponding promises and contractual obligations, Defendants refused to pay for Plaintiffs' losses and expenses, necessitating the filing of this action.

74.□ Due to the nature of Plaintiffs' Claim submitted to Defendants, time is of the essence. Under the current circumstances, the prompt, orderly, and efficient payment of Plaintiffs' Claim under the Policy is required.

75.□ Plaintiffs have engaged the undersigned counsel to represent it in this action and have agreed to pay a reasonable fee for the services rendered. Plaintiffs seek their attorneys' fees and costs pursuant to Fla. Stat. § 627.428.

### **COUNT I – DECLARATORY JUDGMENT**

76.□ Plaintiffs re-adopt and re-allege paragraphs 1 through 75 above.

77.□ Plaintiffs seek declaratory relief under Chapter 86, Florida Statutes.

78.□ Plaintiffs' Policy is an insurance contract under which Defendants was paid premiums in exchange for promises to pay Plaintiffs' losses and expenses covered by the Policy.

79.□ A current dispute exists between Plaintiffs and Defendants as to whether the Policy provides coverage for Plaintiffs due to recent events including, but not limited to, the COVID-19 pandemic and/or mandatory government closures of Plaintiffs' business and operations.

80.□ COVID-19 caused direct physical loss of and damage to the insured premises, resulting in the suspension of business operations at the premises. The suspension has caused Plaintiffs to suffer losses of business income and extra expenses.

81.□ The suspension and losses satisfied all requirements and triggered business income coverage, extra expense coverage, and/or civil authority coverage under the Policy.

82.□ Plaintiffs have complied with all applicable provisions of the policy, including payment of premiums.

83.□ Defendants, without justification, dispute that the Policy provides coverage for these losses.

84.□ The Policy fully and completely provides coverage for Plaintiffs' claim.

85.□ Plaintiffs are interested and/or in doubt about their rights under the Policy, therefore, Plaintiffs seek to obtain a declaration of their rights, and Defendants' obligations, under the Policy, by this Court making a determination of a question of construction arising under the Policy.

86.□ There is a bona fide dispute between the parties and an actual, present, and practical need for a declaration as to whether the Policy provides coverage for Plaintiffs' claim.

**WHEREFORE**, Plaintiffs, TAPCO RESTAURANT GROUP, LLC, TAP 42 MIAMI, LLC, TAP 42 GABLES, LLC, TAP 42 BOCA, LLC, TAP 42 AVENTURA, LLC, TAP 42 CORAL SPRINGS, LLC, AND TAP 42 DORAL, LLC, respectfully request that this Court enter a declaratory judgment declaring that the Policy provides coverage for the losses suffered; award Plaintiffs their attorneys' fees and costs pursuant to Florida Statutes Section 627.428 and other applicable laws; award costs pursuant to Florida Statutes Section 86.081 and other applicable laws; and award and additional and further relief as the Court deems just, equitable, and proper.

### **COUNT II – BREACH OF CONTRACT**

87.□ Plaintiffs re-adopt and re-allege paragraphs 1 through 75 above.

88.□ Plaintiffs entered into a valid and enforceable insurance contract with Defendants.

89.□ Plaintiffs gave valuable consideration to Defendants, which was in the form of premium payments in exchange for Defendants' promises to pay Plaintiffs' losses and expenses in the event of a loss of business income.

90.□ Plaintiffs suffered losses and incurred expenses as a result of a covered loss under the Policy.

91.□ Plaintiffs made a claim under the Policy, as a result of a covered loss, which was denied by Defendants.

92.□ Defendants breached the insurance contract by denying Plaintiffs' claim for a covered loss under the Policy, which was not subject to any exclusions.

93.□ Plaintiffs complied with its obligations under the insurance contract.

94.□ Plaintiffs have been injured and suffered actual and substantial damages as a result of Defendants' breach of the insurance contract, for which Defendants are liable.

**WHEREFORE**, Plaintiffs, TAPCO RESTAURANT GROUP, LLC, TAP 42 MIAMI, LLC, TAP 42 GABLES, LLC, TAP 42 BOCA, LLC, TAP 42 AVENTURA, LLC, TAP 42 CORAL SPRINGS, LLC, AND TAP 42 DORAL, LLC, seek compensatory damages resulting from Defendants' breach of the Policy; award Plaintiffs their attorneys' fees and costs pursuant to Florida Statutes Section 627.428 and other applicable laws; and award and additional and further relief as the Court deems just, equitable, and proper.

#### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs, TAPCO RESTAURANT GROUP, LLC, TAP 42 MIAMI, LLC, TAP 42 GABLES, LLC, TAP 42 BOCA, LLC, TAP 42 AVENTURA, LLC, TAP 42 CORAL SPRINGS, LLC, AND TAP 42 DORAL, LLC, respectfully requests that the Court enter judgment in its favor and against Defendants, as follows:

- A.  Entering a declaratory judgment on Count I, in favor of Plaintiffs as follows:
  - i.  Business Income, Civil Authority, and Extra Expense losses and expenses incurred and sustained as a result of COVID-19 and related civil authority actions are insured and covered losses and expenses under Plaintiffs' policy; and
  - ii.  Defendants are obligated to pay for the full amount of the Business Income, Civil Authority, and Extra Expense losses and expenses sustained and incurred, and to be sustained and incurred, as a result of COVID-19 and related civil authority actions are insured and covered losses and expenses under Plaintiffs' Policy;
- B.  Entering judgment on Count II, in favor of Plaintiffs and awarding damages for breach of contract in an amount to be determined at trial;
- C.  An order requiring Defendants to pay both pre- and post-judgment interest on any amounts awarded;
- D.  An award of costs and attorneys' fees; and
- E.  Such other or further relief as may be appropriate.



**DEMAND FOR JURY TRIAL**

The Plaintiff hereby demands a trial by jury as to all issues so triable.

Respectfully submitted,

/s/ Steven H. Osber

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