

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

CASE NO.

FRANCO's COCKTAIL PRODUCTS, INC.,  
a Florida corporation,

Plaintiff,

v.

mitsui sumitomo insurance company  
of america, a New York corporation,

Defendant.

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**COMPLAINT**

Plaintiff, Franco's Cocktail Products, Inc. sues Defendant Mitsui Sumitomo Insurance Company of America ("Mitsui") and states:

**JURISDICTION, PARTIES AND VENUE**

1. This is a civil action for breach of an insurance contract, costs, and attorneys' fees in excess of Thirty Thousand Dollars (\$30,000.00).
2. Plaintiff Franco's Cocktail Products, Inc. is a Florida corporation and operator of cocktail mix processing plants located in Pompano Beach, Florida.
3. Mitsui is a New York insurance company based in New Jersey and authorized to conduct business in Florida.
4. Venue lies in Broward County, Florida pursuant to Fla. Stat. § 47.051 because Mitsui has agents in Broward County, this is where the cause of action accrued, and where the property in litigation is located. *See also* Fla. Stat. § 47.011; Fla. Stat. § 47.041.
5. This Court has personal jurisdiction over Mitsui pursuant to Fla. Stat. § 48.193(1)(a) because Plaintiff's claim arises out of Mitsui conducting, engaging in and

carrying on business in Florida; Mitsui's agents and brokers have offices in Florida; Mitsui breached an insurance contract in Florida by failing to perform its contractual obligations that the insurance contract requires to be performed in Florida; and Mitsui contracted to insure Plaintiff's business located in Florida at issue in this action.

6. All conditions precedent to this action have occurred, been performed or have been waived.

## **FACTS**

### **A. Background**

7. People and businesses buy insurance to help themselves when disaster occurs.

8. People and businesses know that they are at their most vulnerable and desperate condition in the wake of disasters like the current pandemic. Insurance companies know it too.

9. Unlike most other types of commercial contracts, the insurance contract contains mutual obligations.

10. The insurance company, including Defendant herein, promises that it will provide money when most needed after a covered loss in the event of a disaster.

11. The insurance company, including Defendant herein, promises, warrants and sells "peace of mind" that in the unlikely event of a catastrophe or disaster such as a pandemic the policy holder will be fully and promptly indemnified.

12. For years and even decades, the vast majority of people and businesses that carry business interruption insurance have faithfully paid their premiums and have never made a claim. Now that there is a catastrophic business interruption caused by a national health pandemic and government-ordered shutdowns, their claims are denied. Like Plaintiff, many people and businesses are relying on their business interruption insurance to cover what it is supposed to

cover – loss of income and ongoing expenses – to get through this crisis and rebuild their businesses.

13. Plaintiff, like any business, is about commerce, including employees, suppliers and customers. The business counts on current income and future income from operations to remain operational, and insurance coverage when operations are suspended due to disasters.

14. Policyholders are dependent on performance by the insurance company when they are most vulnerable. Dependence here arises from the policyholders' financial desperation combine with a state of mind focused on managing the fallout from the disaster.

15. When the insurance company fails to fulfill its obligations timely and completely, the policyholder suffers contractual and harm to the existence of its business.

16. In order to protect its business and its income from losses, Plaintiff obtained an insurance policy (the "Policy") issued by Mitsui.

17. Plaintiff purchased this commercial output income coverage policy, with policy number PKG3126739, effective January 1, 2020. *See Exhibit A.* The Policy protects against, among other risks, business income losses and extra expenses that result from an involuntary interruption of business operations.

18. The Policy insures Plaintiff's commercial output from its business operations, which is based on sale of its cocktail mix products to restaurants. The Policy is in full effect as Plaintiff has faithfully paid the premiums due which Defendant accepted.

19. The Policy is a contract whereby Plaintiff agreed to pay monthly premiums in exchange for Defendant's promises of coverage for losses, including losses due to the involuntary interruption of its commercial output and business earning from dependent locations such as customers who purchase Plaintiff's products.



20. Beginning in March 2020, Plaintiff was forced to suspend business operations as a result of the national emergency proclaimed to deal with the national COVID-19 pandemic and resultant civil authority orders, which closed non-essential businesses and prohibited access to the restaurants, bars and others who purchase Plaintiff's products. These ongoing suspensions has caused Plaintiff to suffer significant income losses and incur significant expenses.

21. Specifically, Defendant is in breach by refusing coverage for the suspension of business that resulted from the national COVID-19 pandemic disaster. Defendant was obligated under the Policy to cover and pay these losses and expenses but has refused to do so.

#### **B. Relevant Policy Provisions**

22. The Policy is an all-risk commercial output income insurance policy that provides coverage for physical loss of the insured business income from all risks unless expressly excluded by language in the body of the policy or through a separate exclusion endorsement. There is no exclusion in Plaintiff's Policy for business interruption caused by a declaration of a national emergency and urgent lock down of non-essential businesses and restaurants and bars and at-home quarantine of the vast majority of the national population due to a global pandemic.

23. The Policy describes Plaintiff's property as "business earnings" for which it will pay for direct physical loss of caused by or resulting from any cause of loss not excluded.

24. The business earnings coverage provides that Defendant will pay for the actual loss of business income Plaintiff sustains due to the necessary suspension of its operations during a period of restoration that ends when business operations return to normal. *Id.* at 109.

25. The Policy defines operations as Plaintiff's usual business operations occurring at the covered locations. *Id.* at 153.

26. The Policy defines business income as net income that would have been earned or incurred” if no physical loss had occurred. *Id.* at 109.

27. The Policy also provides for coverage for extended business income where the necessary suspension of operations produces a business income loss up to the time normal business operations resume. *Id.* at 110.

28. The Policy includes coverage for extra expense, providing that Defendant will pay the necessary expenses Plaintiff incurs that it would not have incurred if there had been no direct physical loss of the earnings. *Id.* at 109.

29. The Policy includes coverage for actions of civil authority, providing that Defendant will pay for the actual loss of business income and incurred extra expenses at the premises caused by the action of civil authority that prohibits access to Plaintiff’s premises or a dependent location by order of a civil authority. *Id.* at 110.

**C. Plaintiff Has Suffered and Continues to Suffer a Loss Under the Policy**

30. Following the proclamation of a national emergency Broward County Administrator Bertha Henry issues a series of Emergency Orders from March 22, 2020 to April 28, 2020 (Emergency Orders 20-01 to 20-07) that closed or severely restricted non-essential businesses in Broward County. Likewise, Miami-Dade Mayor Carlos Jimenez issued Emergency Orders 3-20 and 7-20 severely restricting or closing non-essential businesses in the County. On March 9, 2020 Governor Ron DeSantis in response to President Trump’s proclamation of a national state of emergency issued Executive Order 20-52 citing his authority to declare a state of emergency under Chapter 267 (1)(a), Florida Statutes which is intended to provide emergency measures to protect residents from disasters that threaten life, health and safety and damage to property. Governor DeSantis issued additional Executive Orders relating to the COVID-19

pandemic including Executive Order 20-70 on March 20, 2020 closing restaurants in certain other Broward County and other South Florida counties (other than for deliveries), bars, taverns, pubs, night clubs, banquet halls, cocktail lounges, cafeterias, movie theaters, concert houses, auditoriums, playhouses, bowling alleys, arcades, gymnasiums, and fitness studios.

31. Then, on March 30, 2020 Governor DeSantis issued Executive Order 20-89, explicitly limiting access to businesses in South Florida:

I hereby order Miami-Dade County, Broward County, Palm Beach County and Monroe County to restrict public access to businesses and facilities deemed non-essential pursuant to the guidelines established by Miami-Dade County pursuant to its March 19, 2020 Emergency Order 07-20, and as modified by subsequent amendments and orders prior to the date of this order.

32. Other similar state and local civil authority orders have been issued that close or restrict access to all non-essential business operations or prohibit public access to the property of non-essential businesses where the individuals gather in close proximity to each other in order to protect people from the dangerous condition of contracting the respiratory illness named COVID-19.

33. The civil authority orders expressly state that the closing of non-essential businesses, reductions in permitted operating hours, and social distancing restrictions placed on the public are necessary emergency measures to protect the health and safety of all residents in due to the spread of COVID-19 through human-to-human and surface-to-human contact with the coronavirus.

34. The COVID-19 pandemic is tantamount to a “natural disaster.” Like other specific disasters, such as hurricanes or earthquakes, it involves substantial damage to property, hardship, suffering, and loss of life.



35. Unsurprisingly, already, at least one State Supreme Court has recognized, in *Friends of DeVito v. Wolf*, that the damage caused by the COVID-19 pandemic is indistinguishable from those caused by earthquakes, fires and the other casualty events:

We agree with Respondents that the COVID-19 pandemic qualifies as a “natural disaster” under the Emergency Code...

2020 Pa. LEXIS 1987, at \*31 (Pa. April 13, 2020).

36. Losses from disasters are what business income insurance coverage has always been intended to cover.

37. The nature of Plaintiff’s non-essential business is sale of its cocktail mix products to restaurants, bars and other establishments open to the public and a place where individuals socialize and gather in close proximity. As a direct result of the existence of the national COVID-19 emergency, and orders to close non-essential businesses, restaurants, bars, hotels and other establishments in South Florida, Plaintiff suffered a physical loss of its business income and extra expenses. The loss continues.

38. Further, the civil authority actions closing non-essential business and restricting the public from accessing Plaintiff’s dependent locations and the area surrounding those locations resulted from dangerous physical conditions which caused a suspension of Plaintiff’s business operations and loss of its business income. Over 6,000 cases of people infected with the coronavirus have been reported in Broward County. This shows that the population is vulnerable to contracting COVID-19 throughout the county, and that dangerous conditions permeate all property, including the areas surrounding Plaintiff’s premises.

39. Specifically, the civil authority orders have denied access to premises, prevented customers from physically occupying premises, caused premises to be physically uninhabitable

by customers, caused many business operations to be nearly eliminated or destroyed, and caused the reduction of the majority of business operations throughout Florida.

**D. Plaintiff Has Suffered and Continues to Suffer a Loss Under the Policy, But Was Denied Coverage**

40. The business income losses Plaintiff has and continues to suffer, and the extra expenses Plaintiff has incurred are covered under the Policy, yet Defendant on April 14, 2020 denied coverage despite Plaintiff's timely notice of its claim just hours before.

41. Due to the proclaimed national disaster, state and local state of emergency declarations, and related civil authority orders, Plaintiff has suffered business income losses from the reduction and suspension of business operations, losses of income, and incurred extra expenses.

42. These losses and expenses have continued through the date of filing of this action as Plaintiff's dependent restaurant operations remain suspended or severely reduced.

43. Plaintiff's lost business income and extra expenses are covered under the Policy, are not limited and have not been excluded from coverage. Plaintiff is entitled to be indemnified by Defendant for its business income losses and expenses incurred.

44. Thus, Defendant is in breach of the Policy for denying coverage.

**COUNT I**

**BREACH OF CONTRACT**

45. Plaintiff incorporates by reference paragraphs 1 – 44 as though fully set forth herein.

46. Plaintiff has a commercial output income insurance policy issued by Defendant.

47. Plaintiff has performed all its obligations as specified by the Policy including the payment of all premiums due.



48. Plaintiff's Policy provides coverage for business income loss, extended business income loss, and extra expense for unexpected and unexcluded causes of loss.

49. As stated above, Plaintiff had to involuntarily close its non-essential business and cease or substantially reduce its operations due to the national COVID-19 emergency and resulting measures put in place by civil authority orders that closed restaurants, bars and other customer locations, and thus has incurred substantial business income losses and extra expenses.

50. Defendant denied and refused to provide coverage for business income losses, extra expenses.

51. As a result of Defendant's breach of the Policy, Plaintiff has suffered actual damages.

**WHEREFORE**, Plaintiff seeks compensatory damages resulting from Defendant's breach of contract, an appraisal to determine the amount of damages, and further seeks all relief deemed appropriate by this Court, including attorneys' fees and costs.

#### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff demands judgment against Defendant as follows:

- (1) Awarding Plaintiff compensatory damages from Defendant's breach of the insurance contract in an amount to be determined at trial or appraisal ordered by this Court, together with appropriate prejudgment interest at the maximum rate allowable by law;
- (2) Awarding Plaintiff costs and disbursements and reasonable allowances for the fees of Plaintiff's experts, and reimbursement of expenses;
- (3) Awarding Plaintiff attorneys' fees pursuant to Fla. Stat. § 627.428; and
- (4) Awarding such other and further relief the Court deems just, proper, and equitable.

**DEMAND FOR A JURY TRIAL**

Plaintiff requests a jury trial for any and all Counts for which a trial by jury is permitted by law.

Respectfully submitted this 3<sup>rd</sup> day of June, 2020.

/s/ Javier A. Lopez

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