

THE WALLACE FIRM, PC
16000 VENTURA BLVD., SUITE 440
ENCINO, CALIFORNIA 91436
Telephone: (818) 476-5998; Facsimile: (818) 476-5598

1 **THE WALLACE FIRM, PC**
2 BRADLEY S. WALLACE, ESQ. (SBN #243169)
3 bradley@wallacefirm.com
4 THOMAS R. BURNS, ESQ. (SBN #297577)
5 thomas@wallacefirm.com
6 16000 Ventura Blvd., Suite 440
7 Encino, CA 91436
8 Tel: 818-476-5998
9 Fax: 818-476-5598

10 Attorneys for Plaintiffs, ROBERT GARY RESTAURANTS, INC.

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **COUNTY OF LOS ANGELES**

13 ROBERT GARY RESTAURANTS, INC.

CASE NO.:

14 Plaintiff,

15 vs.

16 TRUCK INSURANCE EXCHANGE, an
17 insurance exchange

COMPLAINT

18 Defendant.

19 Plaintiff ROBERT GARY RESTAURANTS, INC., by and through its attorneys, Bradley S.
20 Wallace, Esq., and Thomas R. Burns, Esq., and The Wallace Firm, P.C., brings this Complaint,
21 alleging against Defendant TRUCK INSURANCE EXCHANGE, an insurance exchange, as follows:

22 **I. INTRODUCTION**

23 1. If an insurer promises that by taking out “business income coverage, your policy
24 helps replace the income lost while your company is closed,” it needs to keep that promise. *See*
25 FARMERS INSURANCE, [https://www.farmers.com/learn/insurance-questions/business-income-](https://www.farmers.com/learn/insurance-questions/business-income-coverage-definition/)
26 [coverage-definition/](https://www.farmers.com/learn/insurance-questions/business-income-coverage-definition/) (last accessed Jan. 27, 2022). Defendant understands that business interruption
27 insurance is critical because it helps keep capital flowing to “keep your company running,”
28 including lost profits, payroll, taxes, and other operating expenses. *Id.*; *see also* FARMERS
INSURANCE, <https://www.farmers.com/business/property/> (last accessed Jan. 27, 2022).

1 2. In March of 2020, when California entered a State of Emergency due to the rapidly
2 developing COVID-19 pandemic, it issued a series of “Stay at Home” Orders forcing essential and
3 non-essential businesses to shutdown either fully or partially.

4 3. Plaintiff is a California business that owns and operates a restaurant in Palm Springs,
5 California. Plaintiff dutifully paid its premiums to Defendant to the tune of \$6,752.04 annually and
6 had a valid business insurance contract with Defendant at the time (the Farmers Policy). Plaintiff
7 suffered business income losses because of the forced government shut down orders that were issued
8 to slow the spread of the COVID-19 virus. These circumstances created a direct physical loss of or
9 damage to property at the Plaintiff’s insured premises.

10 4. After sustaining losses because of the governmental orders, Plaintiff made a timely
11 and proper insurance claim to Defendant to obtain the benefits afforded under the terms of its
12 insurance contract.

13 5. Properly construed, the terms of the Farmers Policy provided Plaintiff with coverage
14 for its claim, especially given that Farmers markets and describes its policy as providing coverage
15 for the loss of business income due to circumstances outside the control of the insured.

16 6. The Farmers Policy provides coverage for the loss of business income and extra
17 expenses sustained due the suspension of business operations and the extra expenses during the
18 period of restoration caused by direct physical loss or damage to the property at the insured
19 premises. The policy includes coverage for all risks and does not exclude payment of benefits for
20 this type of governmental action.

21 7. Defendant’s obligation to provide business income coverage in the circumstances
22 here—when government action shuts down or limits the business’s access or use of property for
23 reasons outside the control of the insured—is supported by both the language of the policy and
24 representations made by Farmers’ captive agents and in their written materials.

25 8. When COVID-19 hit the United States, governments across the country—state and
26
27
28

1 local—acted to protect the public health by entering orders that limited business operations, use of or
2 access to facilities, travel, and in-person social interactions. The governmental orders also directed
3 businesses to undertake certain affirmative actions, such as regular disinfecting and cleaning of
4 business premises. These orders caused Plaintiff to suffer the very losses Defendant promised to
5 reimburse. These governmental orders are a quintessential, well-known exercise of police powers.
6 “The state’s inherent prerogative to protect the public’s health, safety, and welfare is known as the
7 police power.” *See* Gostin, Lawrence, and Wiley, Lindsey, *Public Health Law*, University of
8 California Press, p. 11. Using or accessing one’s real property or employing or putting into service (or
9 removing therefrom) one’s equipment and business property, is inherently physical in nature. And
10 ousting or precluding the use of or access to real property results in a loss of a physical nature.

11
12 9. Without any investigation of the insured premises, Defendant denied Plaintiff’s
13 claim by interpreting the term “direct physical loss” to require a physical alteration and also by
14 applying an inapplicable virus exclusion.

15
16 10. The policy excludes only specific types of harm from governmental action, meaning
17 that, by excluding some but not all situations, certain governmental action is both a covered risk
18 and eligible for payment if the governmental-action exclusion does not apply. Here, Defendant
19 excluded only governmental action ordering the seizure or destruction of property, indicating that
20 all other governmental action is a covered cause of loss. Under the policy’s business-income
21 protection, Defendant agreed to cover, among other things, all suspensions of business operations
22 caused by direct physical loss to property on the premises. Defendant chose not to define what
23 “direct physical loss to property at the described premises” means, and now construes in a manner
24 that narrows coverage and is favorable to Defendant, contrary to standard principles of contract
25 interpretation.
26

27 11. Defendant’s interpretation of the policy language is wrong, and its denial of
28 coverage for losses caused by limitations on the physical use and access to insured’s property

1 breached the contract.

2 12. The meaning of the term “direct physical loss of property at the described premises”
3 is ambiguous at best. There is no indication in the policy that this term requires a physical
4 alteration. Reading the term in context of the language used elsewhere in the policy supports
5 coverage. The policy’s exclusions imply that but for the exclusion, payment would have been made
6 in situations where no physical alteration is present. For example, the policy provides that
7 Defendant “will not pay for loss or damage caused directly or indirectly by” things such as nuclear
8 reactions, radioactive contamination, and the failure of power or other utility services. By stating
9 that no payment will be made for these types of losses or harms indicates that, but for the exclusion,
10 they would be losses that would otherwise be paid. Yet, none of these examples would constitute a
11 physical alteration as Defendant uses the term in denying Plaintiff benefits. The language of the
12 exclusions supports that position that the term “direct physical loss of property at the described
13 premises” is not limited to physical alterations.

14
15 13. In addition to improperly requiring a physical alteration, Defendant has, since
16 Plaintiffs’ losses began to occur due to the COVID-19 pandemic over one year ago, improperly
17 attempted to escape responsibility for payment on Plaintiff’s claims by applying an inapplicable
18 virus or bacteria exclusion endorsement in the policy. The virus exclusion is irrelevant to Plaintiff’s
19 claim of direct physical loss resulting from governmental action. Plaintiff’s claim rests on the risk
20 of governmental action that is not included in the exclusion, which renders it a risk that is covered.
21 That the governmental action is related to a virus does not transform the risk of governmental
22 action into a different type of risk.

23
24 14. Plaintiff seeks compensatory damages, statutory damages, attorney’s fees, interest,
25 and declaratory relief.
26

27 **II. PARTIES**

28 15. At all relevant times, ROBERT GARY RESTAURANTS, INC., DBA

1 BRICKWORKS BISTRO (“Brickworks Bistro”) is a corporation authorized to do business in the
2 State of California, County of Riverside. Brickworks Bistro owns, operates, manages, and/or controls a
3 restaurant located at 155 South Palm Canyon Dr., Palm Springs, CA. 92262. The insured location is
4 listed as an insured location in Brickworks Bistro’s policy.

5 16. At all relevant times, Defendant Truck Insurance Exchange (“Truck”), is and was a
6 reciprocal or inter-insurance exchange, and member of the Farmers Insurance Group of Companies,
7 and a corporation doing business in the County of Los Angeles, State of California.
8

9 17. Defendant’s place of business is 6301 Owensmouth Ave, Woodland Hills, CA
10 91367.

11 18. At all relevant times mentioned herein, the true names and capacities, whether
12 individual, corporate, associate or otherwise, of Defendants and DOES 1 through 50, inclusive, are
13 currently unknown to Plaintiff, who therefore bring suit against these Defendants by their fictitious
14 names and capacities. Plaintiff is informed and believes and thereupon alleges that each factiously
15 named Defendant, whether acting for itself or as an agent, corporation, association, or otherwise, is
16 liable or responsible to Plaintiff and proximately caused injuries and damages to Plaintiff as alleged
17 herein. While at this time Plaintiff is unaware of the true names and capacities of the DOE
18 Defendants, Plaintiff will amend its Complaint to show the true names and capacities of DOES 1
19 through 50, inclusive, when those identities have been ascertained.
20

21 19. All allegations in this Complaint are based on information and belief and/or are
22 likely to have evidentiary support after a reasonable opportunity for further investigation or
23 discovery. Whenever allegations in this Complaint are contrary or inconsistent, such allegations
24 shall be deemed alternative.
25

26 **III. JURISDICTION AND VENUE**

27 20. Jurisdiction is proper pursuant to Cal. Code Civ. Proc. §§ 410.10, 410.50 and 1060.

28 21. Venue is proper in this judicial district pursuant to Cal. Code Civ. Proc. § 395.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. FACTUAL BACKGROUND

A. Plaintiff's insurance policy covers all risks unless expressly limited or excluded in the contract.

22. To protect its thriving business from interruption and other perils, Plaintiff purchased business insurance from Defendant, including loss of income, extra expense, property, liability, and other coverages.

23. Business Income (Business Interruption) coverage is an insurance product marketed and sold by Farmers, as a coverage designed to minimize the risk of financial uncertainty associated with suspensions of insured business operations.

24. This type of insurance specifically covers and pays out benefits to policyholders to allow the policyholder to pay continuing operating expenses, additional expenses incurred because of the suspension of their operations, and supplement its lost-business income.

25. The advertised purpose of the business income and extra expense coverage was to keep insureds in business following a loss or disaster. *What is Business Income Coverage, FARMERS* <https://www.farmers.com/learn/insurance-questions/business-income-coverage-definition/> (last visited Feb. 4, 2022). Farmers notably advertises that its business income product “not only helps you to cover expenses needed to keep a business operating after a loss, but it also helps you to replace loss revenue.”

26. Upon information and belief Farmers markets and describes its Business Interruption product as providing coverage when the insured business is partially or fully inoperable for reasons outside the insured's control.

27. With that mindset, Farmers sold, and Plaintiff purchased, business-income replacement coverage to protect against “all risks.”

1 28. Plaintiff's policy is Policy Number 60667-39-36 issued to Plaintiff Robert Gary
2 Restaurants, Inc. dba Brickworks Bistro. A true and accurate copy of Brickworks Bistro's Policy
3 and renewal are attached hereto as **Exhibits 1 and 2** ("Policy").

4 29. Plaintiff paid \$6,752.04 for the Policy, paying in dutifully making monthly
5 payments of \$562.67. Plaintiff purchased business insurance from Defendant and paid the requisite
6 premiums in exchange for "insurance as stated in the policy."

7 30. The Policy's effective period is July 31, 2019, to July 31, 2020.

8 31. The Policy is a renewal policy. The prior policy contained material terms identical to
9 the Policy currently in effect.

10 32. Plaintiff's Policy consists of the policy jacket and its policy provisions, the
11 declarations or information page, and the endorsements.

12 33. This businessowners coverage applies to the insured's covered location identified in
13 the Policy Declarations as 155 S. Palm Canyon B21 Palm Springs, CA 92262-8300. The location
14 comprises the described premises and business personal property covered by the Policy.
15

16 34. The Policy covers the following property: buildings and structures at the described
17 premises as well as business personal property located in or on the buildings at the described
18 premises or in the open within 100 feet of the described premises.
19

20 35. In exchange for payment of the premium, Defendant agreed to provide the insurance
21 coverages described in the Policy.

22 36. Before Plaintiff entered the Policy, Plaintiff conferred with the Ron Henderson
23 Insurance Agency Inc., a Farmers captive agent (Henderson) located in the Coachella Valley,
24 regarding business interruption insurance.
25

26 37. In response to Plaintiff's inquiry about the business interruption coverage and when
27 it applies, Henderson told Plaintiff that if the business is not able to operate through no fault of its
28 own, it would be covered under the business interruption benefits provided by the Policy.

1 38. On information and belief, Henderson got his understanding of the product and
2 made this representation because of Defendant’s training and marketing materials.

3 39. The Policy is an “all risks” policy, meaning the policy covers the insured for any
4 peril, imaginable or unimaginable, unless expressly limited or excluded. In the event a covered peril
5 results in physical loss or damage to Plaintiff’s business premises or property, the Policy will pay
6 for lost business income and extra expenses. Business income means net income (net profit or loss)
7 that would have been earned had no physical loss or damage occurred, and continuing normal
8 operating expenses incurred (including payroll). Extra expense means the costs incurred because of
9 the physical loss or damage—that is, those costs that would have otherwise been avoided. In the
10 event of physical loss or damage, the Policy pays for both.

11
12 40. Specifically, the Policy provides property coverage under the Businessowners
13 Special Property Coverage Form. The Businessowners Special Property Coverage Form includes
14 coverage for “Business Income” and “Extra Expense.”

15
16 41. Under the Business Income coverage, Defendant must “pay for the actual loss of
17 Business Income you sustain due to the necessary suspension of your ‘operations’ during the
18 ‘period of restoration’.”

19
20 42. Under the Extra Expense coverage, Defendant must pay the “necessary Extra
21 Expense you incur during the ‘period of restoration’ that you would not have incurred if there had
22 been no direct physical loss or damage to property at the described premises.”

23
24 43. The Business Income and Extra Expense paragraphs also establish the applicable
25 Covered Causes of Loss, which is defined as “Risks of Direct Physical Loss unless the loss is: a.
26 Excluded in Section B, Exclusions; or b. Limited in Paragraph A.4, Limitations; that follow.” This
27 language covers all risks unless limited by Paragraph A.4 or excluded by Section B.

28
29 44. Farmers, upon information and belief, represented that business-income coverage was
30 simple to understand. Yet it was anything but that, and the average person, to ascertain if a

1 governmental shutdown of a business was covered, would have to analyze and parse through
2 complicated and often contradictory appellate holdings.

3 45. "Direct Physical Loss of property at the described premises" is undefined by the
4 policy. There is no indication in the policy that this term requires a physical alteration. Indeed,
5 reading the term in context of the language used elsewhere in the policy indicates the opposite is
6 true. For example, the policy provides that Defendant "will not pay for loss or damage caused
7 directly or indirectly by" things such as nuclear reactions, radioactive contamination, and the failure
8 of power or other utility services. By stating that no payment will be made for these types of losses
9 or harms indicates that, but for the exclusion, they would be losses that would otherwise be paid.
10 Yet, none of these examples would constitute a physical alteration in the sense Defendant interprets
11 it to deny Plaintiff benefits. This language supports that position that the term "direct physical loss
12 of property at the described premises" is not limited to physical alterations.

13
14 46. If Farmers wanted to limit "direct physical loss" to physical alterations, it had the
15 ability to set forth that limitation on the face of the policy and it would not have needed to excluded
16 the aforementioned risks that do not constitute a direct physical loss.

17
18 47. The Policy provides extended coverage for loss of business income from dependent
19 properties, tips, and certain orders from a civil authority. These coverages have independent limits
20 of insurance benefits.

21 48. The Policy contains several other exclusions, which identify risks that preclude
22 coverage for loss or damage caused by those risks.

23
24 49. None of the exclusions in the Policy preclude coverage for the governmental orders
25 pursuant to which Plaintiff suspended its business operations. The governmental orders therefore
26 constitute a covered "direct physical loss" under the Policy.

27 50. Because the policy excluded the payment of benefits for several categories of harm
28 that inherently do not alter property physically, and because Defendant represented that its coverage

1 would apply if the suspension of business resulted from something outside of Plaintiff's control,
2 Plaintiff reasonably expected that its insured business would be covered during suspensions of
3 business for reasons outside of its control.

4 51. The language of the Farmers Policy, Defendant's own marketing materials,
5 statements made by Defendant's agents, and a commonsense analysis of the coverage language,
6 indicates that Plaintiff's inability to access or use specific property is a direct physical loss and
7 eligible for resultant business-income losses.

8
9 **B. The COVID-19 pandemic hits California.**

10 52. The first public reports of COVID-19 appeared on December 31, 2019, indicating
11 the outbreak of the virus in Wuhan, China.

12 53. On January 21, 2020, the first American COVID-19 case was confirmed in the State
13 of Washington. *See* CENTERS FOR DISEASE CONTROL, [https://www.cdc.gov/media/—](https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html)
14 [releases/2020/p0121-novel-coronavirus-travel-case.html](https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html) (last accessed Apr. 28, 2020).

15 54. According to news reports, shortly thereafter, by January 26, 2020, the United States
16 Centers for Disease Control ("CDC") confirmed the first COVID-19 case in California. *See*
17 CALIFORNIA DEPARTMENT OF HEALTH, [https://www.cdph.ca.gov/Programs/CID/DCDC/](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx)
18 [Pages/Immunization/ncov2019.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx) (last accessed Apr. 28, 2020).

19 55. On February 26, 2020, the CDC announced the first reported California COVID-19
20 case resulting from community spread. *See* CENTERS FOR DISEASE CONTROL, [https://www.cdc.gov](https://www.cdc.gov/media/releases/2020/s0226-COVID-19-spread.html)
21 [/media/releases/2020/s0226-COVID-19-spread.html](https://www.cdc.gov/media/releases/2020/s0226-COVID-19-spread.html) (last accessed Apr. 28, 2020).

22 56. On March 4, 2020, the first COVID-19 fatality was reported in California.

23 57. By March 13, 2020, California's total COVID-19 case count had risen to 198
24 confirmed cases. *See* CALIFORNIA HEALTHLINE (Mar. 13, 2020), [https://californiahealthline.org/](https://californiahealthline.org/morning-briefing/friday-march-13-2020/)
25 [morning-briefing/friday-march-13-2020/](https://californiahealthline.org/morning-briefing/friday-march-13-2020/) (last accessed Apr. 28, 2020).
26
27
28

1 58. On March 13, 2020, the President of the United States declared a national
2 emergency.

3 59. Yet, throughout this entire period from December 2019 through March 13, 2020,
4 Plaintiff did not suffer an interruption or cessation of its thriving business.

5 **C. California takes governmental action forcing Plaintiff's business to shutter.**

6 60. It was when California's state and local governments entered civil authority orders
7 beginning in March 2020 that Plaintiff was forced to close or curtail its business operations.

8 61. As early as March 4, 2020, the Governor of the State of California, Gavin Newsom,
9 entered an order declaring "a State of Emergency to exist in California as a result of the threat of
10 COVID-19." See State of California Executive Order N-25-20 (Mar. 4, 2020) available at
11 <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.12.20-EO-N-25-20-COVID-19.pdf> (last
12 accessed June 1, 2020).

13 62. By March 11, 2020, the World Health Organization officially recognized the spread of
14 COVID-19 as a pandemic.¹

15 63. By March 12, 2020, the Governor began ordering compliance with state and local
16 social distancing measures. *Id.* The Governor further empowered the California Health and Human
17 Services Agency and the Office of Emergency Services to identify and make available hotels "suitable
18 for use as places of temporary residence or medical facilities as necessary for quarantining, isolating,
19 or treating individuals who test positive for COVID-19." *Id.*

20 64. On March 15, 2020, the Governor issued guidelines calling for "profoundly significant
21 steps" to limit the spread of COVID-19. These guidelines required the self-isolation of all residents 65
22 years of age or older and the closure of all "[b]ars, nightclubs, wineries, brew pubs and the like."
23

24
25
26
27 ¹ See World Health Organization, *WHO Director-General's opening remarks at the media briefing on COVID-19 - 11*
28 *March 2020* (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

1 @CAGovernor, TWITTER (Mar. 15, 2020, 1:45 PM) [https://twitter.com/CAGovernor/
2 status/1239291671939919872](https://twitter.com/CAGovernor/status/1239291671939919872). The guidelines further required all restaurants to halve their capacities
3 and keep customers at least six feet from one another. *Id.* These guidelines applied to restaurants, bars,
4 nightclubs, and other such facilities operating within or as part of hotel facilities. See *Id.*, see also
5 Cowan, Jill, California Governor Orders Radical Changes to Daily Life, N.Y. TIMES (Mar. 16, 2020),
6 <https://www.nytimes.com/2020/03/16/us/california-newsom-bars-home-isolation.html> (last accessed
7 Apr. 29, 2020).

8
9 65. The next day, on March 16, 2020, the Governor announced new directives to gyms,
10 health clubs, and movie theaters to close down. The Governor asked restaurants to shut their doors, or,
11 at the restaurants' option, to limit services to takeout only. These directives applied to restaurants,
12 gyms, and health clubs operating within or as part of hotel facilities. See California COVID Update,
13 FACEBOOK, https://www.facebook.com/watch/live/?v=560533608146352&ref=watch_permalink
14 (last accessed June 3, 2020); see also Perper, Rosie, California Asks All Dine-In Restaurants, Gyms,
15 and Movie Theaters to Close to Curb the Coronavirus' Spread, BUSINESS INSIDER (Mar. 16, 2020,
16 9:47PM), [https://www.businessinsider.com/california-closes-restaurants-gyms-encourages-ban-on-
17 social-gatherings-2020-3](https://www.businessinsider.com/california-closes-restaurants-gyms-encourages-ban-on-social-gatherings-2020-3) (last accessed Apr. 29, 2020). That same day, the California Department of
18 Public Health issued guidance reflecting Governor Newsom's remarks. See Sonia Y. Angell, MD,
19 MPH, Coronavirus Disease 2019 (COVID-19) and Retail Food, Beverage, and Other Related Service
20 Venues (Mar. 16, 2020), [https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-
21 19/RetailFoodBeverageandOtherRelatedServiceVenues.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/RetailFoodBeverageandOtherRelatedServiceVenues.aspx).

22
23
24 66. On March 19, 2020, less than two months after the first confirmed case of COVID-19
25 appeared in California, the Governor took the dramatic step of ordering "all individuals living in the
26 State of California to stay at home or at their place of residence" subject to narrow enumerated
27 exceptions. The Governor also required that "[w]hen people need to leave their homes or places of
28 residence, whether to obtain or perform the [enumerated] functions . . ., or to otherwise facilitate

1 authorized necessary activities, they should at all times practice social distancing.” By its own terms,
2 this shelter order was necessary “[t]o preserve the public health and safety, and to ensure the healthcare
3 delivery system is capable of serving all,” as well as to “bend the curve, and disrupt the spread of the
4 virus.” The order was made enforceable pursuant to California law, and violation of the order carried
5 the threat of misdemeanor punishable by a fine, imprisonment, or both. See State of California
6 Executive Order N-33-20.

7
8 67. Governor Newsom’s March 19, 2020 order further directed the California Department
9 of Public Health to issue statewide public health directives regarding permissible essential activities.
10 *Id.* The California of Department Health complied and identified 16 critical infrastructure sectors,
11 ordering Californians working in those 16 sectors “to continue their work because of the importance of
12 these sectors to Californians’ health and well-being.” *Id.* Food industry workers were deemed
13 essential, but only to the extent they were “supporting restaurant carry-out and quick serve food
14 operations, including food-preparation, carry-out, and food delivery.” See Essential Workforce,
15 California Department of Public Health, available at
16 <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf> (last visited January 29, 2022).

17
18 68. Municipal and local governments across California have entered their own orders
19 mandating that residents shelter in place and that businesses limit or cease operations. Often these
20 municipal orders extend much further than the statewide orders, mandating more stringent restrictions
21 on the movement of people and the use or access of goods, services, and facilities.

22
23 69. On March 14, 2020, the City of Palm Springs declared a state of emergency. [https://](https://www.palmspringsca.gov/home/showpublisheddocument/72611/637198676952800000)
24 www.palmspringsca.gov/home/showpublisheddocument/72611/637198676952800000.

25
26 70. On March 17, 2020, the City of Palm Springs issued a shelter in place order to go into
27 effect on March 18, 2020. This order required the shutdown of non-essential businesses. Echoing the
28 State’s orders, the City of Palm Springs deemed restaurants an essential business only to the extent
they provided delivery, drive through, and carry out options. See <https://kesq.b-cdn.net/2020/03/>

1 [PalmSpringsShelternPlaceO.pdf](#) (last visited Jan. 29, 2022).

2 71. Since March of 2020, there have been numerous governmental orders impacting
3 Plaintiff's business to varying degrees. Each of these successive orders has restricted the manner in
4 which Plaintiff has been permitted to operate its business and use its property.

5 72. Plaintiff has sustained, and continues to sustain, losses as a result of following state,
6 county, and city orders as well as industry standards set by regulatory agencies and city/local
7 municipalities.

8 **D. Defendant denies Plaintiff's insurance claim.**

9 73. In light of the foregoing civil authority orders, circumstances well outside of
10 Plaintiff's control, it had to cease and/or limit its business operations. Plaintiff submitted a claim for
11 related business losses and extra expenses

12 74. Plaintiff understood that it was entitled to coverage based on the description of
13 coverage provided by the Farmer's agent and because of the nature of the exclusions from payment
14 for losses that inherently do not involve alteration of the physical property in the way Defendant
15 construes the term.

16 75. Defendant denied Plaintiff's claim.

17 76. In reaching its denial decision, Defendant conducted no investigation into the
18 representations that were made to Plaintiff regarding coverage. Defendant made no attempt to
19 communicate with Plaintiff from the time that Plaintiff filed its claim and the time Defendant
20 informed Plaintiff a denial was forthcoming, did not ask for any additional information, and did not
21 view in any way the covered premises.

22 77. Plaintiff followed the requirements and guidance of all governmental orders
23 described herein, resulting in the curtailment or complete closure of its business operations.

24 78. The responsive measures taken to comply with the governmental orders included (1)
25 closing the dining room; (2) restricting the number of diners in the dining room when on-site dining
26
27
28

1 was permitted in a limited fashion; (3) moving tables to ensure social distancing; (4) applying
2 corrosive chemicals to all surfaces; (5) placing physical barriers between tables; (6) removing
3 tables from the dining room; (7) building out additional outdoor dining space; (8) adding hand
4 sanitizing stations throughout the restaurant; and (9) adding signage to the insured premises.

5 79. The denial is wrong. The governmental action affecting Plaintiff's property—
6 executive orders that directly or indirectly limit direct physical access to or use of Plaintiff's real
7 property and business equipment—has caused a loss of income and an increase in expense. This
8 risk—governmental action that does not destroy or seize property—is nowhere limited or excluded
9 in the Policy.

10
11 **E. Improper application of the virus exclusion.**

12 80. In denying coverage, Defendant cited the virus exclusion in the policy as a secondary
13 basis for its denial.

14 81. The virus exclusion precludes coverage for losses resulting from the physical presence
15 of a virus/bacteria on the insured premises. Even if this were not the case, Defendant did not inspect
16 the covered premises—and therefore has no support one way or the other about the presence of
17 COVID-19—before improperly applying the virus exclusion to deny Plaintiff's claim.

18
19 82. Plaintiff's claim is based on the loss of its ability to use, access, and maintain its
20 business property due to governmental orders, not because there was a virus on the property.

21 83. Defendant's application of the virus exclusion to deny coverage is wrong.

22 **FIRST CAUSE OF ACTION**

23 **Declaratory Relief**

24 84. Plaintiff re-alleges and incorporates by reference into this cause of action each and
25 every allegation set forth in each and every paragraph of this Complaint.

26
27 85. Plaintiff brings this cause of action for itself and the Class under California Rule of
28 Civil Procedure Section 1060 *et seq.*, seeking a declaration that, for those who maintain an insurance

1 policy with Defendant, it violates California state law and the insurance contracts for Defendant to
2 ignore the narrow nature of the governmental-action exclusion and to adopt a narrow interpretation of
3 what must cause a suspension of business. The Policy requires that a “suspension” be caused by
4 “direct physical loss of or damage to property at the described premises.”

5 86. Defendant’s interpretation that the requirement of “physical loss” is not satisfied by
6 losing physical access or use and quiet enjoyment of Plaintiff’s property is wrong. The undefined
7 phrase “direct physical loss” is reasonably construed to mean the direct loss of the ability to physically
8 access or use property. Losing the ability to access or use one’s property is a loss of physical, material
9 rights and advantages, substantial and important. Considering that: (1) Farmers markets its product as
10 covering all suspensions of business due to circumstances outside of the insured’s control, (2) the
11 policy excludes payment for losses that inherently do not involve alteration of the physical property,
12 (3) ambiguous language drafted by the insurer should ordinarily be construed against the drafter, and
13 (4) that Plaintiff’s interpretation is supported by dictionary definitions of the terms, coverage should be
14 afforded.
15

16 87. Under the Business Income coverage, Defendant must “pay for the actual loss of
17 Business Income you sustain due to the necessary suspension of your ‘operations’ during the ‘period
18 of restoration.’”
19

20 88. Under the Extra Expense coverage, Defendant must pay the “necessary Extra Expense
21 you incur during the ‘period of restoration’ that you would not have incurred if there had been no
22 direct physical loss or damage to property at the described premises.”
23

24 89. The Policy does not define the term “suspension.” According to the Randomhouse
25 Unabridged Dictionary, the term means “temporary abrogation or withholding, as of a law, privilege,
26 decision, belief, etc.” See *Suspension*, RANDOMHOUSE UNABRIDGED DICTIONARY, available
27 at <https://www.dictionary.com/browse/suspension> (last accessed May 25, 2020).
28

90. Under the Policy, “‘Operations’ means your business activities occurring at the

1 described premises.”

2 91. Under the Policy, “Period of restoration” for Business Income coverage means the
3 period of time that begins 72 hours after the time of direct physical loss, and for Extra Expense
4 coverage means the period of time that begins at the time of direct physical loss.

5 92. Additionally, under Business Income and Extra Expense coverage, the loss or damage
6 must be caused by “direct physical loss.”

7 **A. Loss of access or use constitutes direct physical loss.**

8 93. The Policy does not define the phrase “direct physical loss.”

9 94. There is no indication in the Policy that this term requires a physical alteration and the
10 representations made by Farmers agents and in marketing materials create a reasonable expectation of
11 broad coverage that would help an insured cover operating expenses while its business is closed or
12 after a loss.

13 95. Common usage of the words in the phrase “direct physical loss” dictates that ouster and
14 prohibition/interdiction of access and use by insureds and others (agents, tenants, customers, etc.) are
15 physical losses. Such losses are direct in that ouster of and prohibition/interdiction of access and use by
16 all nonessential people results directly in a physical loss.

17 96. Physical means relating to “material things” that are “perceptible especially through the
18 senses.” See Physical, MERRIAM-WEBSTER (2020), [https://www.merriam-webster.com/
19 dictionary/physical](https://www.merriam-webster.com/dictionary/physical) (last accessed May. 24, 2020). It is also defined in a way that is tied to the body:
20 “of or relating to the body.” Id. Another Merriam-Webster Dictionary refines the concept of material
21 this way: “of or relating to natural or material things as opposed to things mental, moral, spiritual, or
22 imaginary.” See *Physical*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, (Unabr.
23 2020) Web. 24 Apr. 2020.

24 97. Additionally, the Policy excludes payment for losses caused by nuclear radiation,
25 governmental seizure of property, and the failure of power or other utility services. By stating that
26

1 no payment will be made for these types of losses or harms indicates that, but for the exclusion,
2 they would be losses that would otherwise be paid. Yet, none of these examples would constitute a
3 physical alteration in the sense Defendant interprets it to deny Plaintiff benefits. This language
4 supports that position that the term “direct physical loss of property at the described premises” is
5 not limited to physical alterations.

6 98. Prohibiting the physical presence on the premises of all persons (except for those
7 facilitating minimal maintenance) and the prohibition of the physical use of equipment, fixtures and
8 furniture constitutes a physical loss that caused the suspension of business operations.

9
10 **B. Governmental action resulted in Plaintiff’s loss of use or access to the premises
11 and business personal property, a non-excluded direct physical loss.**

12 99. Coverage under the “all risks” Policy is provided for any risk of direct physical loss
13 unless expressly limited or excluded.

14 100. One risk addressed in the Paragraph B exclusions is governmental action. *See* Form BP
15 00 02 01 97, Paragraph B.1.c.

16 101. By recognizing governmental action in the Paragraph B exclusions, the Policy confirms
17 governmental action as a risk of direct physical loss and a Covered Cause of Loss.

18 102. The Policy excludes some but not all governmental action from coverage. The Policy
19 excludes coverage for governmental orders requiring seizure and destruction only. Specifically, this
20 provision excludes any loss or damage caused directly or indirectly by governmental action that
21 consists of seizure or destruction of property by order of governmental authority unless the destruction
22 was done to prevent the spread of a fire. As ordinarily used, “seizure” means “taking possession of
23 person or property by legal process.” The provision excludes no other governmental action from
24 coverage (i.e., governmental orders not seeking seizure or destruction).
25

26 103. The governmental orders affecting Plaintiff’s property do not require seizure or
27 destruction because the government did not destroy the property of Plaintiff or take physical
28

1 possession of, or title to, such property. Instead, the orders limit access to and use of covered property
2 at the premises described in the Policy declarations.

3 104. The Policy does not exclude the governmental action described herein.

4 105. The business-income losses, extra expenses, and other losses sustained by Plaintiff
5 were caused by or resulted from the aforementioned governmental orders, a Covered Cause of Loss.

6 106. The policy further requires that the business-income losses be incurred because of the
7 necessary suspension of operations during the period of restoration. Plaintiff suffered losses because of
8 suspension of operations during the period of restoration.

9 107. The direct loss of physical access to and use of the premises listed in the Declarations,
10 and business property thereon, for tenants and their vendors, agents, employees, and customers caused
11 the suspension of the operations by the Plaintiff.

12 108. Because the Policy covers all risks, including governmental action that, for the good of
13 the public, does no more than limit physical access to and use of property (real and personal), coverage
14 is required.

15 109. The governmental action affecting Plaintiff's property—executive orders that directly
16 or indirectly limit direct physical access to Plaintiff's real and personal property—has caused a loss of
17 income and an increase in expense, exactly the "outside force" that interrupts business and causes
18 insureds to close their doors for a period of time, that requires that capital continue to flow to keep the
19 business afloat and to help replace lost income and pay expenses such as salaries and mortgages. This
20 governmental action is precisely the unexpected jolt that motivates the purchase of insurance.

21 **C. No other exclusions apply to preclude coverage.**

22 110. No other applicable exclusions or limitations apply to preclude coverage for the direct
23 physical losses caused by or resulting from the governmental action described herein. *See* Paragraph B,
24 Form BP00090197.

25 111. The existing virus exclusion is inapplicable because Plaintiff's losses were caused by
26
27
28

1 governmental action, not the physical presence of the virus on the covered premises. The exclusion
2 only applies to viruses/bacteria physically present on the insured premises.

3 112. Defendant conducted no investigation and has no evidence to satisfy its burden of
4 showing the physical presence of a virus on the insured properties, which is required when asserting an
5 exclusion. Defendant denied the claim without investigating the property.

6 113. Coverage begins at the time of governmental action. Plaintiff's property was subject to
7 governmental orders in California that did not seek to seize or destroy the property. The governmental
8 orders do not constitute governmental seizures because at no point did any governmental entity in
9 California take physical possession of the property or legal title to the property. The orders properly
10 exercised the police powers of their respective state and local governments to protect public health,
11 affecting Plaintiff's property, which caused a loss of the ability to physically access and use the insured
12 property.

13 114. Under each successive order, Plaintiff's property was limited to the minimum
14 necessary operations or required closure. The governmental action also prohibited, via stay-at-home
15 orders or travel restrictions, all nonessential movement by all residents. These governmental orders
16 resulted in losing physical access to and physical use and enjoyment of Plaintiff's property by its
17 owners, customers, vendors, employees, and others.

18 115. Nor does the provision entitled "Consequential Losses" that excludes "Delay, loss of
19 use or loss of market" preclude coverage.

20 116. Consequential damages are special or indirect damages. Put differently, consequential
21 damages are "[l]osses that do not flow directly and immediately from an injurious act but that result
22 indirectly from the act. — Also termed *indirect damages*." See *Consequential Damages*, Black's Law
23 Dictionary (11th ed. 2019) (emphasis in original).

24 117. The exclusion for "loss of use" therefore applies only if that "loss of use" is itself
25 consequential. That is not the case here. The insured-against peril—governmental action—resulted
26

1 directly and immediately in Plaintiff's physical loss of access or use.

2 118. Limiting the "loss of use" exclusion to consequential losses also renders sensible an
3 exclusion that otherwise swallows the entire Policy

4 **D. Declaratory relief.**

5 119. Plaintiff seeks a declaration of rights under Defendant's Policy language and a
6 declaration of the rights and liabilities of the parties herein.

7 120. This Court has the power to declare the rights of the Defendant's policyholders whether
8 or not the policyholders have made claims related to losses relating to COVID-19.

9 121. Plaintiff seeks a Declaratory Judgment finding that the Policy covers Business Income
10 and Extra Expense during the period of restoration caused by or resulting from governmental action
11 that forced Plaintiff to suspend operations, subject to no limitations or exclusions under the Policy.
12

13 **SECOND CAUSE OF ACTION**

14 **Breach of Contract**

15 122. Plaintiff re-alleges and incorporates by reference into this cause of action each and
16 every allegation set forth in each and every paragraph of this Complaint.

17 123. Plaintiff has a valid contract of insurance with Defendant, whereby Plaintiff agreed to
18 make and did make premium payments to Defendant in exchange for Defendant's promise to
19 indemnify the policyholders for losses including, but not limited to, Business Income and Extra
20 Expense.
21

22 124. Plaintiff is current on all premiums required under the Policy and the Policy is in full
23 effect.
24

25 125. The Policy requires payment of losses incurred caused by or resulting from the forced
26 suspension of operations mandated by government orders issued in California, including but not
27 limited to Business Income and Extra Expense. Coverage for these losses is in no way limited or
28 excluded under the Policy terms.

1 126. Plaintiff reasonably expected that the “all risks” policy afforded it coverage for all
2 closures of or curtailments to its business for reasons outside of its control.

3 127. Despite the Policy affording coverage, Defendant denies the Policy affords coverage
4 and denied coverage to Plaintiff.

5 128. In addition, Defendant has uniformly taken the position, without seeking independent
6 coverage advice or investigating representations made to its insureds, that the Policy’s language does
7 not afford coverage where governmental action limited or prohibited certain use, access, and
8 deployment of insureds’ property and that such claim would, as a business practice, be denied.
9 Defendant’s entire decision was rendered based on its reading of the contract language, and not by any
10 specifics relating to each insured (as no investigation occurred here). By making its decision known,
11 Defendant has anticipatorily breached the contracts.
12

13 129. Defendant’s failures to affirm coverage and pay benefits breach the contract and
14 represent a systematic failure to pay the benefits required by the contract.

15 130. As a result of Defendant’s breach of contract, Plaintiff has suffered and will continue to
16 suffer monetary losses, and without prompt relief will be forced to shutter indefinitely.
17

18 **PRAYER FOR RELIEF**

19 Wherefore, Plaintiff prays for the following judgment:

- 20 1. Declaratory relief as described herein;
21 2. An Order finding Defendant to have breached the Policy contract;
22 3. Compensatory damages;
23 4. An award of attorney’s fees and costs, as provided by law and/or as would be
24 reasonable from any recovery of monies recovered for or benefits bestowed upon the
25 Class;
26 5. Pre- and post-judgment interest at the highest rate allowed by law; and
27 6. For such other and further relief as the Court may deem just and proper.
28


THE WALLACE FIRM, PC
16000 VENTURA BLVD., SUITE 440
ENCINO, CALIFORNIA 91436
Telephone: (818) 476-5998; Facsimile: (818) 476-5598

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: February 7, 2022

THE WALLACE FIRM, PC

By:


BRADLEY S. WALLACE, ESQ.
THOMAS R. BURNS, ESQ.
Attorney for Plaintiffs,
ROBERT GARY RESTAURANTS, INC