

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Shoogie Shack LLC d/b/a
Poseidon/Coastal Provisions,

Plaintiff,

vs.

The Certain Underwriters at Lloyd's, London,
HDI Global Specialty SE, and Indian Harbor
Insurance Company,

Defendants.

TO THE DEFENDANTS NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the Complaint attached hereto, a copy of which is herewith served upon you, and to serve a copy of your Answer to this Complaint upon Earhart Overstreet LLC, P.O. Box 22528 Charleston, South Carolina, 29413, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, or otherwise appear and defend, Plaintiff will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you.

This 31st day of August, 2021.

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2021-CP-07-

SUMMONS

Respectfully submitted,

EARHART OVERSTREET LLC

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COMPLAINT

(JURY TRIAL DEMANDED)

Now comes the Plaintiff, Shoogie Shack LLC d/b/a Poseidon/Coastal Provisions ("Poseidon"), by and through the undersigned counsel, and complains of The Certain Underwriters of Lloyd's London subscribing to the certificates underlying the insurance policy AVS011263002 ("Defendant," or "Lloyds" or "Insurer"), and against HDI Global Specialty SE ("HDI"); and against Indian Harbor Insurance Company ("Indian Harbor") (collectively "Defendants" or "Insurers"), and demanding a trial by jury, and would respectfully show unto the Court as follows:

PARTIES

1. Plaintiff Shoogie Shack LLC dba Poseidon /Coastal Provisions is a limited liability company established in South Carolina.

2. Upon information and belief, Defendant The Certain Underwriters at Lloyds London is based in London England, and is an insurance company doing business through certain underwriters and names, and which, upon information and belief, has citizenship in South Carolina among other states.

3. Lloyds is comprised of various underwriters, who in turn allow participation in the underwriting of risks by various names, with those certificates and participations being identified generally on the Participation Endorsement found within the policy at form PROP 90 81 0315.

4. Generally, Lloyds is treated as having the citizenship of its insureds, and or the citizenship of each of the names making up the syndicate and as a result, shares the same South Carolina citizenship as the Plaintiff.

5. HDI Global Specialty SE is a participating insurer in the policy with its participation percentage found at form PROP 90 81 0315 within the Policy. Upon information and belief, HDI is based in London, England and is a Lloyds type company that has citizenship in the various states of each name or participate which may include citizenship within South Carolina.

6. Indian Harbor Insurance Company is a company doing business out of Pennsylvania.

7. The Insurers are surplus lines insurance companies.

JURISDICTION AND VENUE

8. This Court has jurisdiction over the subject matter and parties to this action.

9. Venue is proper in Beaufort County, South Carolina since the cause of action arises, in part, in this jurisdiction.

INTRODUCTION

10. Poseidon brings this complaint to redress the Insurer's wrongful denial of its claim damages resulting from direct physical loss and damage resulting from business interruption losses that are covered by the insurance policy Poseidon purchased from the Defendants, Lloyds, HDI Global Specialty SE, and Indian Harbor Insurance Company.

11. Plaintiff operates a facility at Shelter Cove Ln, Hilton Head SC (the “Insured Property”), at which it operates a commercial restaurant, a retail establishment, theme-based dining, and an entertainment venue, that hosts large numbers of people. These assets have a particular focus on entertainment, dining, and retail venues that attract and depend upon gatherings of large numbers of visitors and patrons.

12. Unlike a retail store selling only a product, the dining, retail, and entertainment businesses primarily sell experiences that involve customers coming onto and moving about the premises and interacting with one another including concerts, dining, direct entertainment, retail sales, and other experiences. Indeed, the business has successfully obtained a unique reputation for events, dining, and event-based functions.

13. To protect the investments made in the Insured Property, Plaintiff purchased from the Defendants at significant expense an "all-risk" insurance policy that specifically covers the Poseidon Insured Property.

14. The Insurer’s sold the Policy to the Plaintiffs representing that it provided "broad coverage," with policy limits of \$3,156,000 for the policy period from December 9, 2019 through December 9, 2020, as set forth in policy no. AVS011263002, which was a renewal of policy no. AVS011263001, a copy of which is attached hereto as Ex. 1 (the "Policy").

15. The Policy provides coverage when there has been a “suspension” of the “operations” of the Plaintiff which is “caused by direct physical loss of or damage to property at premises.”

16. In this instance, there has been a “suspension” of the “operations” of the Plaintiff which is “caused by direct physical loss of or damage to property at premises” caused by and

related to the COVID-19 and due to the actions of the South Carolina Governor's office concerning the COVID-19.

17. The Policy does not define what constitutes "direct physical loss" nor does it define "physical damage".

18. Likewise, the Policy does not define "loss."

19. In the absence of a policy definition, the Policy provides the ordinary meaning of the undefined terms, as provided by the dictionary.

20. Merriam-Webster defines "direct," when used as an adjective, as "characterized by close logical causal, or consequential relationship," as "stemming immediately from a source," or as "proceeding from one point to another in time or space without deviation or interruption."

21. Merriam-Webster defines "physical" as relating to "material things" that are "perceptible especially through the senses." Physical, Merriam Webster (Online ed. 2020). The term is also defined in a way that is tied to the body: "of or relating to the body." Id. Webster's Third New International Dictionary defines physical as "of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary." Physical, Webster's Third New International Dictionary (2020). The definition from Black's Law Dictionary comports: "Of, relating to, or involving material things; pertaining to real, tangible objects." Physical, Black's Law Dictionary (11th ed. 2019). Direct, Merriam-Webster (Online ed. 2020).

22. Although not defined in the Policy, a dictionary definition of "loss" is "the act of losing possession," "the harm of privation resulting from loss or separation," or the "failure to gain, win, obtain, or utilize." Loss, Merriam-Webster (Online ed. 4 Cincinnati does not contest whether Plaintiffs' losses were "accidental." (2020).

23. Another dictionary definition of the term Loss is "the state of being deprived of or of being without something that one has had." Loss, Random House Unabridged Dictionary (Online ed. 2020).

24. Applying these definitions reveals that the ordinary meaning of the phrase "direct physical loss" includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause.

25. Importantly, Poseidon also purchased business interruption coverage covering:

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". The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.

26. Poseidon also purchased Additional Coverage for:

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain caused by action of civil authority that prohibits access to the described premises...

27. Under the Policy Covered Cause of Loss means "means direct physical loss unless the loss is excluded or limited in this policy."

28. Plaintiff accepted the Policy and paid the premiums with the understanding that the undefined terms would be accorded their dictionary definitions.

29. Applying the above definitions corresponds with Plaintiff's understanding of the ordinary meaning of the phrases as used in the Policy, and specifically the definition of "direct physical loss" to include the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions. In the context of

the Policies, therefore, "direct physical loss" describes the scenario where the Plaintiff, its employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing the business property.

30. Beginning on March 13, 2020, and continuing through at least January 2021, the Office of the Governor of South Carolina has issued a number of Executive Orders beginning with Ex. Order 2020-08 dealing with Covid-19.

THE VIRUS AND COVERAGE UNDER THE POLICY

31. Coronavirus (COVID-19) is a highly contagious virus that has rapidly spread and continues to spread across the United States. It is a physical substance, a human pathogen, and can be present outside the human body in viral fluid particles. According to the CDC, everyone is at risk of getting COVID-19.

32. COVID-19 is spread by a number of methods, including "community spread," meaning that some people have been infected and it is not known how or where they became exposed. Public health authorities, including the Centers for Disease Control ("CDC"), have reported significant ongoing community spread of the virus including instances of community spread in all 50 states, including South Carolina.

33. At those times relevant hereto, the CDC advised that a person could become infected with COVID-19 by touching a surface or object (like a table, floor, wall, furniture, desk, countertop, touch screen or chair) that has the virus on it, and then touching their own mouth, nose or eyes. COVID-19 can and does live on and/or remains capable of being transmitted and active on inert physical surfaces.

34. More specifically, COVID-19 infections are spread through droplets of different sizes which can be deposited on surfaces or objects or transferred from person to person.

35. In addition, The New England Journal of Medicine reported finding that experimentally-produced aerosols containing the virus remained infectious in tissue-culture assays, with only a slight reduction in infectivity during a 3-hour period of observations. An April 2020 study published in the journal from the Emerging Infectious Diseases found a wide distribution of COVID-19 on surfaces and in the air about 13 feet from patients in two hospital wards. This means there has been a finding of COVID-19 in the air.

36. The appropriate bodies of the State of South Carolina and the United States of America, have determined that the COVID-19 is present at or that all locations in South Carolina, which has been subject to, the COVID-19, giving the Office of the Governor of South Carolina the duty and providing the authority to issues orders abrogating the rights of the public to freely frequent the covered owned and operated by the Plaintiffs, and precluding the free and unobstructed conducting of business by the Plaintiffs at the covered location.

37. Unlike other policies which were available at the time that the Defendant's policy was purchased by, and issued to the Plaintiff, the Defendants insurance Policy did not exclude from coverage damages by virus or a pandemic, but instead covers the losses identified herein related to the COVID – 19 Virus (the "Virus") as to viral contamination and the interruption of business operations.

38. COVID-19 has been transmitted by way of human contact with other humans, with surfaces and items of physical property located at the Premises.

39. COVID-19 has been transmitted by way of human contact with airborne COVID-19 particles emitted into the air throughout South Carolina.

40. The presence of, and the potential presence of, COVID-19 particles at the insured location and the resulting loss of unfettered use of the Plaintiff's business property is a direct physical loss under the policy.

41. The presence of people infected with or carrying COVID-19 particles renders physical property within South Carolina unsafe and unusable resulting in business interruption which is covered under the Policy.

THE VIRUS AND COVERAGE UNDER THE POLICY

42. Plaintiffs' operations have been, suspended, impacted and/or threatened by the novel coronavirus, SARS-CoV which causes the infectious disease COVID-19 (the "Virus").

43. The presence of the virus at the insured properties has been confirmed by persons who have been diagnosed with the infection and by their location at the property at the time that they were shedding virus, although at a time when they may have been asymptomatic.

44. To protect their businesses in the event that they suddenly had to suspend operations for reasons outside of their control, or in order to prevent further property damages due to business interruptions, the Plaintiffs purchased insurance coverage from Defendant.

45. The Defendants have an obligation to pay for the Defendants' "direct physical loss" which includes the loss of use or access to covered property even where that property has not been structurally altered.

46. Defendant's Policy provides coverage for "Business Interruption" in which the Defendants' have promised to pay for loss due to the full or partial suspension of operations caused by, among other things, COVID-19 which has resulted in the loss of Plaintiffs' full use of the Insured Premises, and which has caused interruption of the Plaintiffs business operations due to Covid-19 spread and the actions of the Governor's office in response thereto.

47. Nothing in the Policy excludes coverage for Plaintiff's losses.
48. While the Defendants could have, they did not exclude the loss in this instance.
49. The Business Interruption coverage includes a "partial" suspension of the Plaintiffs' operations at a covered location.
50. As a result of the virus physical changes to the structure of the Property were affected by the Insured.
51. The Plaintiffs sustained business interruption from the suspension and partial suspension of the Plaintiffs' operations at covered locations attributable to a Covered Cause of loss.
52. To date, the business interruption continues as the operations have not been restored to the point at which the insured's normal operations could be reasonably restored.
53. The dispersal and migration of the virus have caused the business interruption of the various insureds including Plaintiff.
54. The Defendants wrongfully denied the Insureds claim.
55. Here coverage exists for the loss of business income and interruption with Plaintiffs business operations as a result of, and caused by the Covid-19, and caused by actions of the State of South Carolina.
56. Plaintiff's loss of Business Income was and is due to the necessary "suspension" of its "operations" which runs until such time as its business operations have been restored to pre-loss conditions.

FIRST CAUSE OF ACTION
(Breach of Contract)

57. Plaintiff restates the allegations contained in Paragraphs 1 through 56 hereof as if

fully stated herein verbatim.

58. Plaintiff's purchased a policy of Insurance from the Defendants.

59. The Policy was in force when Plaintiff sustained damage from a covered cause of loss, which continues.

60. The Policy constitutes a contract for which all premiums have been paid in exchange for the Defendants' promise to pay the Plaintiff for its claims and losses resulting from, or related to, business interruption related to the COVID 19.

61. The Plaintiff has substantially complied with all contractual terms, or those terms have been waived, or the Insurer is estopped to rely thereon, and yet Illinois Union has abrogated its insurance coverage obligations pursuant to the policies' clear and unambiguous terms and has wrongfully and illegally refused to provide coverage to which Plaintiffs are entitled.

62. The Insurers are in breach of contract, which breaches include, but are not limited to, the failure to adjust the claim timely and in good faith and the failure to pay the claim

63. Plaintiff made a claim against the Defendants which claim was wrongfully denied.

64. Plaintiff brings this cause of action for breach of contract.

65. Plaintiff requests and asks for damages due to the Defendants breach of contract.

66. A "slowdown or cessation" of business activities at the insured is a "suspension" under the policy, for which the Defendant agreed to pay for Business Interruption and for which the losses through the dates set forth above have been sustained.

67. Plaintiff asks for actual damages and the costs of this action.

SECOND CAUSE OF ACTION
(Bad Faith)

68. Plaintiff restates the allegations contained in Paragraphs 1 through 67 hereof as if fully stated herein verbatim.

69. Plaintiff had a policy of insurance with the Defendant which, at all times relevant hereto, was fully in force and for which all premiums had been paid.

70. Plaintiff had and has a covered loss pursuant to the terms of the policy as alleged aforesaid.

71. In addition to the losses due to the loss resulting from the COVID-19, the Plaintiff sustained loss when the various orders of the Governor, as a result of damage and risk of loss to property adjoining the covered property, issued an order resulting in the shutting down of the Plaintiffs business operations in part and resulting in a suspension of operations.

72. That Plaintiff sustained business interruption and incurred extra expenses as a result of the COVID-19 and acts of the governor.

73. The Defendants, through adjusters, brokers, officers, agents and/or employees did deny the claim and that such denial was without force of law, in bad faith, and unreasonable.

74. Plaintiff had, and has, an obligation to follow the Executive Orders of the Governor of South Carolina.

75. Plaintiff brings this cause of action for the Defendants' bad faith and wrongful refusal to accept the claim, and their refusal to settle the claim when there is clear coverage.

76. Plaintiff brings this cause of action for bad faith wrongful refusal to pay the actual damages and given the intentional acts of the Defendants, for punitive damages and for the costs of this action to include attorney's fees.

WHEREFORE, the Plaintiff prays the Court issue an Order:

1. Granting a jury trial on those claims entitled to be tried by jury;

2. Granting payment of attorneys' fees and costs in this matter;
3. Granting payment of actual and punitive damages in this matter; and
4. Granting such other and further relief as the Court deems just and proper.

This 31st day of August, 2021.

Respectfully submitted,

EARHART OVERSTREET LLC

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