

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

CHRISTOPHER P. GIANNASIS
CLERK OF COURTS
STARK COUNTY, OHIO
2020 MAY 21 PM 12:48

CARPE DIEM COFFEE SHOP, INC.

215 Market Avenue North
Canton, OH 44702

Plaintiff,

-vs.-

THE CINCINNATI INSURANCE COMPANY

6200 S. Gilmore Road
Fairfield, OH 45014

Defendant.

CASE NO:
2020 CV 00814

JUDGE:
Hartnett

COMPLAINT:
DECLARATORY JUDGMENT; BREACH
OF CONTRACT; BAD FAITH;

Now comes Plaintiff, Carpe Diem Coffee Shop, Inc. ("Carpe Diem"), and for its Complaint against The Cincinnati Insurance Company ("CIC" or "Defendant") hereby states as follows:

INTRODUCTION

1. Carpe Diem is an independent coffee shop that has been operated in downtown Canton for over seventeen (17) years by life-long Stark County residents Cathy and Patrick Wyatt.
2. Carpe Diem has aimed to be an oasis of warmth, friendliness, and caffeination for its loyal following of hundreds of local Canton residents and employees who stop in daily for a meal, cup of coffee, or treat.
3. Like many hospitality-based businesses, Carpe Diem has been deeply affected by the recent government shutdowns, has suffered substantial economic damages, and had no choice but to temporarily close the entire business beginning on March 23, 2020.
4. Also, like many hospitality-based businesses, for years Carpe Diem has faithfully paid thousands of dollars in insurance payment premiums to Defendant, and believed that it was insured to the fullest extent possible to protect itself, its employees, and its customers in the event of any losses.

5. In recent weeks, Carpe Diem has learned that Defendant claims that Carpe Diem does not have any insurance coverage for the losses it has suffered, and is continuing to suffer.

THE PARTIES

6. Carpe Diem is an Ohio corporation with its principal place of business located at 215 Market Avenue North, Canton, Stark County, Ohio.

7. CIC is an Ohio corporation with its principal office located at 6200 S. Gilmore Road, Fairfield, OH.

JURISDICTION AND VENUE

8. This Honorable Court has jurisdiction over the parties and this dispute, including for declaratory relief, pursuant to Ohio Revised Code § 2307.382, et seq., Ohio Revised Code § 2721.02, et seq. and Rule 57 of the Ohio Rules of Civil Procedure.

9. An actual controversy between Carpe Diem and CIC exists within the meaning of Ohio Revised Code § 2721.02, et seq. regarding whether CIC has a duty to provide Carpe Diem coverage and indemnity for, among other things, business income loss pursuant to the terms and conditions of the Cincinnati policy of insurance, due to the COVID-19 pandemic, as more particularly described below.

10. Venue is proper in Stark County, Ohio under Ohio Rules of Civil Procedure 3(C)(3), 3(C)(5), and 3(C)(6) because Defendants conducted activity giving rise to Carpe Diem's claims for relief in Stark County, because all of Carpe Diem's claims for relief arose in Stark County, and because all of Carpe Diem's damages were suffered in Stark County.

FACTUAL BACKGROUND

The Policy: Carpe Diem Relied Upon Defendants to Provide it with the Broadest Possible Insurance Coverage to Protect Itself, its Employees, and its Customers.

11. At all relevant times, Cincinnati insured Carpe Diem under a commercial business owner policy drafted by CIC, bearing policy number ECP 038 79 74 ("Policy"). The certified Policy is in the

possession of CIC, and while not attached hereto because it consists of hundreds of pages, it is incorporated herein by reference.

12. Since approximately 2010, Carpe Diem has relied upon CIC to provide business insurance sufficient to provide the broadest available coverage to protect Carpe Diem, its employees, and its customers absent any express exclusion.

Carpe Diem Has Paid for Business Interruption Coverage Including Coverage for Losses Sustained from Physical Conditions Affecting Property and/or Losses Sustained from the Orders or Actions of Governmental Authorities

13. CIC delivered the Policy to Carpe Diem in Stark County.

14. Under the Policy, Carpe Diem agreed to make premium payments to CIC in exchange for CIC's promise to indemnify Carpe Diem for losses including, but not limited to, business income loss at its commercial property location at 215 Market Avenue North, Canton, Stark County, Ohio ("Property").

15. The Policy is in effect from June 1, 2019 to June 1, 2022 and Carpe Diem faithfully paid premiums to CIC, specifically to provide additional coverage for loss of Business Income including Rental Value, Extended Business Income, Extra Expense coverage, and coverage for loss due to actions of a Civil Authority as detailed below.

Business Income and Extra Expense Coverage

16. Subparagraph (1) **Business Income** of Paragraph b **Business Income and Extra Expense** of SECTION E states:

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 'loss' to property at a 'premises' caused by or resulting from any Covered Cause of Loss. * * *

17. Subparagraph (2) **Extra Expense** of paragraph b **Business Income and Extra Expense** of SECTION E states:

- (a) We will pay Extra Expense you sustain during the 'period of restoration'. Extra Expense means necessary expenses you sustain (as described in Paragraphs(2)(b), (c) and (d)) during the 'period of restoration' that you would not have sustained if there had been no direct 'loss' to property caused by or resulting from a Covered Cause of Loss.

18. The **BUSINESS INCOME (AND EXTRA EXPENSE COVERAGE FORM)**

includes its own Business Income and Extra Expense provisions. Paragraph 1. **Business Income** states:

- a. We will pay 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 'loss' 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' must be caused by or result from a Covered Cause of Loss. * * *

19. Paragraph 2. **Extra Expense** states:

- a. Extra Expense coverage is provided at the 'premises' described in the Declarations only if the Declarations show that 'Business Income' coverage applies at that 'premises'.
- b. Extra Expense means necessary expenses you sustain (as described in Paragraphs 2.c., d. and e.) during the 'period of restoration' that you would not have sustained if there had been no direct 'loss' to property caused by or resulting from a Covered Cause of Loss.

20. Sub-paragraph (a) **Covered Cause of Loss** of paragraph 3 **Covered Cause of Loss** defines Covered Causes of Loss to mean "direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part." Neither the exclusions nor the limitations in the Coverage Part include a virus exclusion or any other applicable exclusion or limitation.

21. Paragraph 2 of Section **G DEFINITIONS** defines "Business Income" as:

- a. Net Income (net profit or loss before income taxes) that would have been earned or incurred; and

b. Continuing normal operating expenses sustained, including payroll.

22. Paragraph 8 of Section **G DEFINITIONS** defines "Loss" to mean "accidental physical loss or accidental physical damage."

23. Paragraph 10 of Section **G DEFINITIONS** defines "Operations" as: "Your business activities occurring at the 'premises.'"

24. Paragraph 11 of Section **G DEFINITIONS** defines "Period of restoration" as the period of time that:

a. Begins at the time of direct 'loss'.

b. Ends on the earlier of:

(1) The date when the property at the 'premises' should be repaired, rebuilt or replaced with reasonable speed and similar quality; or

(2) The date when business is resumed at a new permanent location.

25. Paragraph 13 of Section **G DEFINITIONS** defines "Premises" as the "Locations and Buildings described in the Declarations."

Civil Authority Provision

26. Subparagraph (3) **Civil Authority** of paragraph b **Business Income and Extra Expense** of SECTION E states:

When a Covered Cause of Loss causes damage to property other than Covered Property at a 'premises', we will pay for the actual loss of 'Business Income' and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the 'premises', provided that both of the following apply:

(a) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and

- (b) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

This Civil Authority coverage for 'Business Income' will begin immediately after the time of that action and will apply for a period of up to 30 days from the date of that action.

This Civil Authority coverage for Extra Expense will begin immediately after the time of that action and will end:

- 1) 30 consecutive days after the time of that action; or
- 2) When your 'Business Income' coverage ends; whichever is later.

27. The **BUSINESS INCOME (AND EXTRA EXPENSE)**

COVERAGE FORM also includes a Civil Authority provision. Section **A(5)(b)**

Civil Authority states:

When a Covered Cause of Loss causes direct damage to property other than Covered Property at the 'premises', we will pay for the actual loss of 'Business Income' you sustain and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the 'premises', provided that both of the following apply:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Civil Authority coverage for 'Business Income' will begin immediately after the time of the first action of civil authority that prohibits access to the 'premises' and will apply for a period of up to 30 consecutive days from the date on which such coverage began.

Civil Authority coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the 'premises' and will end 30 consecutive days after the date of that action; or when your Civil Authority coverage for 'Business Income' coverage ends, whichever is later.

28. Under the Policy, insurance is extended to apply to the actual loss of business income sustained and the actual, necessary and reasonable extra expenses incurred when access to the Property is specifically prohibited by order of Civil Authority as the direct result of a covered loss to property in the immediate area of Carpe Diem's Property. The covered loss includes, without limitation, loss of use.

29. COVID-19's actual or suspected physical presence at or in the vicinity of Carpe Diem's Property prevents Carpe Diem from making full use of the Property, especially in cases where the business must close in part or in full. Under the terms and condition of the Policy, this kind of loss constitutes a direct loss to the Property in that there has been a loss of use of the Property. Moreover, the COVID-19 virus is a "physical" thing. For example, restaurants and event venues, such as those operated by Carpe Diem, forced to close due to COVID-19 in or near the restaurants and event venues have suffered a direct "loss" to Property, with resulting business interruption loss.

30. Under the terms and conditions of the Policy, physical loss does not mean and/or require tangible physical damage.

31. The Policy is an "all-risk" policy, as it provides that a covered cause of loss under the policy means direct physical loss of or damage to the property unless the loss is specifically excluded or limited in the Policy.

32. Here, Carpe Diem suffered a direct physical loss for which no specific exclusion applies to reasonably justify the denial of Carpe Diem's claims, including, but not limited to any exclusion for pandemic, virus, or disease.

Carpe Diem has Suffered – and Continues to Suffer – Substantial Losses from the Physical Presence or Contamination of COVID19 and/or the Business Suspension Orders of the Government

33. While the Policy was in force, Carpe Diem sustained, and continues to sustain, a loss(es) due to the issues created by the physical spread and/or contamination of COVID-19 at, in, on, and/or around Carpe Diem's premises described in the Policy which includes Carpe Diem's Property.

34. While the Policy was in force, Carpe Diem sustained, and continues to sustain, a loss(es) due to the issues surrounding the spread of COVID-19 in the community (the "Pandemic").

35. While the Policy was in force, Carpe Diem sustained, and continues to sustain, a loss(es) due to the civil authority orders issued by the Governor of Ohio and the Ohio Department of Health addressing COVID-19 and the Pandemic.

36. Based upon information and belief, CIC has accepted the policy premiums from Carpe Diem with no intention of providing any coverage under the Policy's Business Income, extended business income, Extra-Expense, or Civil Authority Coverage Sections due to a loss and/or shutdown from a virus, disease, or pandemic, i.e. the issues surrounding the COVID-19 pandemic.

37. While the Policy was in force, Carpe Diem sustained, and continues to sustain, a loss(es) due to the issues created by COVID-19 at, in, on, and/or around Carpe Diem's premises described in the Policy which includes Carpe Diem's Property.

38. While the Policy was in force, Carpe Diem sustained, and continues to sustain, a loss(es) due to the issues created by the spread of COVID-19 in the community.

39. While the Policy was in force, Carpe Diem sustained, and continues to sustain, a loss(es) due to the civil authority orders issued by the Governor of Ohio and the Ohio Department of Health addressing the COVID-19 Pandemic.

The COVID-19 Pandemic: The Policy Does Not Contain any Pandemic Exclusion

40. In late 2019 and early 2020, an outbreak of respiratory illness caused by a novel COVID-19 started to infect humans across the globe.

41. On January 31, 2020, under §319 of the Public Health Service Act (42 U.S.C.247d), The Secretary of Health and Human Services ("HHS") declared a public health emergency in response to COVID-19.

42. On March 11, 2020, the World Health Organization ("WHO") declared the COVID-19 outbreak a pandemic (i.e. a global outbreak of disease) (the "Pandemic").

43. On March 13, 2020 the President of the United States of America, Donald J. Trump, issued the Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak ("Proclamation"), proclaiming the COVID-19 outbreak constituted a national emergency in the United States, beginning March 1, 2020.

44. Various states, including the State of Ohio have issued and implemented mandatory Stay-At-Home Orders, requiring business, such as Carpe Diem, to shut down or severely curtail their operations, thus suffering a loss of use of their Properties, and resulting in substantial loss of business income.

45. On March 29, 2020 President Donald J. Trump announced the extension of his Administration's social distancing guidelines until April 30, 2020.

46. COVID-19 is a physical substance.

47. COVID-19 can be present outside the human body in viral fluid particles.

48. COVID-19 can and does live on and/or remains capable of being transmitted and active on inert physical surfaces.

49. COVID-19 can and does live on and/or remains capable of being transmitted and active on floors, walls, furniture, desks, tables, chairs, countertops, computer keyboards, touch screens, cardboard packages, food items, silverware, plates, serving trays, glasses, straws, menus, pots, pans, kitchen utensils, faucets, refrigerators, freezers, and other items of property for a period of time.

50. COVID-19 can be transmitted by way of human contact with surfaces and items of physical property on which COVID-19 particles are physically present.

51. COVID-19 has been transmitted by way of human contact with surfaces and items of physical property located at premises in Stark County.

52. COVID-19 can be transmitted by human to human contact and interaction at premises in Stark County, including places like restaurants and coffee shops.

53. COVID-19 has been transmitted by human to human contact and interaction at premises in Stark County.

54. COVID-19 can be transmitted through airborne viral particles emitted into the air at premises.

55. COVID-19 has been transmitted by way of human contact with airborne COVID-19 particles emitted into the air at premises in Stark County.

56. The presence of any COVID-19 particles renders items of physical property unsafe.

57. The presence of any COVID-19 particles on physical property impairs its value, usefulness and/or normal function.

58. The presence of any COVID-19 particles causes direct physical harm to property.

59. The presence of any COVID-19 particles causes direct physical loss to property.

60. The presence of any COVID-19 particles causes direct physical damage to property.

61. The presence of any COVID-19 particles at a premises renders the premises unsafe, thereby impairing the premises' value, usefulness and/or normal function.

62. The presence of people infected with or carrying COVID-19 particles renders physical property in their vicinity unsafe and unusable, resulting in direct physical loss to that property.

63. The presence of people infected with or carrying COVID-19 particles at premises renders the premises, including property located at that premises, unsafe, resulting in direct physical loss to the premises and property.

***Various Civil Authorities Have Issued Orders Which Required
the Suspension of Carpe Diem's Business Operations***

64. In response to COVID-19 and the Pandemic, the Governor of Ohio has issued multiple executive orders pursuant to the authority vested in him by the Ohio Constitution and the laws of Ohio.

65. In response to COVID-19 and the Pandemic, the Ohio Department of Health, pursuant to its authority under Ohio law, has issued multiple orders, including a Stay At Home Order.

66. The term "civil authority" is not defined in the Policy.

67. The State of Ohio is a civil authority as contemplated by the Policy.

68. The Ohio Department of Health is a civil authority as contemplated by the Policy.

69. The Stark County Health Department is a civil authority as contemplated by the Policy.

70. The Governor of the State of Ohio is a civil authority as contemplated by the Policy.

71. On March 9, 2020, Ohio Governor Mike DeWine issued Executive Order 2020- 01D that declared a state of emergency in response to the physical presence of COVID-19 and the Pandemic.

72. On March 15, 2020, Ohio restricted food and beverage sales to carry-out and delivery only, with no onsite consumption permitted. Further, Ohio prohibited social gatherings of more than ten people. The stated goal of these orders was to slow the spread of COVID-19 by minimizing in-person

interaction "in an environment with a multitude of hard surfaces." The order reiterated that "It may be possible that individuals can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose or eyes." Also that:

Previously studied human coronaviruses (including SARS, which is very closely related to COVID-19) can survive on paper, wood, glass, plastic up to 4-5 days. *Persistence of coronaviruses on inanimate surfaces and their inactivation with biocidal agents*, The Journal of Hospital Infection, March 2020, Volume 104, Issue 3, Pages 246-251.

73. On March 22, 2020, the Ohio Department of Health issued a Stay At Home Order, effective March 23, 2020, ordering Ohio residents to stay at home. By way of this order the State of Ohio ordered all non-essential businesses in Ohio to cease all activities.

74. Carpe Diem's businesses do not qualify as Essential Businesses and Carpe Diem was required to cease and/or significantly reduce operations at all its locations.

75. The civil authority orders, including, but not limited to the Stay At Home Order, prohibit access to Carpe Diem's premises described in the Policy.

76. The State of Ohio, through the Governor and the Department of Health, have issued, and continue to issue, authoritative orders governing Ohioans and Ohio businesses, including Carpe Diem, in response to COVID-19 and the Pandemic, the effect of which have required and continue to require Carpe Diem to cease and/or significantly reduce operations at, and that have prohibited and continue to prohibit access to, the premises described in the Policy.

The Presence of COVID19 Is Uniformly Recognized to Cause Contamination, Loss and Damage to Property

77. State and local governmental authorities, and public health officials around the Country, acknowledge that the issues surrounding COVID-19 and the Pandemic cause direct physical loss and damage to property. For example:

a. The state of Colorado issued a Public Health Order indicating that "COVID-

- 19... physically *contributes to property loss, contamination, and damage* ... " (Emphasis added);
- b. The City of New York issued an Emergency Executive Order in response to COVID-19 and the Pandemic, in part "because the virus *physically is causing property loss and damage.*" (Emphasis added);
 - c. Broward County, Florida issued an Emergency Order acknowledging that COVID-19 *"is physically causing property damage."* (Emphasis added);
 - d. The State of Washington issued a stay at home Proclamation stating the "COVID-19 pandemic and its progression ... remains a public disaster affecting life, health, *[and]property ..* ." (Emphasis added);
 - e. The State of Indiana issued an Executive Order recognizing that COVID-19 has the "propensity to *physically* impact surfaces and personal *property.*" (Emphasis added);
 - f. The City of New Orleans issued an order stating "there is reason to believe that COVID-19 may spread amongst the population by various means of exposure, including the propensity to attach to surfaces for prolonged period of time, thereby spreading from surface to person and *causing property loss and damage* in certain circumstances." (Emphasis added);
 - g. The State of Illinois issued an Executive Order describing COVID-19's "propensity to *physically* impact surfaces and personal *property.*" (Emphasis added);
 - h. The State of New Mexico issued a Public Health Order acknowledging the "threat" COVID-19 "poses" to *"property."* (Emphasis added);
 - i. North Carolina issued a statewide Executive Order in response to the Pandemic not only "to assure adequate protection for lives," but also to "assure adequate protection of... *property.*" (Emphasis added); and
 - j. The City of Los Angeles issued an Order in response to COVID-19 "because, among other reasons, the COVID-19 virus can spread easily from person to person and it is *physically causing property loss or damage* due to its tendency to attach to surfaces for prolonged periods of time." (Emphasis added).

78. The issues surrounding COVID-19 and the Pandemic are physically impacting public and private property in Ohio and throughout the country.

79. The issues surrounding COVID-19 and the Pandemic have caused and continue to cause direct physical loss and damage to property.

80. People in Stark County have been diagnosed with COVID-19.

81. As of May 20, 2020, Stark County had reported 610 cases of COVID-19 and 79 resulting deaths.

82. People in Stark County have, and have had, COVID-19 disease but have not been diagnosed.

83. People in Stark County have COVID-19 particles on or about their person and personal property.

84. Properties and premises throughout Stark County contain the presence of COVID-19 particles on surfaces and items of property.

85. Based on the prevalence of the virus in Stark County, Carpe Diem has sustained direct physical loss of or damage due to the presence of coronavirus, and has unquestionably sustained direct physical loss as the result of the Pandemic and/or civil authority orders issued by the Governor of Ohio.

The Rules of Contract Interpretation Provide Coverage for Carpe Diem but Defendant Has Wrongfully Denied Coverage Even Though the Policy Contains No Exclusions for Pandemic or Virus-Related Losses

86. Carpe Diem submitted a timely insurance claim to CIC.

87. The Policy does not include any applicable exclusion for pandemic, virus, or disease such that would exclude coverage.

88. Any effort by CIC to deny the reality that the Pandemic, virus, and/or disease causes physical loss of or damage to property would constitute a false and potentially fraudulent misrepresentation that could endanger policyholders, such as Carpe Diem, and the public.

89. However, on April 24, 2020, CIC wrongfully denied Carpe Diem's claims for Business Interruption, Extended Business Interruption, Extra Expense, Civil Authority and any other applicable insurance coverages.

90. CIC had at its disposal contractual language that specifically excluded viruses, disease, pandemics and SARS but did not include those policy exclusions in the subject Policy, yet wrongfully denied claims for those very reasons.

91. Alternatively, the business income losses suffered by Carpe Diem were caused by the orders issued by the Governor of Ohio requiring Carpe Diem to cease and/or severely curtail its business operations and not COVID-19.

92. Alternatively, the terms and conditions of coverage and exclusionary language relied upon by CIC to deny Carpe Diem coverage under the Policy related to the Pandemic are ambiguous and, therefore, must be strictly construed against CIC and in favor of Carpe Diem.

COUNT ONE

DECLARATORY JUDGMENT

93. Carpe Diem restates each preceding paragraph as if fully rewritten herein.

94. There is a genuine dispute and actual controversy, over which this Honorable Court has jurisdiction, between Carpe Diem and CIC concerning their respective rights, duties and obligations for which Carpe Diem requests a declaration of rights and obligations under the Policy. Speedy relief is necessary in order to preserve the rights of the parties which may otherwise be impaired or lost. The declaratory judgment sought will settle the controversy between the parties.

95. Since there is a dispute about whether or not Carpe Diem has coverage under CIC's Policy for the loss sustained and to be incurred in the future, Carpe Diem is entitled to declaratory relief from this Court pursuant to Ohio Civil Rule 57 and R.C. §2721.01 to 2721.15.

96. Carpe Diem is entitled to a declaration including, but not limited to, that:

- a. Carpe Diem sustained direct physical loss or damage as a result of the Pandemic;
- b. Physical loss under the Policy does not require tangible physical damage;
- c. Loss of use and/or utilization of Carpe Diem's business constitutes a direct physical loss under the Policy;
- d. COVID-19 is a covered cause of loss under the Policy;
- e. The losses incurred by Carpe Diem as a result of the executive orders issued by the Governor of Ohio are covered losses under the Policy;
- f. The prohibition (and/or significant limitation) of access to Carpe Diem's properties as Ordered by the Civil Authority Orders, constitutes a prohibition to the insureds' Properties;
- g. The Civil Authority Orders trigger coverage because the Policy does not include an exclusion for a pandemic;
- h. The Policy provides coverage to Carpe Diem for any current and future civil authority closures of commercial buildings due to physical loss of or damage to property from COVID-19 under the Civil Authority coverage parameters and the Policy provides business income coverage in the event COVID-19 has caused a loss or damage at the insureds' Properties or immediate area of the

insureds' Properties;

- i. The Civil Authority Orders constitute a prohibition of access to the insureds' Properties by a Civil Authority as defined in the Policy;
- j. CIC has not and cannot prove the application of any exclusion or limitation;
- k. Carpe Diem is entitled to coverage for its Business Income loss, Extended Business Income Loss and Extra Expense resulting from coronavirus;
- l. Carpe Diem is entitled to coverage for loss due to the actions of Ohio's civil authorities;
- m. Carpe Diem has coverage for any substantially similar civil authority order in the future that limits or restricts the public's access to Carpe Diem's business establishments; and
- n. Any other issue that may arise during the course of litigation that is a proper issue on which to grant declaratory relief.

COUNT TWO

BREACH OF CONTRACT

97. Carpe Diem restates each preceding paragraph as if fully rewritten herein.
98. Carpe Diem and CIC entered into a valid and enforceable insurance contract.
99. Carpe Diem gave valuable consideration in the form of premium payments in exchange for the promise of insurance coverage in the event of, among other things, loss of business income.
100. CIC had an affirmative duty to comply with terms and conditions of the Policy and find coverage wherever possible under the Policy and indemnify Carpe Diem for its losses sustained and recoverable under the terms and conditions of the Policy.

101. Carpe Diem made a claim for loss of Business Income, Extended Business Income, Extra Expense, and Civil Authority coverage, arising from the Pandemic, interruption by civil authority and prohibited ingress and loss of use and/or utilization of Carpe Diem's businesses.

102. CIC breached the insurance contract by denying coverage for Carpe Diem's loss, which was due to a covered and foreseeable peril not subject to any exclusion.

103. Carpe Diem complied with all of its obligations under the insurance contract.

104. Carpe Diem has been injured and suffered financial harm as a result of CIC's breach of the insurance contract.

105. In addition, in breaching the contract, CIC has violated its implied duty to act in good faith and fair dealing with Carpe Diem.

106. As a direct and proximate result of CIC's breach of contract, Carpe Diem has incurred substantial and ongoing monetary damages in excess of \$25,000.00.

COUNT THREE

BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING (BAD FAITH)

107. Carpe Diem restates each preceding paragraph as if fully rewritten herein.

108. Ohio law recognizes the independent tort of bad faith in the context of the insured/insurer relationship.

109. CIC's conduct has breached the implied covenant of good faith and fair dealing implicit to the policy of insurance.

110. Ohio law provides that an insurer's lack of good faith is equivalent to bad faith.

111. Carpe Diem is an insured of CIC in the State of Ohio.

112. CIC failed and refused to make an adequate investigation or any investigation regarding Carpe Diem's claims which, among other things, has caused a severe delay in full indemnification of

Carpe Diem, and providing all benefits that Carpe Diem is entitled to under the Policy, which has severely prejudiced and damaged Carpe Diem, and has further resulted in CIC withholding all recoverable benefits due under the Policy.

113. CIC refused and continues to refuse to give any reasonable interpretation to the provisions in the Policy or any reasonable application of such provisions to Carpe Diem's claims and has acted to protect its own financial interests therein at the expense of and detriment to Carpe Diem's rights.

114. CIC failed to provide Carpe Diem any reasonable or justifiable basis for denying Carpe Diem's claims.

115. CIC misrepresented the Policy terms and conditions to Carpe Diem in a knowingly and malicious attempt to avoid paying Carpe Diem all benefits it is entitled to under the Policy.

116. CIC, knowing that Carpe Diem was inexperienced in insurance matters and unable to act to protect its interests, that such benefits were justly due, and that such benefits were necessary to pay Carpe Diem's necessities of its use of the Premises, nevertheless have deprived Carpe Diem of such benefits.

117. CIC's refusal to properly investigate, adjust, handle, process, and/or pay benefits due Carpe Diem compelled Carpe Diem to, among other things, engage counsel and to initiate litigation to recover such benefits.

118. Upon information and belief, Carpe Diem alleges that CIC intends to and will continue to delay, deny, and withhold, in bad faith, benefits due Carpe Diem unless and until compelled to pay such benefits by final judgment of this Honorable Court.

119. As a direct and proximate result of CIC's conduct, Carpe Diem has sustained substantial compensable losses, including benefits withheld, and economic losses, such as attorney's fees, out of pocket expenses, loss of business income, personal property loss, out-of-pocket costs and expenses,

diminution in value of the insurance policy, all to Carpe Diem's detriment and damage in an amount to be proven at trial in excess of \$25,000.00.

120. Further, at all material times and in doing things alleged herein, CIC acted intentionally and with actual malice so as to justify the award of punitive damages against CIC.

WHEREFORE, Plaintiff, Carpe Diem, demands judgment as follows:

- A. For Count One, a declaratory judgment as set forth in Paragraph 96 of this Complaint;
- B. For Count Two, judgment against CIC for compensatory damages in excess of \$25,000.00;
- C. For Count Three, judgment against CIC for compensatory damages in excess of \$25,000.00, punitive damages in an amount to be determined at trial, and attorney fees;
- D. For judgment against CIC for attorneys' fees in an amount to be determined by the Court, prejudgment and post judgment interest in accordance with the statutory rate; costs of the within action; and
- E. Any further relief that this Court deems just and equitable.

DATED: May 21, 2020

Respectfully submitted,

TZANGAS | PLAKAS | MANNOS | LTD



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INSTRUCTIONS FOR SERVICE

To the Clerk:

Please issue summons and a copy of the Complaint upon the Defendant at the address contained in the caption of this Complaint by Certified Mail, Return Receipt Requested. Please also issue summons and a copy of the Complaint upon the Defendant at the following address by Certified Mail, Return Receipt Requested:

The Cincinnati Insurance Company
c/o Steve Corbly
P.O. Box 145496
Cincinnati, OH 45250-5496



Collin S. Wise