

UNITED STATES DISTRICT COURT FOR
EASTERN DISTRICT OF NEW YORK

**DANIEL P. BUTTAFUOCO AND
ASSOCIATES PLLC, d/b/a BUTTAFUOCO
AND ASSOCIATES, PLCC, and
DANIEL P. BUTTAFUOCO, LLC**

Plaintiffs,

vs.

**HARTFORD INSURANCE COMPANY OF
THE MIDWEST**

Defendant.

JURY TRIAL DEMANDED

No.:

Plaintiffs, DANIEL P. BUTTAFUOCO AND ASSOCIATES PLLC, d/b/a BUTTAFUOCO & ASSOCIATES, PLCC and DANIEL P. BUTTAFUOCO, LLC (hereinafter collectively referred to as “Buttafuoco” or “Plaintiff” in the singular also reflecting the plural) brings this Complaint, alleging against Defendant, Hartford Insurance Company of the Midwest (hereinafter “Hartford” or “Defendant”), and avers as follows:

I. NATURE OF THE CASE

1. This is a civil action seeking declaratory relief arising from Plaintiff’s contract of insurance with the Defendant.

2. In light of the Coronavirus global pandemic (“COVID-19”) and state and local government orders (“Orders”) mandating that all non-essential businesses must shut down, and due to the suffering of physical harm within Plaintiff’s business premises and/or the immediate area surrounding and outside its business premises, Plaintiff shut its doors to customers on March 16, 2020.

3. Plaintiff's insurance policy provides coverage for all non-excluded business losses, including Business Income that would have otherwise been earned, and thus provides coverage here.

4. As a result, Plaintiff is entitled to declaratory relief that it is covered for all business losses that have been incurred in an amount estimated to be greater than \$150,000.00.

II. JURISDICTION

5. This court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332, because there is complete diversity of citizenship between Plaintiff and the Defendant. Further, Plaintiff has suffered business losses in an amount greater than \$150,000.00. The amount in controversy necessary for diversity jurisdiction over a declaratory judgment action is measured by the value of those business losses. *Id.* at § 1332(a).

6. The Court has personal jurisdiction over Defendant because at all relevant times it has engaged in substantial business activities in the State of New York. At all relevant times Defendant transacted, solicited, and conducted business in New York through its employees, agents, and/or sales representatives, and derived substantial revenue from such business in New York.

7. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a) because a substantial portion of the wrongful acts upon which this lawsuit is based occurred in this District. Venue is also proper pursuant to 28 U.S.C. § 1391(c) because Defendant is a corporation that has substantial, systematic, and continuous contacts in the State of New York, and as a result it is subject to personal jurisdiction in this District.

8. The acts and/or omissions complained of took place, in whole or in part, within the venue of this Court.

III. PARTIES

9. At all relevant times, Plaintiff Daniel P. Buttafuoco, LLC is a limited liability corporation authorized to do business and doing business in the State of New York, County of Nassau. Daniel P. Buttafuoco, LLC owns, operates and/or controls real property at 144 Woodbury Road, Woodbury, New York 11797 (hereinafter the “Insured Property”). Plaintiff Daniel P. Buttafuoco, LLC is the primary named insured on the Policy. The members of the PLLC are Daniel P. Buttafuoco, who resides in Suffolk County, New York; Kristen N. Taormina, who resides in Suffolk County, New York, Taryn N. Bennardo, who resides in Suffolk County, New York, and; Rachel Margiotta, who resides in Suffolk County, New York.

10. At all relevant times, Plaintiff Daniel P. Buttafuoco & Associates, PLLC is a limited liability corporation authorized to do business and doing business in the State of New York, County of Nassau. Daniel P. Buttafuoco & Associates, PLLC is a law firm that does business on occasion as Buttafuoco and Associates, PLCC. It is located at 144 Woodbury Road, Woodbury, New York 11797. The members of the LLC are Daniel P. Buttafuoco, who resides in Suffolk County, New York; Mark T. Freeley, who resides in Suffolk County, New York, and; James T. McCarthy, who resides in Suffolk County, New York.

11. At all relevant times, Hartford is a corporation with a principal place of business at One Hartford Plaza, Hartford, CT 06155, subscribing to Policy Number 12 SBA NC2462 SB issued to the Plaintiff for the period of March 4, 2020 to March 4, 2021. *See* Policy Declaration page, attached hereto as Exhibit 1. Defendant is transacting the business of insurance in the State of New York and within the County of Nassau and the basis of this suit arises out of such conduct.

IV. FACTUAL BACKGROUND

A. Insurance Coverage

12. On or about March 4, 2020, Defendant entered into a contract of insurance with the Plaintiff, whereby Plaintiff agreed to make payments to Defendant in exchange for Defendant's promise to indemnify the Plaintiff for losses including, but not limited to, business income losses at its primary location in 144 Woodbury Road, Woodbury, New York 11797 (hereinafter "Covered Premises"). Plaintiff Daniel P. Buttafuoco, LLC is the primary named insured on the Policy; Daniel P. Buttafuoco & Associates, PLLC, d/b/a Buttafuoco and Associates, PLCC is named on an endorsement to the Policy naming it as an additional named insured. <https://www.1800nowhurt.com/> (last visited April 24, 2021). Daniel P. Buttafuoco & Associates, PLLC is a plaintiff's personal injury law firm.

13. The Insured Property is covered under a policy issued by the Defendant with policy number believed to be 12 SBA NC2462 SB (hereinafter "Policy").

14. The Policy is currently in full effect, providing, among other things, building coverage, business personal property coverage, business income and extra expense coverage, extended business income coverage, and additional coverages between the period of March 4, 2020 to March 4, 2021.

15. Plaintiff faithfully paid policy premiums to Defendant, specifically to provide, among other things, additional coverages in the event of business interruption caused by action of civil authority.

16. Under the Policy, insurance is extended to apply to the actual loss of business income sustained when access to the business is specifically prohibited by order of civil authority. This additional coverage is identified as coverage under "Civil Authority."

17. The Policy is an all-risk policy, insofar as it provides that covered perils under the policy means physical loss or physical damage unless the loss is specifically excluded or limited in the Policy.

18. An all-risk policy is one that protects against catastrophic events, such as COVID-19. COVID-19, a pandemic currently being experienced on a global scale, has resulted in the widespread, omnipresent and persistent presence of COVID-19 in and around Plaintiff's Insured Property and adjacent properties.

19. Plaintiff's all-risk policy includes coverage for suspension of business activities, which is standard in most all-risk commercial property insurance policies, along with coverage for extended business income losses.

20. Plaintiff purchased the aforementioned Policy expecting to be insured against losses, including, but not limited to, business income losses at its Covered Premises.

21. Plaintiff purchased, among other coverages, business income coverage for closure or suspension by Order of Civil Authority.

22. Coverage under the Policy is to be broadly interpreted and provided, and exclusions are to be narrowly construed in favor of coverage.

23. There is no Virus Exclusion in the Policy, and thus, Plaintiff's claims are covered under the plain language of the Policy.

24. The absence of a Virus Exclusion in Plaintiff's Policy means that the coverage being provided is as broad as possible, as there was no effort, regardless of whether such an effort was valid or not, to narrow the scope of coverage by an addition of a Virus Exclusion Endorsement to Plaintiff's Policy.

25. Based upon information and belief, the Policy provided by Defendant included language that is essentially standardized language adopted from and/or developed by the ISO (“Insurance Service Office”). The ISO, founded in 1971, provides a broad range of services to the property and casualty insurance industry. In addition to form policies, ISO collects and manages databases containing large amounts of statistical, actuarial, underwriting, and claims information, fraud-identification tools, and other technical services. ISO describes itself as follows: “ISO provides advisory services and information to many insurance companies. ... ISO develops and publishes policy language that many insurance companies use as the basis for their products.” ISO General Questions, Verisk, <https://www.verisk.com/insurance/about/faq/> (last visited October 26, 2020); *see also* Insurance Services Office (ISO), Verisk, <https://www.verisk.com/insurance/brands/iso/> (last visited October 26, 2020).

26. The language in the Policy is language that is “adhesionary” in that Plaintiff was not a participant in negotiating or drafting its content and provisions.

27. Plaintiff possessed no leverage or bargaining power to alter or negotiate the terms of the Policy, and more particularly, Plaintiff had no ability to alter, change or modify standardized language derived from the ISO format.

28. Plaintiff purchased the Policy with an expectation that it was purchasing a policy that would provide coverage in the event of business suspension, such as that suffered by Plaintiff as a result of COVID-19.

29. At no time had Defendant, or its agents, notified Plaintiff that the coverage that Plaintiff had purchased pursuant to an all-risk policy that included business income *and* extended business income coverage, contained exclusions and provisions that purportedly undermined the

very purpose of the coverage: providing benefits in the occurrence of business suspension and related extended expenses.

30. The reasonable expectations of Plaintiff—i.e., an objectively reasonable interpretation by the average Policyholder of the coverage that was being provided—was that the Policy included coverage when a civil authority forced closure of the business for an issue of public safety such as that involving the COVID-19 pandemic in the immediate area surrounding the Insured Property.

31. The purported exclusions of the Policy that Defendant has or is expected to raise in defense of Plaintiff's claim under the Civil Authority coverage of the Policy are strained and contradictory to the provision of Civil Authority coverage.

32. Furthermore, Defendant's expected application of exclusions to undermine Plaintiff's bargained-for coverage violates public policy of the State of New York as a contract of adhesion and is unenforceable against Plaintiff.

33. Access to Plaintiff's business was prohibited by the Orders, and the Policy provides for coverage for actual loss of business income sustained caused by the prohibitions of the Orders in and around the area of Plaintiff's Covered Premises.

34. Plaintiff had a reasonable expectation that the Policy's coverages applied where a civil authority forced closure, thereby barring access to the Covered Premises, due to an issue of public safety within and in the immediate area surrounding the Covered Premises.

35. The Policy does not exclude the losses suffered by Plaintiff and therefore the Policy does provide coverage for those losses.

36. The Policy also does not define the terms “direct,” “physical,” “loss,” or “damage” within the relevant coverage provisions, rendering those terms ambiguous and requiring them to be construed in favor of the Policyholder.

37. Regardless, Plaintiff did suffer direct physical loss or damage within the definitions of the Policy, as the loss of use of property at the Covered Premises constitutes loss or damage under the Policy, triggering coverage.

38. Plaintiff’s losses were also caused by the entry of Civil Authority Orders, particularly those by Governor Cuomo, New York State, and the New York State Department of Health, to mitigate the spread of COVID-19.

39. Based on information and belief, the Defendant has accepted the policy premiums with no intention of providing any coverage for business losses or the Civil Authority extension due to a loss and shutdown.

40. Factual issues related to direct physical loss of use or physical damage to Plaintiff’s Insured Property and/or surrounding property will require development of a factual record through discovery. Plaintiff also intends to serve subpoenas on the ISO and Department of Insurance regarding coverage under the Policy’s standardized language, including but not limited to statements made by Defendant and by the ISO on behalf of Defendant as to meanings of language in Policies.

41. The timing of Plaintiff’s Policy is critical. It was issued in early March of 2020, after COVID-19 was known to be in the United States but before it was widely regarded as a threat to businesses. However, Defendant understood the relative risks of COVID-19 and has already considered or should have considered whether coverage would be afforded to businesses impacted by COVID-19, government shutdowns, or civil authority orders. Neither the carrier, nor its agents

or the broker. mentioned anything to the Plaintiffs regarding coverage (or lack thereof) in these scenarios.

42. Because there was nothing to explicitly address something like COVID-19 in the policy, issued after it was within the knowledge of the Defendant, coverage exists. Defendant should not be able to simply rely on pre-existing, cookie-cutter language it had been using for years in the face of a new risk that was known prior to the issuance of this policy. Defendant could have protected itself, and it did not.

43. In light of the fact that there was no Virus Exclusion in the policy, and no one mentioned anything to Plaintiffs about COVID-19, Plaintiff maintains an objective and subjective reasonable expectation of coverage in light of the events that transpired starting in March of 2020.

44. At the end of March, 2020, Plaintiff contacted the broker to inquire about coverage for business interruption and specifically, how to start the process to file a claim. Plaintiff was told specifically there was no coverage and not to bother to file a claim. In light of that clear communication, Plaintiff did not file a claim and instead brings this action.

B. The Coronavirus Pandemic

45. The scientific community, and those personally affected by the virus, recognize the Coronavirus as a cause of real physical loss and damage. It is clear that contamination of the Insured Property would be a direct physical loss requiring remediation to clean the surfaces of the business.

46. The virus that causes COVID-19 remains stable and transmittable in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard and up to two to three days on plastic and stainless steel. See <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last visited April 19, 2021).

47. The CDC has issued a guidance that gatherings of more than 10 people must not occur. People in congregate environments, which are places where people live, eat, and sleep in close proximity, face increased danger of contracting COVID-19.

48. On March 11, 2020 the World Health Organization (“WHO”) made the assessment that COVID-19 shall be characterized as a pandemic. *See* <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (last visited April 19, 2021).

49. The global Coronavirus pandemic is exacerbated by the fact that the deadly virus physically infects and stays on surfaces of objects or materials, “fomites,” for up to twenty-eight (28) days. Human coronaviruses can remain infectious on inanimate surfaces at room temperature for up to 9 days. At a temperature of 30 degrees Celsius (86 degrees F) or more the duration of persistence is shorter. *See* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7132493/> (last visited April 19, 2021).

50. A particular challenge with the novel coronavirus is that it is possible for a person to be infected with COVID-19 but be asymptomatic. Thus, seemingly healthy people unknowingly spread the virus via speaking, breathing, and touching objects.

51. While infected droplets and particles carrying COVID-19 may not be visible to the naked eye, they are physical objects which travel to other objects and cause harm. Habitable surfaces on which COVID-19 has been shown to survive include, but are not limited to, stainless steel, plastic, wood, paper, glass, ceramic, cardboard, and cloth.

52. The virus is thought to spread mainly from person to person: between people who are in close contact with one another (within about 6 feet); through respiratory droplets produced when an infected person coughs, sneezes or talks; these droplets can land in the mouths or noses

of people who are nearby or possibly be inhaled into the lungs; and some recent studies have suggested that COVID-19 may be spread by people who are not showing symptoms. *See* <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited April 19, 2021).

53. The CDC has noted that “[i]t may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes, but this is not thought to be the main way the virus spreads.” *See* <https://www.cdc.gov/foodsafety/newsletter/food-safety-and-Coronavirus.html> (last visited April 19, 2021).

54. The CDC has said that the best way to prevent illness is to avoid being exposed to this virus and that steps can be taken to slow its spread: Maintain good social distance (about 6 feet). This is very important in preventing the spread of COVID-19; Wash your hands often with soap and water. If soap and water are not available, use a hand sanitizer that contains at least 60% alcohol; Routinely clean and disinfect frequently touched surfaces; and Cover your mouth and nose with a cloth face covering when around others.

55. “The primary and most important mode of transmission for COVID-19 is through close contact from person-to-person. Based on data from lab studies on COVID-19 and what we know about similar respiratory diseases, it may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes, but this isn’t thought to be the main way the virus spreads.” <https://www.cdc.gov/media/releases/2020/s0522-cdc-updates-covid-transmission.html> (last visited April 19, 2021).

56. A number of studies have demonstrated that the coronavirus is “much more resilient to cleaning than other respiratory viruses so tested.” See Nevio Cimolai, *Environmental and decontamination issues for human coronaviruses and their potential surrogates*, 92 J. Med. Virol. 2498 (2020), <https://doi.org/10.1002/jmv.26170>.

57. The measures that must be taken to remove the coronavirus from property are significant and far beyond ordinary or routine cleaning.

58. The mere fact that the coronavirus is known to be on property demonstrates it as impacting physical property, rendering property unsafe pending appropriate, thorough and constant cleaning in an effort to remove the coronavirus from property with which it comes into contact.

59. Efficacy of decontaminating agents for viruses is based on a number of factors, including the initial amount of virus present, contact time with the decontaminating agent, dilution, temperature, and pH, among many others. Detergent surfactants are not recommended as single agents, but rather in conjunction with complex disinfectant solutions. *Id.* Additionally, it can be challenging to accurately determine the efficacy of decontaminating agents. The toxicity of an agent may inhibit the growth of cells used to determine the presence of virus, making it difficult to determine if lower levels of infectious virus are actually still present on treated surfaces. *Id.*

60. In order to be effective, cleaning and decontamination procedures require strict adherence to protocols not necessarily tested under “real life” or practical conditions, where treated surfaces or objects may not undergo even exposure or adequate contact time. *Id.*

61. Studies of coronaviruses have demonstrated viral RNA persistence on objects despite cleaning with 70% alcohol. See Joon Young Song et al., *Viral Shedding and Environmental*

Cleaning in Middle East Respiratory Syndrome Coronavirus Infection, 47 J. Infection & Chemotherapy 252 (Dec. 2015), <https://doi.org/10.3947/ic.2015.47.4.252>.

62. Studies have demonstrated that a virus can survive on fabrics and be transferred to skin and other surfaces, “suggesting it is biologically plausible that . . . infectious diseases can be transmitted directly through contact with contaminated textiles.” Lucy Owen and Katie Laird, *The role of textiles as fomites in the healthcare environment: a review of the infection control risk*, 8 PeerJ e9790 (2020), <https://peerj.com/articles/9790/>.

63. This demonstrates that the coronavirus and COVID-19, and the measures required to prevent their spread from surfaces and materials used by the Plaintiff, cause physical loss of or damage to property.

64. Moreover, the aerosolized coronavirus particles and virions cannot be eliminated by routine cleaning. Cleaning surfaces in an indoor space will not remove the aerosolized coronavirus particles from the air that people can inhale and become infected with the coronavirus and develop COVID-19. Mike Ives & Apoorva Mandavilli, *The Coronavirus Is Airborne Indoors. Why Are We Still Scrubbing Surfaces?*, N.Y. Times (Nov. 18, 2020), <https://www.nytimes.com/2020/11/18/world/asia/covid-cleaning.html>.

65. Simply cleaning physical locations and maintaining social distancing through the “six foot rule” does not prevent COVID-19 exposure or prevent the losses suffered here. *See* <https://www.yahoo.com/news/staying-6-feet-apart-indoors-112732760.html> (last visited May 3, 2021).

66. Given the ubiquity and pervasiveness of the coronavirus, no amount of cleaning or ventilation intervention will prevent a person infected with the coronavirus from entering an indoor space and exhaling millions of coronavirus particles and virions into the air, further: (a) filling the

air with the aerosolized coronavirus that can be inhaled, sometimes with deadly consequences; and (b) depositing coronavirus particles and virions on the surfaces, physically altering and transforming those surfaces into disease-transmitting fomites.

67. Cleaning of property at a given moment does not assure that the property will not again be impacted by the coronavirus. Much like testing provides essentially only a snapshot in time about whether a person had the coronavirus at the time of the test, but nothing about whether the person contracted COVID-19 after the test was performed, cleaning only sanitizes property (if performed correctly) at any given moment in time until the cleaning “wears off.” This therefore requires businesses to constantly engage in cleaning efforts at cost in order to comply with CDC recommendations.

68. Compliance with the CDC recommendations, along with compliance with the civil authority orders, effectively made it impossible for Plaintiff to operate its business in the usual and customary manner causing the business to suffer business losses and added expenses as provided for and covered under the Policy

69. China, Italy, France, and Spain have implemented the cleaning and fumigating of public areas prior to allowing them to re-open publicly due to the intrusion of microbials.

70. A French Court has determined that business interruption coverage applies to the COVID-19 Pandemic. *See* <https://www.insurancejournal.com/news/international/2020/05/22/569710.htm> (last visited April 19, 2021).

71. Similarly, on September 15, 2020, the United Kingdom’s High Court found that the ‘disease’ and/or ‘denial of access’ clauses in the various insurance policy wordings provide

coverage in the circumstances of the COVID-19 pandemic, and that the trigger for coverage caused policyholders' losses. The High Court further noted:

The fact that a provision in a contract is expressed as an exception does not necessarily mean that it should be approached with a pre-disposition to construe it narrowly. Like any other provision in a contract, words of exception or exemption must be read in the context of the contract as a whole and with due regard for its purpose. As a matter of general principle, it is well established that that if one party, otherwise liable, wishes to exclude or limit his liability to the other party, he must do so in clear words; and that the contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed.

<https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-judgment.pdf>.

72. Courts in other countries, including Australia and South Africa, have also ruled in favor of policyholders in similar cases. *See*

<https://www.cliffordchance.com/briefings/2020/11/covid-19--landmark-judgments-in-nsw--australia--and-england-in-b.html>;

<https://www.insurancejournal.com/news/international/2020/12/17/594368.htm> (last visited April 19, 2021).

73. These cases are consistent with public policy that during a worldwide pandemic, such as COVID-19, businesses that possess business interruption insurance coverage should recover their losses from the insurance carriers.

C. Civil Authority

74. On March 7, 2020, New York Governor Andrew Cuomo declared a Disaster Emergency for the entire state of New York as a result of COVID-19.

75. On March 12, 2020, Governor Cuomo set restrictions on large gatherings.

76. On March 20, 2020, the State of New York issued a stay-at-home order that all non-essential workers must stay at home as a result of the COVID-19 pandemic. To date, this order has been extended to at least May 15, 2020.

77. As of March 22, 2020, Governor Cuomo ordered all “non-essential businesses” statewide to be closed. This Order remains in effect as of this filing.

78. On April 17, 2020, the State of New York ordered all individuals over the age of two to wear a face covering when in a public place.

79. Further, on April 10, 2020 President Trump seemed to support insurance coverage for business loss like that suffered by the Plaintiff:

REPORTER: Mr. President may I ask you about credit and debt as well. Many American individuals, families, have had to tap their credit cards during this period of time. And businesses have had to draw down their credit lines. Are you concerned Mr. President that that may hobble the U.S. economy, all of that debt number one? And number two, would you suggest to credit card companies to reduce their fees during this time?

PRESIDENT TRUMP: Well it’s something that we’ve already suggested, we’re talking to them. ***Business interruption insurance***, I’d like to see these insurance companies—you know you have people that have paid. When I was in private I had business interruption. When my business was interrupted through a hurricane or whatever it may be, I’d have business where I had it, I didn’t always have it, sometimes I had it, sometimes, I had a lot of different companies. ***But if I had it I’d expect to be paid***. You have people. I speak mostly to the restaurateurs, where they have a restaurant, they’ve been paying for 25, 30, 35 years, business interruption. They’ve never needed it. All of a sudden they need it. And I’m very good at reading language. I did very well in these subjects, OK. And I don’t see the word pandemic mentioned. Now in some cases it is, it’s an exclusion. But in a lot of cases I don’t see it. I don’t see it referenced. And they don’t want to pay up. I would like to see the insurance companies pay if they need to pay, if it’s fair. And they know what’s fair, and I know what’s fair, I can tell you very quickly. But business interruption insurance, that’s getting a lot money to a lot of people. And they’ve been paying for years, sometimes they just started paying, but you have people that have never asked for business interruption insurance, and they’ve been paying a lot of

money for a lot of years for the privilege of having it, and then when they finally need it, the insurance company says ‘we’re not going to give it.’ We can’t let that happen.

https://youtu.be/_cMeG5C9TjU (last visited on May 29, 2020) (emphasis added).

80. The President is articulating a few core points:
 - a. Business interruption is a common type of insurance for businesses.
 - b. Businesses pay in premiums for this coverage and should reasonably expect they’ll receive the benefit of the coverage.
 - c. This pandemic should be covered unless there is a specific exclusion for pandemics.
 - d. If insurers deny coverage, they would be acting in bad faith.

81. Plaintiff did not have the ability or right to ignore these civil authority Orders and proclamations as doing so would expose Plaintiff to fines and sanctions.

82. Plaintiff’s adherence to the requirements of these civil authority Orders and proclamations was in furtherance of protecting the public, the public good, public policy in favor of minimizing the risk of spread of COVID-19, and complying with the civil authority Orders.

D. Impact on Plaintiff Businesses

83. Plaintiff’s business loss occurred when the state and local government-issued Orders forced Plaintiff’s business to shut down.

84. Prior to the issuance of the orders, Plaintiff’s business was open.

85. In light of the Plaintiff’s inability to safely use or operate its Covered Premises due to the COVID-19 Pandemic, as well as state and local civil authority Orders requiring all non-life-sustaining businesses to cease operations and close all physical locations due to physical loss and damage caused by the COVID-19 Pandemic, Plaintiff was forced to suspend operations of its business.

86. Consequently, access to Plaintiff's business was prohibited by the civil authority Orders.

87. Even with the entry of these civil authority Orders, there remained physical impact not only in and within Plaintiff's business property but in and around the surrounding location of Plaintiff's business property in light of COVID-19 presence not being detectable other than through microscopic means, and occurrence of illness.

88. Due to COVID-19, Plaintiff has suffered "direct physical loss of or damage" to its Covered Premises. Among other things, COVID-19 made the Covered Premises unusable in the way that it had been used before COVID-19, rendered the Premises substantially unusable and uninhabitable, intruded upon the Premises, damaged the Premises, prevented physical access to and use of the Premises, and caused a suspension of business operations at the Premises.

89. Instead of being able to operate a business, the Covered Premises was required to physically alter and drastically reduce operations and even close entirely. To do anything else would lead to the emergence or reemergence of COVID-19 at the location. Given the widespread prevalence of COVID-19 in the State of New York and the County of Nassau, even limited use of the Covered Premises was not possible.

90. Plaintiff's businesses were impacted in the following specific ways:

a. COVID-19 was physically present at the Insured Property. Employees contracted COVID-19 at the Insured Property or were infected with COVID-19 and were themselves present at the Insured Property, where it was or could have spread. As a result of this outbreak, employees were unable and unwilling to work at the Insured Property;

b. Plaintiff purchased special machines to clean the air at the Insured Property. Plaintiff also took specific remedial steps, including sanitizing and changing the layout of the offices, to avoid additional exposures. These changes cost money and are covered by the Policy.

c. Plaintiff DANIEL P. BUTTAFUOCO AND ASSOCIATES PLLC, d/b/a BUTTAFUOCO & ASSOCIATES, PLCC is a trial practice. State and federal courts in New York were closed for a discrete period of time. Because of the closing of state and federal courts in New York, Plaintiff suffered damages that are covered by the Policy.

91. The Policy provides coverage for all non-excluded business losses, including Business Income that would have otherwise been earned, and thus provides coverage here.

92. COVID-19 resulted in the suffering of physical harm and impact and damages occurring both within Plaintiff's Covered Premises and/or within the immediate area surrounding and outside the Premises.

93. This loss is direct. Plaintiff is not asking Defendant to reimburse it after someone obtained a judgment against Plaintiff for getting them sick. That might be an indirect loss. Plaintiff is asking Defendant to pay for its loss of business income occasioned directly by being unable to use the Insured Property.

94. This loss is physical. Instead of being able to operate normally, the Covered Premises was required to physically alter and drastically reduce operations, and even to close entirely. To do anything else would lead to the emergence or reemergence of COVID-19 at the location. Given the widespread prevalence of COVID-19, even limited use of the Covered Premises was not reasonably safe for extended periods. The probability of illness prevents the use of the space in no less of a way than, on a rainy day, a crumbling and open roof from the aftermath of a tornado would make the interior space of a business unusable.

95. This loss is a loss. It is the loss of functionality of the space for business purposes. It is the diminishment of the physical space in the buildings. What once could hold many now can safely hold only a few, or none at all.

96. Plaintiff specifically sought coverage for business suspension losses and paid premiums for such coverage with an expectation that the Policy provided such coverage, with no disclosures to the contrary being made to Plaintiff by Defendant or its agents.

97. Insurers around the country are now wanting federal and state judges to interpret the words “direct physical loss of or damage,” but those words need no interpretation. What insurers want is for courts to change the meaning of those terms—instead of just letting a jury apply the facts of the case to these ordinary words and reach a verdict in the same way a jury would reach a verdict if it were called upon to answer whether a person was injured or property was damaged.

98. As a result, Plaintiff is entitled to declaratory relief that its business is covered for all business losses that have been suffered and sustained, which losses are in an amount greater than \$150,000.00.

E. CAUSE OF ACTION

**COUNT 1
DECLARATORY RELIEF**

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

100. The Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides that in “a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a); *see also Columbus McKinnon Corp. v.*

SST Casting, Inc., No. 08-CV-1672, 2009 WL 1563922, at *3 (W.D.N.Y. June 3, 2009); *Dow Jones & Co. v. Harrods Ltd.*, 346 F.3d 357, 359 (2d Cir. 2003).

101. An actual controversy has arisen between Plaintiff and the Defendant as to the rights, duties, responsibilities and obligations of the parties under the Policy in that Plaintiff contends and, on information and belief, the Defendant disputes and denies that:

- a. The Orders constitute a prohibition of access to Plaintiff's Covered Premises;
- b. The prohibition of access by the Orders has specifically prohibited access as defined in the Policy;
- c. The Orders trigger coverage;
- d. The Policy provides coverage to Plaintiff for any current and future civil authority closures of businesses in Nassau County due to physical loss or damage directly or indirectly from the Coronavirus under the Civil Authority coverage parameters;
- e. Under the circumstances of the COVID-19 pandemic and the entry of the Civil Authority Orders, Plaintiff had no choice but to comply with the Orders, and Plaintiff's compliance resulted in business losses, business suspension and extended expenses, and therefore constitute covered losses;
- f. Defendant's denial of coverage for losses sustained that were caused by the entry of the Civil Authority Orders referenced, and Plaintiff's required compliance with the Orders, violates public policy;
- g. The Policy provides business income coverage in the event that Coronavirus has directly or indirectly caused a loss or damage at the insured premises or immediate area of the Insured Property; and
- h. Resolution of the duties, responsibilities and obligation of the parties is necessary as no adequate remedy at law exists and a declaration of the Court is needed to resolve the dispute and controversy.

102. Plaintiff seeks a Declaratory Judgement to determine whether the Orders constitute a prohibition of access to Plaintiff's office as Civil Authority as defined in the Policy.

103. Plaintiff further seeks a Declaratory Judgement to affirm that the Orders trigger coverage.

104. Plaintiff further seeks a Declaratory Judgment to affirm that the Policy provides coverage to Plaintiff for any current and future Civil Authority closures due to physical loss or damage from the Coronavirus and the policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the Insured Property.

F. PRAYER FOR RELIEF

WHEREFORE, Plaintiff herein prays as follows:

- 1) For a declaration that the Orders constitute a prohibition of access to Plaintiff's Covered Premises.
- 2) For a declaration that the prohibition of access by the Orders is specifically prohibited access as defined in the Policy.
- 3) For a declaration that the Orders trigger coverage under the Policy.
- 4) For a declaration that the Policy provides coverage to Plaintiff for any current and future closures due to any physical loss or damage directly or indirectly arising out of COVID-19 and/or pandemic circumstance under the Civil Authority coverage parameters.
- 5) For a declaration that under the circumstances of the COVID-19 pandemic and the entry of the Civil Authority Orders, Plaintiff had no choice but to comply with the Orders and Plaintiff's compliance resulted in business losses, business suspension and extended expenses, and therefore constitute covered losses.
- 6) For a declaration that the Policy provides coverage to Plaintiff for any current, future and continued civil authority closures of non-essential businesses due to physical loss or damage directly or indirectly from COVID-19 under the Policy's Civil Authority coverage.
- 7) For a declaration that the Policy provides coverage to Plaintiff for any current, future and continued civil authority closures of businesses due to physical loss or damage directly or

indirectly from the Coronavirus under the Policy's Civil Authority coverage.

8) For a declaration that the Policy provides coverage to Plaintiff based on the closure of New York courts.

9) For a declaration that the Policy provides business income coverage in the event that Coronavirus has directly or indirectly caused a loss or damage at the Plaintiff's Covered Premises or the immediate area of the Plaintiff's Covered Premises.

10) For such other relief as the Court may deem proper.

TRIAL BY JURY IS DEMANDED

Dated: May 27, 2021

Respectfully submitted,

/s/ Daniel P. Buttafuoco

Daniel P. Buttafuoco, Esq.

Daniel P. Buttafuoco & Associates, PLLC

144 Woodbury Rd

Woodbury, New York 11797

Telephone: (516) 746-8100

DButtafuoco@ButtafuocoLaw.com

Richard M. Golomb, Esq.

Kenneth J. Grunfeld, Esq.

GOLOMB & HONIK, P.C.

1835 Market Street, Suite 2900

Philadelphia, PA 19103

Telephone: (215) 985-9177

Facsimile: (215) 985-4169

rgolomb@golombhonik.com

kgrunfeld@golombhonik.com

Arnold Levin, Esq.

Frederick Longer, Esq.

Daniel Levin, Esq.

LEVIN SEDRAN & BERMAN, L.L.P.

510 Walnut Street, Suite 500

Philadelphia, PA 19106-3697

Telephone: (215) 592-1500

alevin@lfsblaw.com

flonger@lfsblaw.com

dlevin@lfsblaw.com

W. Daniel "Dee" Miles, III
Rachel N. Boyd
Paul W. Evans
**BEASLEY, ALLEN, CROW, METHVIN,
PORTIS & MILES, P.C.**
P.O. Box 4160
Montgomery, AL 36103
Telephone: (334) 269-2343
Facsimile: (334) 954-7555
dee.miles@beasleyallen.com
rachel.boyd@beasleyallen.com
paul.evans@beasleyallen.com

Counsel for Plaintiff