

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>JESSE'S EMBERS, LLC, d/b/a Jesse's Embers,</p> <p>Plaintiff,</p> <p>v.</p> <p>WESTERN AGRICULTURAL INSURANCE COMPANY, d/b/a FARM BUREAU FINANCIAL SERVICES,</p> <p>Defendant.</p>	<p>Case No.</p> <p><b>PETITION AND JURY DEMAND</b></p>
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COMES NOW the Plaintiff, and for its Petition at Law and Jury Demand states as follows:

**PARTIES AND JURISDICTION**

1. This Petition is for a civil action in which Plaintiff seeks to recover damages for breach of contract and bad faith caused by the Defendant's denial of business interruption insurance claims, and further seeks declaratory relief regarding the coverage provided under Plaintiff's insurance policy.
2. Plaintiff Jesse's Embers, LLC is an Iowa limited liability company qualified to do business and doing business in the state of Iowa.
3. That Jesse's Embers, LLC is owned, managed, and operated by Marty Scarpino and Deena Edelstein.
4. That Plaintiff Jesse's Embers is located at 3301 Ingersoll Avenue, Des Moines, IA 50312-3901.

5. That Plaintiff Jesse's Embers, LLC obtained a business owners policy through Elliott Milakovich in Ankeny, Iowa, on January 22, 2020. Elliott Milakovich is an agent for Farm Bureau Financial Services, or Western Agricultural Insurance Company.

6. That upon information and belief, Farm Bureau Financial Services is a fictitious name or DBA for Western Agricultural Insurance Company, which is an Iowa insurance company authorized to sell property/casualty insurance in Iowa, to include business owner coverages.

7. That upon information and belief, Farm Bureau Financial Services' and Western Agricultural Insurance Company's business address is 5400 University Avenue, West Des Moines, IA 50266.

8. That the insurance policy issued was purchased and primarily to be enforced and interpreted in Polk County, Iowa.

9. The damages giving rise to this Petition are sufficient to meet the jurisdictional requirements for the amount in controversy.

10. Jurisdiction is conferred upon this court pursuant to Iowa Code §602.6101.

11. Venue is conferred pursuant to Iowa Code §616.18.

### **FACTUAL BACKGROUND**

12. Defendant caused to be issued a business interruption and loss of income policy to the Plaintiff. The policy number is BP6023272 01. A copy of the Declaration page is attached hereto. See Exhibit A. See the "x" by Western Agricultural Insurance Company.

13. The policy in question is a business owners property coverage form providing for coverage that would pay for "direct physical loss or damage to" the premises described in the Declaration.

14. Pursuant to the policy, it covered causes of loss to include “risks of direct physical loss” unless otherwise excluded or limited by the policy.

15. The policy further provides that Defendant would “pay for the actual loss of business income sustained due to the necessary suspension of operations during the period of restoration.” The suspension must be caused by direct physical loss of or damage to the property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.

16. The policy contains an exclusion providing that Defendant “will not pay for loss and damage caused by or resulting from any virus... that induces, or is capable of inducing, physical distress, illness or disease.”

17. On or about March 17, 2020, Governor Kim Reynolds issued a governmental Proclamation and Order that required the closure of bars and restaurants throughout the state of Iowa.

18. Governor Reynolds’ March 17, 2020, Order did cause and continues to cause the necessary suspension of Plaintiff’s operation, which in turn has caused Plaintiff to sustain significant losses to its business income.

19. As a result of Governor Reynolds’ Proclamation, Plaintiff has been forced to terminate dozens of employees.

20. Plaintiff, in an effort to mitigate its income losses, attempted to sell carry-out orders and opened on May 12, 2020, five days a week as allowed by the Governor’s modification of the March 17, 2020 Proclamation.

21. Plaintiff has incurred a net loss of business income each month it has been closed, plus additional expenses, and expects to continue to incur significant losses until

such time as it is able to completely and fully reopen and re-gain market share of its business prior to the Governor's Proclamation and Order.

22. Plaintiff under its business owners policy submitted a claim to Defendant for loss of business income as a result of the Governor of the State of Iowa issuing an Order closing all restaurants and food and beverage businesses throughout the state of Iowa.

23. That Jesse's Embers, LLC d/b/a Jesse's Embers received a letter denying the claim for business income loss based upon the review of the policy. The denial-of-coverage letter dated June 17, 2020 is attached hereto and made a part of the allegations of the Petition. See Exhibit B.

24. The purported reason for the denial of coverage as set forth in the declination letter was that there is a policy exclusion of loss due to a virus; that the business income loss must be caused by direct physical loss or damage to the premises, and the Civil Authority provision of the policy was not applicable.

25. Plaintiff has no knowledge of the insured facility being infected with the coronavirus or any other virus, nor is it aware of any employee or customer having contracted the coronavirus or any other virus at any time prior to the Governor's Proclamation and Order, or subsequent to the Governor's Proclamation and Order.

**COUNT I**  
**DECLARATORY JUDGMENT AGAINST WESTERN AGRICULTURAL INSURANCE**  
**COMPANY, d/b/a FARM BUREAU FINANCIAL SERVICES**  
**PURSUANT TO IOWA RULES OF CIVIL PROCEDURE 1.1101**

26. Plaintiff re-alleges the above paragraphs 1 through 25 as if fully set forth herein.

27. Plaintiff claims damages that are covered under the business interruption and loss of income (including civil authority) policy, issued to Plaintiff by the Defendant.

28. Defendant Western Agricultural Insurance Company, d/b/a Farm Bureau Financial Services has denied coverage under policy number BP6023272 01.

29. Plaintiff had reasonable expectations that the loss of business income and additional expenses would be covered by the policy sold to him by a Western Agricultural Insurance Company, d/b/a Farm Bureau Financial Services agent.

30. An actual justiciable controversy exists between the Plaintiff and Defendant with regard to whether the loss claimed by Plaintiff is covered under the policy that has been issued to Plaintiff by Western Agricultural Insurance Company, d/b/a Farm Bureau Financial Services.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in its favor and against the Defendant, including the relief of:

- a. Entering a Declaratory Judgment acknowledging the rights of the Plaintiff and obligation of the Defendant under the policy and declaring that the loss claimed by Plaintiff is covered by the policy, and;
- b. Order payment of loss of income as substantiated by the Plaintiff, and for such other and further relief as the Court deems proper, including costs and attorney fees.

**COUNT II**  
**BREACH OF CONTRACT**

31. That Plaintiff re-alleges paragraphs 1 through 30 as fully set forth herein.

32. The necessary suspension of Plaintiff's operations was and continues to be due to Governor Reynolds' March 17, 2020 Proclamation Order requiring the closure of all restaurants and bars throughout the state of Iowa.

33. As a result of Governor Reynolds' Proclamation, Plaintiff has sustained and continues to sustain direct physical loss of its property as required by the policy, including physical loss of access, customers, use, and utilization for its intended purposes.

34. That Plaintiff is attempting to mitigate its damages by partially opening on May 13, 2020 on a limited 50 percent basis but has not had any substantial revenue that would reduce the damages being suffered by Plaintiff.

35. The necessary suspension of Plaintiff's facility under these circumstances is a covered loss under the policy that is otherwise not excluded.

36. As a result of this covered loss, Plaintiff has sustained and continues to sustain significant financial loss of income that is covered under the policy.

37. Plaintiff provided timely notice to the Defendant and has otherwise complied with all conditions precedent to the coverage under the policy.

38. That Defendant has wrongfully denied coverage of Plaintiff's claim.

39. Defendant's denial erroneously relies on the virus exclusion contained in Plaintiff's policy, which does not operate to exclude coverage under these circumstances.

40. That the virus exclusion relied upon by the Defendant specifically contemplates the virus to be capable of "inducing physical distress, illness or disease."

41. Likewise, the Defendant's denial erroneously concludes that the Plaintiff did not sustain a "direct physical loss of or damage."

42. The term "loss of" is not defined in the policy, and by its inclusion necessarily entails a different definition than the term "damage". Otherwise the policy would not distinguish the two terms.

43. The Western Agricultural Insurance Company, d/b/a Farm Bureau Financial Services agent did not explain the difference between “physical loss of or damage” as stated in the policy and Plaintiff at all times had the reasonable expectations the loss would be covered.

44. The closure of Plaintiff’s restaurant is a direct physical loss, including physical loss of access, customers, use, and utilization for its intended purposes.

45. Defendant has failed to properly apply the policies and compensate the Plaintiff for the losses provided for under the policy and as a result, has breached its obligations under the provisions of the policy.

46. As a direct and proximate result of the Defendant’s breach of its contractual obligations under the policy issued, the Plaintiff has sustained damages in net income plus additional expenses and will continue to incur significant losses until completely opened, exclusive of interest, costs and attorney fees.

WHEREFORE, the Plaintiff respectfully requests that the Court enter judgment in favor of the Plaintiff and against the Defendant, including costs and interest, and any other relief deemed appropriate under the circumstances.

**COUNT III**  
**CONDUCT OF BAD FAITH**

47. The Plaintiff re-alleges paragraphs 1 through 46 as if fully set forth herein.

48. Defendant has a contractual obligation to fully and completely investigate a claim of an insured for policies which they have written and for which they have received commissions.

49. That Plaintiff promptly paid all premiums required to effectuate the policy of the Plaintiff for business loss of income under the policy.

50. Defendant denied coverage for Plaintiff's claim based on a virus exclusion contained in the policy.

51. Defendant failed to fully investigate the claim in a good faith manner.

52. That the Defendant has acted in bad faith in denying Plaintiff's claim.

53. As a direct and proximate result of the Defendant's conduct, the Plaintiff has sustained damages and will continue to incur significant losses until completely opened, exclusive of interest, costs and attorney fees.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in favor of the Plaintiff and against the Defendant, including the following relief:

- a. An award to the Plaintiff against the Defendant for the loss of income substantiated by Plaintiff, plus additional expenses, plus pre-judgment interest, and;
- b. The award of punitive damages as a result of the Defendant acting in bad faith, and for such other relief as the Court deems proper, including costs and reasonable attorney fees.

**JURY DEMAND**

The Plaintiff hereby makes a demand for trial by jury on all issues so triable.

Respectfully submitted,

CARNEY & APPLEBY, P.L.C.

*/s/ James W. Carney*

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JAMES W. CARNEY (AT0001327)

*/s/ Nicholas J. Mauro*

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**ATTORNEYS FOR PLAINTIFF**