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MEDURE'S CATERING INC.,
2500 New Butler Road
New Castle PA 16101

Plaintiff,

vs.

DONEGAL MUTUAL INSURANCE
COMPANY,
P. O. Box 302
Marietta, PA 17537

And

DONEGAL INSURANCE GROUP,
P. O. Box 302
Marietta, PA 17537

Defendants.

**IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY**

TERM, 2020

NO:

JURY TRIAL DEMANDED

COMPLAINT FOR DECLARATORY JUDGMENT RELIEF

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP

Lawyer Reference Service
Philadelphia Bar Association
1101 Market Street, 11th Floor
Philadelphia, PA 19107
(215) 238-6300

AVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted tiene veinte (20) dias de plazo al partir de la fecha de la demanda y la notificacion. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o nofificacion. Ademias, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perder dinero o sus propiedades y otros derechos importantes para usted.

LLEVE ESTA DEMANDA A UN ABOGADO INMEDIATAMENTE. SI NO TIENE ABOGADO O SI NO TIENE EL DINERO SUFICIENTE DE PAGAR TAL SERVICIO. VAYA EN PERSONA O LLAME POR TELEFONO A LA OFICINA CUYA DIRECCION SE ENCUENTRA ESCRITA ABAJO PARA AVERIGUAR DONDE SE PUEDE CONSEGUIR ASISTENCIA LEGAL.

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Plaintiff Medure's Catering Inc., brings this Complaint as an Action for Declaratory Judgment, pursuant to Pa.R.C.P. 1601 *et al* and 42 P.S. §7532 and §7534, alleging against Defendants Donegal Mutual Insurance Company and Donegal Insurance Group, as follows:

PARTIES

1. At all relevant times, Plaintiff Medure's Catering, Inc. (hereinafter referred to as "Medure"), is a company authorized to do business and doing business in the Commonwealth of Pennsylvania. Medure owns, operates, manages, and/or controls a catering business.

2. At all relevant times, Defendants Donegal Mutual Insurance Company and Donegal Insurance Group ("Defendants") are corporations doing business in the County of Philadelphia, Commonwealth of Pennsylvania, with their corporate headquarters in Marietta, Pennsylvania.

3. Medure subscribed to an insurance policy of the Defendants, Policy Number CPA-PA-01-20-091139 issued to Medure for the period of March 8, 2020 – March 8, 2021. *See* Policy, attached hereto as Exhibit 1. Defendants transact the business of insurance in the Commonwealth of Pennsylvania and within the County of Philadelphia.

JURISDICTION

4. This Court has jurisdiction over this action and the matters alleged herein and this is an action for Declaratory Judgment Relief, pursuant to Pa. R. C.P. 1601 *et al* and 42 P. S. §§7532 and 7534.

5. Venue is proper based on Defendants' substantial insurance operations in Philadelphia County. Defendants' policy at issue in this case has been issued to other insured's in the County of Philadelphia.

FACTUAL BACKGROUND

A. Insurance Coverage

6. On or about March 8, 2020, Defendants entered into a contract of insurance with Plaintiff, as a renewal of an insurance policy, whereby Plaintiff agreed to make premium payments to Defendants in exchange for Defendants' promise to indemnify Plaintiff for losses including, but not limited to, business income losses for Plaintiff's catering businesses located in Lawrence County (the "Insured Properties").

7. The Insured Properties are located at 2500 New Butler Road, New Castle, Pennsylvania 16101 and 291 Columbus Boulevard, New Castle, Pennsylvania 16101 and consists of a catering business¹ which is owned, leased by, managed, and/or controlled by Plaintiff. Prior to March 16, 2020, the business maintained fully operational catering. Plaintiff's spring season is its busiest time of the year.

8. The Insured Properties are covered under a policy issued by Defendants with policy number CPA8689811 (hereinafter "Policy").

9. The Policy is currently in full effect, providing property, business personal property, business income and extra expense, contamination coverage, and additional coverages between the period of March 8, 2019 through March 8, 2020.

10. Plaintiff faithfully paid policy premiums to Defendants, specifically to provide, among other things, additional coverages in the event of business closures by order of Civil Authority.

11. Under the Policy, insurance is extended to apply to the actual loss of business

¹ These addresses are listed as the Insured Properties under the Policy.

income sustained and the actual, necessary and reasonable extra expenses incurred when access to the Insured Properties is specifically prohibited by order of Civil Authority as the direct result of a covered cause of loss to property in the immediate area of Plaintiff's Insured Properties. This additional coverage is identified as coverage under "Civil Authority."

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

13. Based on information and belief, Defendants have 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 from a virus pandemic. The Policy's Exclusion of Loss Due to Virus or Bacteria does not apply to the business losses incurred by Plaintiff here. The Virus and Bacteria exclusion do not exclude a pandemic. Further, Defendants did not properly include the Virus or Bacteria exclusion in its policy to its insureds and Plaintiff.

B. The Coronavirus Pandemic

14. The scientific community, and those personally affected by the virus, recognize the Coronavirus (also known as Covid-19) as a cause of real physical loss and damage. It is clear that contamination of the Insured Properties would be a direct physical loss requiring remediation to clean the surfaces of the catering building where the catering business is situated.

15. 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 9, 2020).

16. The CDC (Centers for Disease Control) had issued a guidance that gatherings of

more than 10 people must not occur. People in congregate environments, which are places where people live, eat, sleep and office waiting rooms in close proximity, face increased danger of contracting COVID-19.

17. 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.

18. 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.

C. Civil Authority

19. On March 6, 2020, Pennsylvania Governor Tom Wolf issued a Proclamation of Disaster Emergency, the first formal recognition of an emergency situation in the Commonwealth of Pennsylvania as a result of COVID-19.

20. On March 19, 2020 Governor Wolf issued an Order requiring all non-life-sustaining businesses in the Commonwealth to cease operations and close all physical locations. Businesses that were permitted to remain open were required to follow “social distancing practices and other mitigation measures defined by the Centers for Disease Control.” <https://www.scribd.com/document/452416027/20200319-TWW-COVID-19-Business-Closure-Order> (last visited April 19, 2019).

21. On April 1, 2020, Governor Wolf issued a Stay at Home Order to the entire Commonwealth of Pennsylvania.

22. On, May 8, 2016, Governor Wolf allowed non-essential businesses to open in Lawrence County, however these businesses are limited to servicing only 25 guests. Further, many counties Plaintiff services are still under a stay at home order and Plaintiff is unable to

service any events there.

23. The Pennsylvania Supreme Court recently clarified the Governor's Orders and supported Plaintiff's position that physical loss and damage exists resulting in coverage here. *See Friends of DeVito, et. al v. Wolf*, No. 68 MM 2020 (Pa. April 13, 2020).

24. 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 April 17, 2020) (emphasis added).

25. The President is articulating a few core points:
- a. Business interruption is a common type of insurance, especially for restaurants.
 - 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.

26. These Orders and proclamations, as they relate to the closure of all “non-life-sustaining businesses,” evidence an awareness on the part of both state and local governments that COVID-19 causes damage to property. This is particularly true in places where business is conducted, such as Plaintiff’s, as the requisite contact and interaction causes a heightened risk of the property becoming contaminated.

D. Impact on Plaintiff Medure

27. As a result of the Orders referenced herein, Plaintiff and its buildings were required to suspend and shut its business to customers as of March 16, 2020. On May 5, 2020, Medure was allowed to reopen however it is only able to service an event of 25 people or less. Further, many of Plaintiff’s customers are located in counties that are still under shut down orders by Governor Wolf.

28. As a further direct and proximate result of the Orders, Plaintiff has been forced to lay off part-time employees and expects to reduce the salaries of full-time employees.

29. Medure’s business is not a closed environment, and because people – staff, customers, family of customers, community members, and others – constantly cycle in and out

of the building, there is an ever-present risk that the Insured Properties are contaminated and would continue to be contaminated.

30. A catering business that exists in a building, like Plaintiff's is more susceptible to being or becoming contaminated, as both respiratory droplets and fomites are more likely to be retained on the Insured Properties and remain viable for far longer as compared to a facility with open-air ventilation.

31. Plaintiff's catering business is not limited to operations at its Insured Properties. Because of Pennsylvania's stay at home orders, Plaintiff was no longer able to cater events outside of its property. Even after Pennsylvania's stay at home orders are lifted in certain regions, Plaintiff is limited to the size of the events he may service.

32. Plaintiff's business is also highly susceptible to rapid person-to-property transmission of the virus, and vice-versa, because the service nature of the business places staff and customers in close proximity to the property and to one another.

33. The virus is physically impacting the catering business. Any effort by Defendants to deny the reality that the virus causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger Plaintiff and the public.

34. A declaratory judgment is necessary that determines that coverage exists under the Policy. Such a declaratory judgment will prevent Plaintiff from being left without vital coverage that was paid for and acquired to ensure the survival of the catering business due to the shutdown caused by the civil authorities' response. As a result of the "shut down" Orders entered by the civil authorities, Plaintiff has incurred, and continues to incur, among other things, a substantial loss of business income and additional expenses covered under the Policy.

FIRST CAUSE OF ACTION

**DECLARATORY RELIEF PURSUANT TO
Pa. R. Civ. Pr. 1601 et al and 42 P.S. §§ 7532 AND 7534**

35. 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.

36. Under the Pennsylvania Declaratory Judgment Act, the Court has the “power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” 42 Pa. § 7532. A contract for insurance may be interpreted under the Pennsylvania Declaratory Judgments Act before there is a breach or even a claim for coverage. *See id.* at § 7534.

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

- a. The Orders constitute a prohibition of access to Plaintiff’s Insured Properties;
- b. The prohibition of access by the Orders has specifically prohibited access as defined in the Policy;
- c. The Policy’s Exclusion Of Loss Due To Virus Or Bacteria does not apply to the business losses incurred by Plaintiff here;
- d. The Orders trigger coverage;
- e. The Policy provides coverage to Plaintiff for any current and future civil authority closures of a non-essential businesses in Pennsylvania due to physical loss or damage from the Coronavirus under the Civil Authority coverage parameters and;

f. The Policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the insured premises or immediate area of the Insured Properties.

38. Resolution of the duties, responsibilities and obligations 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.

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

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

41. Plaintiff further seeks a Declaratory Judgment to affirm that the Policy provides coverage to Plaintiff for any current and future civil authority closures of a non-essential businesses in Pennsylvania due to physical loss or damage from the Coronavirus and that the policy provides business income coverage in the event that the Coronavirus has caused a loss or damage at the Insured Properties.

42. Plaintiff does not seek any determination of whether the Coronavirus is physically in or at the Insured Properties, an amount of damages, or any other remedy other than declaratory relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff herein prays as follows:

- 1) For a declaration that the Orders constitute a prohibition of access to Plaintiff's Insured Properties.
- 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, future and continued civil authority closures of the catering business in Butler County due to physical loss or damage from the Coronavirus under the Civil Authority coverage parameters.
- 5) For a declaration that the Policy provides business income coverage in the event that the Coronavirus has caused a loss or damage at the Plaintiff's Insured Properties or the immediate area of the Plaintiff's Insured Properties.
- 6) For such other relief as the Court may deem proper.

TRIAL BY JURY IS DEMANDED

Dated: May 11, 2020

Respectfully submitted,

/s/ Daniel C. Levin

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