

1 Jonathan G. Brinson (AZ #025045)
2 jbrinson@polsinelli.com
3 Michelle M. Buckley (AZ #030617)
4 mmmbuckley@polsinelli.com
5 **POLSINELLI PC**
6 One E. Washington St., Ste. 1200
7 Phoenix, AZ 85004
8 Phone: (602) 650-2000
9 Fax: (602) 264-7033
10 *Attorneys for Whiskey Row Nashville, LLC*

11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
12 **IN AND FOR THE COUNTY OF MARICOPA**

13 WHISKEY ROW NASHVILLE, LLC, an
14 Arizona limited liability company,

15 *Plaintiff,*

16 v.

17 MT. HAWLEY INSURANCE COMPANY,
18 a Delaware corporation,

19 *Defendant.*

Case No. CV2020-013699

VERIFIED COMPLAINT

[Eligible for Commercial Court]

20 Plaintiff Whiskey Row Nashville, LLC (“Plaintiff” or “WRN”) alleges the following
21 claims for breach of contract and bad faith against Defendant Mt. Hawley Insurance
22 Company (“Mt. Hawley”):

23 **PARTIES, JURISDICTION, AND VENUE**

24 1. Plaintiff Whiskey Row Nashville, LLC is an Arizona limited liability
25 company that operates and manages a restaurant, bar and nightclub doing business as
26 “Dierks Bentley’s Whiskey Row” in Nashville, Tennessee.

27 2. WRN is a manager-managed limited liability company. WRN’s sole
28 manager is a Delaware limited liability company with its principal place of business at
7525 E. Camelback Road, Suite 100, Scottsdale, Arizona. WRN’s sole manager is a

1 citizen of Arizona and California.

2 3. WRN has twenty-three members who are citizens of various states including,
3 the State of Illinois.

4 4. Defendant Mt. Hawley Insurance Company is a corporation organized and
5 existing in the State of Delaware, with its principal place of business in Illinois. Mt. Hawley
6 is authorized to transact business and has transacted substantial business in Arizona, and
7 avails itself of the laws of the State of Arizona. Accordingly, this Court has personal
8 jurisdiction over Mt. Hawley.

9 5. This action arises out of an insurance policy that was issued and delivered to
10 WRN at its principal place of business in Scottsdale, Arizona.

11 6. This Court has jurisdiction over the parties and subject matter of this action
12 pursuant to A.R.S. § 12-123.

13 7. This Court is the proper venue for this action pursuant to A.R.S. § 12-401(10),
14 (18).

15 GENERAL ALLEGATIONS

16 8. WRN incorporates by reference each and every allegation contained in the
17 preceding paragraphs of this Complaint.

18 9. This is an action for breach of contract, breach of the duty of good faith and fair
19 dealing, and punitive damages.

20 THE POLICY

21 10. WRN purchased from Mt. Hawley a Commercial Property Policy, No.
22 MCP0168865 ("Policy"), with a policy period of December 14, 2019 to December 14, 2020
23 and Policy limits for Business Interruption of \$8 million.

24 11. The Policy was issued and delivered to WRN at 7525 East Camelback Road,
25 Suite 100, Scottsdale, Arizona.

26 12. The Policy Declarations correctly identify WRN's mailing address as 7525
27 East Camelback Road, Suite 100, Scottsdale, Arizona 85251.

28 13. Under the Policy's provisions, Mt. Hawley agreed to pay for "actual loss of

1 Business Income you sustain due to the necessary ‘suspension’ of your ‘operations’ during
2 the ‘period of restoration.’” [Policy, Business Income (And Extra Expense) Coverage Form, §
3 A(1)]. A true and correct copy of the Policy is attached hereto as Exhibit 1.

4 14. The Business Income coverage applies where the “suspension” is “caused by
5 direct physical loss of or damage to property at premises which are described in the
6 Declarations.” [*Id.*].

7 15. The Policy Declarations describe the premises as “400 Broadway, Nashville,
8 TN 37203” (the “Premises”).

9 16. The Policy provides for Extra Expense coverage in addition to the Business
10 Income coverage.

11 17. The Policy also provides Civil Authority additional coverage, which applies to
12 loss “caused by action of civil authority that prohibits access to the described premises,” when
13 “a Covered Cause of Loss causes damage to property other than property at the described
14 premises.” [Policy, Ex. 1 hereto at Business Income (And Extra Expense) Coverage Form, §
15 A(5)(a)].

16 18. Civil Authority coverage applies where: (1) “[a]ccess to the area immediately
17 surrounding the damaged property is prohibited by civil authority as a result of the damage,
18 and the described premises are within that area but are not more than one mile from the
19 damaged property;” and (2) “the action of civil authority is taken in response to dangerous
20 physical conditions resulting from the damage or continuation of the Covered Cause of Loss
21 that caused the damage.” [*Id.*].

22 19. Covered Cause of Loss is defined very broadly as “Risks of Direct Physical
23 Loss,” unless excluded by the Policy. [*Id.* at Causes of Loss-Special Form, § A].

24 **EXECUTIVE ORDER NO. 17 & WRN’S DIRECT LOSSES**

25 20. On March 22, 2020, the Governor of Tennessee signed Executive Order No.
26 17. Attached as Exhibit 2 hereto is a true and correct copy of Executive Order No. 17.

27 21. The Governor ordered that “[r]estaurants, bars, and similar food or drink
28 establishments, including nightclubs, shall not be open to persons, except only to offer drive-

1 through, pickup, carry-out, or delivery service for food or drink.”

2 22. The Governor specifically made this order based on authority to “make orders
3 concerning entry and exit and the occupancy of premises within an emergency area.”
4 [Executive Order No. 17, Ex. 2 hereto at 2, ¶ 4].

5 23. The Premises falls within the “emergency area” due to the presence of SARS-
6 CoV2 at property near the Premises, including property within one mile of the Premises.

7 24. The Governor of Tennessee extended and modified Executive Order No. 17
8 through Executive Orders Nos. 21, 27, 29, and 38. Executive Orders Nos. 21, 27, 29, and 38
9 are attached hereto as Exhibits 3-6, respectively.

10 25. As a result of these Executive Orders, WRN suffered a direct physical loss of,
11 and damage to, the Premises, including the ability of customers to physically enter the
12 Premises, the ability to occupy and otherwise utilize the Premises for services, the ability of
13 the Premises to operate and function as intended, and other losses. The Executive Orders,
14 while in effect, have significantly damaged the Premises and caused a loss of the Premises.

15 26. As a result of this direct physical loss of, and damage to, the Premises, WRN
16 has suffered significant and devastating losses to its Business Income and has incurred
17 significant extra expenses, to the extent that WRN’s very existence is at risk.

18 **MT. HAWLEY’S BAD FAITH REFUSAL TO PAY**

19 27. Given the near-total loss it suffered, WRN immediately tendered its loss to Mt.
20 Hawley to recover under the security it purchased.

21 28. Despite the Policy provisions providing for coverage, Mt. Hawley denied
22 coverage on May 15, 2020, without even conducting a thorough investigation. A true and
23 correct copy of Mt. Hawley’s May 15, 2020 letter denying coverage is attached hereto as
24 Exhibit 7.

25 29. In its May 15, 2020 letter, Mt. Hawley asserted that WRN did not experience a
26 direct physical loss of or damage to property on that sole ground that WRN “closed your
27 business solely based upon the guidelines put in place by the Governor of Tennessee.” [May
28 15, 2020 Letter, Ex. 7 hereto at 6, ¶ 1].

1 30. Mt. Hawley misrepresented the nature of Executive “Order” No. 17 as mere
2 “guidelines” in order to improperly deny coverage to WRN.

3 31. Mt. Hawley also failed to acknowledge caselaw making clear that the type of
4 loss experienced by WRN is a physical loss of or damage to property, as covered by the
5 Policy. *See, e.g., Am. Guar. & Liab. Ins. Co. v. Ingram Micro, Inc.*, 2000 WL 726789, *2 (D.
6 Ariz. Apr. 18, 2000) (“[P]hysical damage’ is not restricted to the physical destruction or
7 harm[,] but includes loss of access, loss of use, and loss of functionality”).

8 32. With respect to Civil Authority coverage, Mt. Hawley glibly stated that “the
9 order was implemented as a preventative measure in an attempt to minimize the spread of
10 COVID-19, and not in response to a Covered Cause of Loss causing damage to property other
11 than at your premises.” [May 15, 2020 Letter, Ex. 7 hereto at 6, ¶ 2].

12 33. Mt. Hawley took this cursory position without investigating the presence of
13 SARS-CoV2 at property within one mile of the Premises. *See, e.g., Port Auth. Of New York*
14 *& New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (“When the
15 presence of large quantities of asbestos in the air of a building is such as to make the structure
16 uninhabitable and unusable, then there has been a distinct [physical] loss to its owner”);
17 *Ingram Micro, Inc.*, 2000 WL 726789 at *2 (“physical damage’ is not restricted to the
18 physical destruction or harm[,] but includes loss of access, loss of use, and loss of
19 functionality”).

20 34. Public and easily-accessible information made clear that the Executive Orders
21 were issued in part due to the presence of SARS-CoV2 at property. The CDC recognizes that
22 “the virus may spread to hands from a contaminated surface and then to the nose or mouth,
23 causing infection,” and thus that facilities should “[c]lean and disinfect frequently touched
24 surfaces.”

25 35. Mt. Hawley additionally cited to four policy exclusions as potentially
26 applicable here. The terms of those exclusions, however, makes clear that they do not apply
27 to WRN’s losses.

28 36. For example, Mt. Hawley asserted that “your policy specifically excludes

1 coverage for loss, damage, cost, or expense caused directly or indirectly by the actual, alleged
2 or threatened discharge, dispersal, release or escape of 'pollutants,' including virus, and such
3 loss or damage is excluded."

4 37. In making this assertion, Mt. Hawley intentionally failed to mention the actual
5 exclusionary language that such discharge, dispersal, release or escape must be from the
6 Premises, a site used for handling waste, or a site where WRN is performing operations. [See
7 Policy, Ex. 1 hereto at Pollution Exclusion]. Nowhere in the Executive Orders do they make
8 any reference to, or rely upon, any alleged or actual discharge of pollutants from the Premises.

9 38. The other references to exclusions similarly lack a valid basis and were simply
10 asserted in a cursory manner in order to deprive WRN of the benefits it purchased under the
11 Policy.

12 39. Mt. Hawley's refusal to honor its coverage obligations have caused WRN
13 significant and debilitating damages, threatening its very ability to remain in business.

14 40. This matter is eligible for commercial court pursuant to Ariz. R. Civ. P.
15 8.1(b)(13) because it arises under a commercial insurance policy.

16 **COUNT I**
17 **(Breach of Contract)**

18 41. WRN incorporates by reference each and every allegation contained in the
19 preceding paragraphs of this Complaint.

20 42. The Policy is a valid contract between WRN and Mt. Hawley.

21 43. The Policy requires Mt. Hawley to pay WRN for its losses caused by the
22 Executive Orders issued in Tennessee.

23 44. Mt. Hawley has breached the contract by refusing to pay WRN the amounts
24 owing under the Policy.

25 45. WRN has been damaged by Mt. Hawley's breach in an amount to be
26 determined at trial.

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COUNT II
(Breach of the Duty of Good Faith and Fair Dealing)

46. WRN incorporates by reference each and every allegation contained in the preceding paragraphs of this Complaint.

47. Mt. Hawley has a duty of good faith and fair dealing under the Policy.

48. Mt. Hawley has breached its duty of good faith and fair dealing, including as set forth in paragraphs 23-36 above.

49. Mt. Hawley's coverage position lacked a reasonable basis.

50. Mt. Hawley failed to conduct a complete investigation prior to denying coverage.

51. Mt. Hawley's conduct compelled WRN to file this lawsuit to recover the benefits to which it is entitled under the Policy.

52. Mt. Hawley's conduct has caused WRN damages in an amount to be determined at trial.

PUNITIVE DAMAGES

53. WRN incorporates by reference each and every allegation contained in the preceding paragraphs of this Complaint.

54. Mt. Hawley intended to injure its policyholder and/or consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to WRN, as set forth above.

55. Mt. Hawley's conduct was oppressive, outrageous, and/or intolerable.

56. Mt. Hawley acted intentionally and with the express purpose of harming WRN's interests.

PRAYER FOR RELIEF

WHEREFORE, WRN respectfully requests judgment as follows:

A. An award against Mt. Hawley of actual and compensatory damages, in the amount established by the evidence;

B. An award against Mt. Hawley for damages caused by its bad faith breach of

1 contract;

2 C. An award against Mt. Hawley of reasonable attorneys' fees, costs and
3 disbursements for this action, as provided under A.R.S. § 12-341.01, A.R.S. § 12-341,
4 common law, and other applicable law;

5 D. An award against Mt. Hawley of punitive damages in the amount established by
6 the evidence, and as warranted by the egregious nature of Mt. Hawley's conduct;

7 E. An award for any and all pre-judgment and post-judgment interest at the rate
8 applicable under the law; and

9 F. Such other and further relief as this Court deems just or proper.

10 DATED this 27th of October, 2020.

11 **POLSINELLI PC**

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By: /s/ Jonathan G. Brinson

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Jonathan G. Brinson

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Michelle M. Buckley

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One East Washington Street, Suite 1200

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Phoenix, Arizona 85004

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*Attorneys for Plaintiff Whiskey Row Nashville,
LLC*

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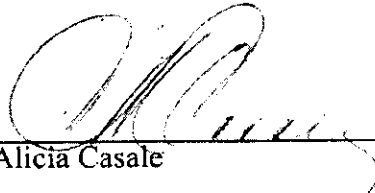
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VERIFICATION

I, Alicia Casale, in my capacity as general counsel for Rooke, LLC d/b/a Riot Hospitality Group, the sole Manager of Plaintiff Whiskey Row Nashville, LLC declare that I have read and know the contents of the foregoing Verified Complaint, and as to the factual allegations contained therein, believe them to be true and correct to the best of my knowledge information and belief, which is formed by personal knowledge and/or the business records of Plaintiff. Pursuant to Rule 80(i), Ariz.R.Civ.P., I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 16, 2020.



Alicia Casale