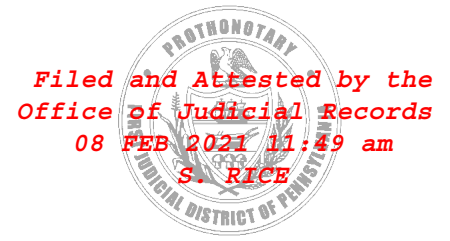


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Attorneys for Plaintiff

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

Plaintiff,

vs.

**ATLANTIC STATES INSURANCE
COMPANY,**
1195 River Road
P.O. Box 302, Marietta, PA 17547

Defendant.

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

NO:

JURY TRIAL DEMANDED

COMPLAINT FOR DECLARATORY JUDGMENT RELIEF

Case ID: 210200687

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 notificacion. 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 IMMEDIATAMENTE. 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.

Lawyer Reference Service
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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 seq.* and 42 P.S. §7532 and §7534, alleging against Defendant Atlantic States Insurance Company, 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, Defendant Atlantic States Insurance Company ("Defendant") is a corporation 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 Defendant, 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. Defendant transacts 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 seq.* and 42 P. S. §§7532 and 7534.

5. Venue is proper based on Defendant's substantial insurance operations in Philadelphia County. Defendant's 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, Defendant entered into a contract of insurance with Plaintiff, as a renewal of an insurance policy, whereby Plaintiff agreed to make premium payments to Defendant in exchange for Defendant's 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 Defendant 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 Defendant, 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. An all-risk Policy such as that purchased by Plaintiff is one that protects against catastrophic events, such as the one occurring now, involving the global COVID-19 Pandemic that has resulted in the widespread, omnipresent, and persistent presence of COVID-19 in and around Plaintiff's Insured Property, including adjacent properties.

14. Coverage under an all-risk policy is to be broadly interpreted and provided, and exclusions are to be narrowly construed in favor of coverage.

15. The Virus Exclusion does not apply to this pandemic. The Policy does not identify any exclusions for a pandemic.

16. Based upon information and belief, the Policy provided by Defendant included language that is essentially standardized language adopted from and/or developed by the Insurance Services Office ("ISO"). 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. The 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 June 5, 2020); *see also* Insurance Services Office (ISO), Verisk, <https://www.verisk.com/insurance/brands/iso/> (last visited June 5, 2020).

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

18. Plaintiff was not a participant in negotiating or drafting the Policy’s content and provisions. 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.

19. The presence of virus or disease can constitute physical damage to property, as the insurance industry has recognized since at least 2006. When preparing the Virus Exclusion, the ISO circulated a statement to state insurance regulators that included the following:

20. Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses. Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case.

21. Upon information and belief, the Virus Exclusion in the Policy was developed by the ISO in response to the SARS outbreak that occurred in or around 2002-2004, which was not a

pandemic and not a global pandemic like the present COVID-19 Pandemic.

22. Upon information and belief, the Virus Exclusion in the Policy was never intended by the ISO nor Defendant to pertain to a pandemic like the present global COVID-19 Pandemic and therefore does not exclude coverage in this matter.

23. Upon information and belief, the Virus Exclusion in the Policy was never intended by the ISO nor Defendant to pertain to a pandemic like the present global COVID-19 Pandemic because the ISO and Defendant define “virus” and “pandemic” as used in their policies differently than how those terms might be normally used.

24. Upon information and belief, the Virus Exclusion was only intended to cover discrete instances of infection or contamination by a virus as a covered cause of loss, not to direct physical loss or damage caused by a pandemic.

25. Upon information and belief, the ISO and the insurance industry, including Defendant, do not consider the term “virus” as used in the Virus Exclusion to include a pandemic in which there is omnipresent contamination by a virus as a covered cause of loss.

26. In fact, the ISO, when seeking approval for the “Exclusion of Loss Due to Virus or Bacteria,” acknowledged that it was intended for losses and damage associated with “disease” and actual “contamination” of the insured property. *See* ISO Circular LI-CF-2006-175, New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria, ISO (July 6, 2006), <https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf> (“In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.”). Other insurers have been much more specific in drafting and specifically using the “pandemic” language. *See, e.g., Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co.*, 218 F. Supp. 3d 1034, 1038 (D. Neb.

2016) (“The actual or suspected presence or threat of any virus, organism or like substance that is capable of inducing disease, illness, physical distress or death, whether infectious or otherwise, including but not limited to any epidemic, pandemic, influenza, plague, SARS, or Avian Flu.”).

27. The Virus Exclusion was therefore never intended to exclude coverage for a pandemic as presented in this matter.

28. Further, the Virus Exclusion was first permitted by state insurance departments due to misleading and fraudulent statements by the ISO that property insurance policies do not and were not intended to cover losses caused by viruses, and so the Virus Exclusion offers mere clarification of existing law. To the contrary, before the ISO made such baseless assertions, courts considered contamination by a virus to be physical damage. Defendant’s use of the Virus Exclusion to deny coverage here shows that the Virus Exclusion was fraudulently adopted, adhesionary, and unconscionable. See <https://www.propertycasualty360.com/2020/04/07/here-we-go-again-virus-exclusion-for-covid-19-and-insurers/> (last visited June 12, 2020).

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

30. At no time had Defendant or their agents notified Plaintiff that the coverage that Plaintiff had purchased pursuant to an all-risk policy that included business interruption coverage had exclusions and provisions that purportedly undermined the very purpose of the coverage—to provide benefits in the event of a business interruption.

31. 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.

32. 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 contradictory to the provision of Civil Authority coverage and violate public policy as a contract of adhesion and hence are not enforceable against Plaintiff.

33. Regulatory estoppel bars Defendant from relying on the Virus Exclusion because of its conduct and any associated conduct of the ISO to inappropriately obtain the permission of state insurance commissioners or departments to include the language of the Virus Exclusion in its policies.

34. The Virus Exclusion has limited applicability as it is intended to apply only to claims based on personal injury that it causes and it is not intended to apply to other types of losses that can be associated with an underlying virus such as those claimed by Plaintiff here involving business losses where no personal injury is claimed to have occurred.

35. The Virus Exclusion does not apply because Plaintiff's losses were not solely caused by a virus. Instead, Plaintiff's losses were caused by the entry of civil authority orders to mitigate the spread of COVID-19.

36. Plaintiff is not seeking coverage because of personal injuries caused by the virus, but rather coverage for property damage, business income loss, and extra expense.

37. The civil authority orders prohibited access to Plaintiff's Insured Property, and the area immediately surrounding the Insured Property, in response to dangerous physical conditions described above resulting from COVID-19. As a result of the presence of COVID-19 and the civil authority orders, Plaintiff suffered business income loss and incurred extra expenses.

38. The Policy does not exclude the losses suffered by Plaintiff, and therefore, the Policy does provide coverage for the losses incurred by Plaintiff.

39. Based on information and belief, 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 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, Defendant did not properly include the Virus or Bacteria exclusion in its policy to its insureds and Plaintiff.

40. Factual issues related to direct physical loss or damage to Plaintiff's Insured Property and/or surrounding property and the scope and validity of the Virus Exclusion will require development of a factual record through discovery. Plaintiff also intends to serve subpoenas on the ISO and Department of Insurance regarding the development of the Virus Exclusion.

B. The Coronavirus Pandemic

41. 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.

42. 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).

43. 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.

44. 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>.

45. 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 July 16, 2020).

46. 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.

47. 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.

48. 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>.

49. 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>.

50. 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.

51. “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 edited May 23, 2020).

52. 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

53. 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.

54. 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>.

55. 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>.

56. The determination by a Court of another country that coverage exists is consistent with public policy that in the presence of 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

57. 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.

58. 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).

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

60. 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.

61. The Orders were issued due to the presence of the coronavirus throughout the state, including causing physical loss and damage to property in and around Plaintiff’s Insured Property.

62. 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).

63. 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).

64. 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.

65. 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.

66. 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.

67. 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 Medure

68. 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.

69. 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.

70. Access to Plaintiff’s business was prohibited by civil authority Orders.

71. Plaintiff had no choice but to comply with the Civil Authority Orders, for failure to do so would have exposed Plaintiff and his business to fines and sanctions. Plaintiff’s compliance with mandates resulted in Plaintiff suffering business losses, business interruption

and extended expenses of the nature that the Policy covers and for which Plaintiff's reasonable expectation was that coverage existed in exchange for the premiums paid. As a result of these Civil Authority Orders, Plaintiff has incurred, and continues to incur, among other things, a substantial loss of business income and additional expenses covered under the Policy.

72. On information and belief, there was community spread of COVID-19 prior to the closures pursuant to state and local civil authority Orders, and COVID-19 was in Plaintiff's Insured Property before it was required to shut down. The mandatory closures occurred because community spread had already occurred.

73. Plaintiff's business was later permitted to reopen by state and local civil authority Orders.

74. On information and belief, the coronavirus has been inside Plaintiff's Insured Property, potentially causing people to become infected and/or pass the coronavirus to others.

75. 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.

76. The civil authority Orders entered by the state and local government were in the exercise of authority to protect the public and minimize the risk of spread of disease.

77. 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.

78. Plaintiff has suffered "direct physical loss of or damage" to its property due to the

COVID-19 Pandemic. Among other things, COVID-19 made the Insured Property unusable in the way that it had been used before the Pandemic, rendered the property substantially unusable and uninhabitable, intruded upon the property, damaged the property, prevented physical access to and use of the property, and caused a suspension of business operations at the property.

79. The COVID-19 Pandemic also caused physical loss and damage to property near Plaintiff's Insured Property.

80. This loss is physical. Instead of being able to operate Plaintiff's business normally, the Insured Property 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 Insured Property was not reasonably safe for extended periods. The high probability of illness and contamination prevents the full physical use of the property.

81. 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.

82. Plaintiff's catering business is not limited to operations at its Insured Properties. Because of Pennsylvania's stay at home orders, Plaintiff's 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.

83. 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.

84. Because of the nature of COVID-19 as described above, relating to its persistence in locations and the prospect of causing asymptomatic responses in some people, the risk of infection to persons is not only high, but could cause persons with asymptomatic responses to then come into contact with others who would not be so fortunate as to suffer merely an asymptomatic response, and instead suffer serious illness.

85. The virus is physically impacting the catering business. Any effort by Defendant 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.

86. Plaintiff specifically sought coverage for business interruption losses and extra expenses 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 their agents.

87. 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 seq.* and 42 P.S. §§ 7532 AND 7534

88. 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.

89. 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.

90. An actual controversy has arisen between Plaintiff and Defendant as to the rights,
duties, responsibilities and obligations of the parties in that Plaintiff contends and, on information
and belief, Defendant 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.

91. 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.

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

93. Plaintiff further seeks a Declaratory Judgment to affirm that the Orders trigger coverage.

94. 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.

95. 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: January 8, 2021

Respectfully submitted,

/s/ Daniel C. Levin

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