

THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN

DINO DROP, INC., d/b/a M-BREW and d/b/a  
DINO'S LOUNG, BUCCAROO, LLC, and  
DM BACH ENTERPRISES, LLC,

Case No.: 20-cv-4  
Hon.  
Magistrate Judge:

Plaintiffs,

vs

THE CINCINNATI INSURANCE COMPANY,

Defendant.

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**COMPLAINT FOR DECLARATORY ACTION, DAMAGES, AND  
OTHER RELIEF AND DEMAND FOR JURY TRIAL**

Plaintiffs Dino Drop Inc, Buccaroo, LLC, and DM Bach Enterprises, LLC,  
(collectively "Plaintiffs"), for their Complaint against Defendant The Cincinnati

Insurance Company, (“Defendant”), state and allege as follows:

**Parties, Jurisdiction, and Venue**

1. This is a declaratory judgment action brought under, inter alia, Fed. R. Civ. P. 57 and Mich. Comp. Laws §500.2006 seeking damages under a business insurance policy.

2. Plaintiff Dino Drop Inc, is a corporation organized under the laws of the State of Michigan and conducting business as a restaurant in the Eastern District of Michigan. Plaintiff Dino Drop, Inc has registered the assumed names “M-Brew” and “Dino’s Lounge.” Plaintiff, therefore, is a citizen of Michigan.

3. Plaintiff Buccaroo, LLC, is a limited liability company organized under the laws of the State of Michigan and conducting business as a restaurant in the Eastern District of Michigan. Plaintiff, therefore, is a citizen of Michigan.

4. Plaintiff DM Bach Enterprises, LLC, is a limited liability company organized under the laws of the State of Michigan and conducting business as a restaurant in the Eastern District of Michigan. Plaintiff, therefore, is a citizen of Michigan.

5. Defendant The Cincinnati Insurance Company (hereinafter “Defendant”) is a foreign insurance company organized under the laws of the state of Ohio with its principal place of business in Cincinnati, Ohio and doing business at all times in Oakland County and Wayne County Michigan. Defendant

is a citizen of Ohio.

6. Plaintiffs submitted claims for insured loss to Defendant for an amount in excess of \$75,000.00, exclusive of consequential damages, interest, fees, costs, or other expenses.

7. Pursuant to 28 U.S.C. §1332, this Court has original jurisdiction over the claims asserted in Counts I – VI and IX-X of this civil action in that they involve a controversy between citizens of different States and the amount in controversy exceeds \$75,000.00.

8. Pursuant to 28 U.S.C. §1367, this Court has supplemental jurisdiction over the claims asserted in Counts VII and VIII in that they involve a controversy between the same citizens of different States but the amount in controversy for those claims is less than \$75,000.00

9. Venue is proper and appropriate in this District under 28 U.S.C. §1391 because Defendant conducts business in this District, because the action concerns breaches of contracts formed under and subject to the laws of the State of Michigan, and because the properties that are the subject of this civil action are situated in this District.

### **General Allegations**

10. Plaintiffs operate restaurants in the Eastern District of Michigan with two locations in the City of Ferndale in Oakland County, Michigan, those being

22736 Woodward Avenue #2740 and 177 Vester Street, and one location in the City of Gaylord in Osetgo County, Michigan, that being 4029 Old US Highway 27 S.

11. The restaurants serve customers from throughout Michigan.

12. Defendant Cincinnati Insurance Company (“Cincinnati”) is a foreign corporation that that insures businesses, including restaurants, throughout the United States and including in Michigan.

13. Plaintiffs purchased an all-risk commercial property insurance policy, Policy No. EPP 0157454, from Defendant to protect the business in the event of property loss and business interruption for the period of August 28, 2019 to August 28, 2020 (“the Policy”). Among other coverages, the Policy provides coverages for loss to the structures and business personal property as well as business income coverage in the amount of the actual loss sustained over a maximum period of 12 months.

14. COVID-19 and the resulting response by state and local governments caused physical loss of Plaintiffs’ property and have interrupted Plaintiffs’ businesses. Yet, Defendant has refused to honor its promise to provide the protection that Plaintiffs purchased.

15. The Policy did not have virus exclusions and exemplifies the broken promise from insurance companies across the country.

16. As a result of COVID-19 and Stay at Home Orders (as defined below), Plaintiffs were forced to greatly reduce operations.

17. This is an action for declaratory judgment and breach of contract damages arising from Defendant's refusal to pay claims related to COVID-19 as required by its property insurance agreements it sold to Plaintiffs.

18. The novel coronavirus – named “severe acute respiratory syndrome coronavirus 2” or “SARS-CoV2” – has spread widely and rapidly across the United States and the world. The illness related to SARS-CoV-2 is “novel coronavirus disease 2019,” commonly abbreviated to “COVID-19.” Although the virus and the related illness are distinct, for purposes of this Complaint, Plaintiffs refer to both interchangeably as “COVID-19.”

19. Over 170,000 Americans have died of COVID-19 as of the date of this filing, according to the Centers for Disease Control and Prevention (“CDC”). Some studies suggest that the number of infected persons is a significantly greater number than confirmed cases.

20. The State of Michigan has over 93,000 Covid-19 cases and over 6,300 confirmed deaths caused by the virus. The majority of cases in Michigan are residents in Oakland County, Wayne County, and Macomb County.

21. A growing body of evidence suggests that the virus transmits both through droplets, when someone sneezes and coughs, and aerosols, which are

produced by normal breathing.

22. Aerosols are particularly concerning because unlike droplets, which stay airborne for only a few seconds, aerosols are water droplets suspended in air and can remain suspended for hours, until gravity ultimately forces them to the nearest surface below.

23. Consequently, aerosols can spread widely through air flow and settle on surfaces hundreds of feet away from any infected individual. Thus, someone not even in the vicinity of an infected person can unknowingly touch an infected surface, later touch their face, and become infected.

24. According to the CDC, everyone is at risk of getting COVID-19. The virus can spread by respiratory droplets when an infected person coughs, sneezes, or talks. A person can become infected from respiratory droplets or potentially by touching a surface or object that has the virus on it and then by touching the mouth, nose, or eyes.<sup>1</sup> The virus can live on surfaces for several days if not longer.<sup>2</sup>

25. In addition, some scientific publications have reported finding COVID-19 in the air. The New England Journal of Medicine reported finding that

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<sup>1</sup><https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>, last retrieved on Sept. 10, 2020. See <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>, last retrieved Sept. 10, 2020.

<sup>2</sup><https://www.health.harvard.edu/diseases-and-conditions/covid-19-basics>, last retrieved Sept. 10, 2020.

experimentally produced aerosols containing the virus remained infectious in tissue-culture assays, with only a slight reduction in infectivity during a 3-hour period of observations. “Aerosols from infected persons may therefore pose an inhalation threat even at considerable distances and in enclosed spaces....”<sup>3</sup>

26. A consensus appears to be emerging that COVID-19 can travel through the air via aerosols. For example, aerosol scientist Lidia Morawska of the Queensland University of Technology in Brisbane, Australia told *Nature* that, “In the minds of scientists working on this, there’s absolutely no doubt that the virus spreads in the air. This is a no-brainer.”<sup>4</sup>

27. An April 2020 study published in the journal *Emerging Infectious Diseases* found a wide distribution of COVID-19 on surfaces and in the air about *13 feet* from patients in two hospital wards in Wuhan, China, leading the authors to conclude that the virus spreads in aerosols in addition to large respiratory droplets. The investigators found evidence of the virus in swabs of floors, computer mice, trash bins, bed handrails, patients’ face masks, health workers’ personal protective equipment, and air vents.<sup>5</sup>

28. The authors also surmised that the high rate of positivity for floor samples in the hospital strongly suggest that droplets fall to the ground and then

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<sup>3</sup><https://www.nejm.org/doi/full/10.1056/NEJMc2009324>, last retrieved Sept. 10, 2020.

<sup>4</sup><https://www.nature.com/articles/d41586-020-00974-w>, last retrieved Sept. 10, 2020.

<sup>5</sup><https://www.cidrap.umn.edu/news-perspective/2020/04/study-finds-evidence-covid-19-air->

are spread via patients' shoes. For example, every sample tested from the pharmacy floor tested positive for COVID-19 even though no patients were housed there.<sup>6</sup>

29. Another study conducted in Wuhan indicates that staff movement, floor cleaning, and the removal of personal protective equipment could transmit the virus through the re-suspension of virus-contaminated aerosols.<sup>7</sup>

30. Kimberly Prather, an aerosol chemist at the University of California, San Diego told *Science* magazine: "I'm relieved to see aerosolization is accepted. This added airborne pathway helps explain why it is spreading so fast."<sup>8</sup>

31. Aerosol particles are held in the air by physical and chemical forces. The suspended particles remain for *hours or more*, depending on factors such as heat and humidity. If virus particles can be suspended in air for more than a few seconds, like, for instance, the measles virus can, then anyone passing through could become infected by a pathogenic aerosol cloud. And the virus can travel long distances and land on surfaces, only to be stirred back up into the air later by cleaning or other disturbances.

32. The SARS virus that caused a 2003 epidemic is a coronavirus and is

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[hospital-surfaces](#), last retrieved Sept. 10, 2020.

<sup>6</sup><https://www.cidrap.umn.edu/news-perspective/2020/04/study-finds-evidence-covid-19-air-hospital-surfaces>, last retrieved Sept. 10, 2020.

<sup>7</sup><https://www.biorxiv.org/content/10.1101/2020.03.08.982637v1>, last retrieved Sept. 10, 2020.

<sup>8</sup><https://www.sciencemag.org/news/2020/04/you-may-be-able-spread-coronavirus-just-breathing->

similar to COVID-19. As a result, the behavior of SARS during the 2003 epidemic provided evidence about any aerosol risk from COVID-19.

33. A 2014 analysis published in the journal *Clinical Infectious Diseases* investigated a seemingly puzzling outbreak in a Hong Kong apartment complex whose residents had not been in close contact with each other.<sup>9</sup> The study found that “airborne spread was the most likely explanation, and the SARS coronavirus could have spread over a distance of 200 meters,” or about 600 feet.<sup>10</sup>

34. The implications of airborne spread of the virus are extremely serious. Airborne spread means that the virus can travel long distances from any infected person. It can then infect someone who unknowingly walks through a pathogenic cloud. It can also infect someone by settling on a physical surface, which someone touches and later becomes infected. And regardless of the transmission method, the evidence suggests that COVID-19 can be transmitted by shoes even once it reaches the ground.

35. State and local governments have determined that without the Stay at Home Orders, COVID-19 could spread rampant throughout the community.

36. In an effort to combat the virus and slow the spread of COVID-19, Governor of the State of Michigan, Gretchen Whitmer, issued multiple Executive

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[new-report-finds](#), last retrieved Sept. 10, 2010.

<sup>9</sup><https://academic.oup.com/cid/article/58/5/683/365793>, last retrieved Sept. 10, 2020.

<sup>10</sup>*Id.*

Orders, including No. 2020-04 that Declared a State of Emergency throughout the State of Michigan. Subsequent Executive Orders were issued restricting entry into restaurants and similar places of public accommodation, including EO 2020-09 and subsequent reiterations or modifications. EO 2020-21 imposed a variety of temporary restrictions on activities not necessary to sustain or protect life which were commonly referred to as the “Stay at Home Order,” “Stay Home, Stay Safe” or “shelter in place” restrictions. These orders, the orders extending their duration, and related actions of the State and local government required residents to stay at home except to perform “essential” activities, like shopping for food, picking up prescription medications, and seeing the doctor for urgent treatment.

37. Governor Whitmer issued EO 2020-9 which closed bars, restaurants, and other places of public accommodation to on-site consumption of food and beverages effective no later than March 16, 2020 at 3:00 p.m. EO 2020-9 expressly provided willful violation of its provisions was a misdemeanor under Michigan law.

38. Based upon the nature of Plaintiffs’ restaurants, EO 2020-9 severely restricted access into the businesses and prevented the performance of most business operations from the March 16, 2020 at 3:00 p.m. to the date of the lifting of the restrictions. As of the date of the filing of this Complaint, Plaintiffs’ businesses have not returned to full capacity at pre-COVID-19 levels and remain

under restrictions related to COVID-19. Specifically, as of the date of the filing of this Complaint, Plaintiffs' businesses remain closed.

39. The government directives required businesses deemed “non-essential” to be closed and in-person work is not permitted. But even businesses classified as “essential” have been severely impacted by the pandemic. For example, “essential” businesses have had to increase the frequency of cleaning, reduce hours, install new protective barriers between employee and customer, provide personal protective equipment to its workforce and prohibit customers from entering their facilities. But even with those precautions, many such business have had great difficulty retaining employees who fear becoming infected at work and have a decrease in services due to customers' fears of infection by eating in a restaurant.

40. The State of Michigan has issued ongoing guidance on the restrictions that remain in place.<sup>11</sup> Those restrictions include limiting seating on-site to 50% capacity.

41. Plaintiffs closed starting on or about March 15, 2020, due to outbreaks of COVID-19 on-site and have been unable to reopen in accordance with the Executive Orders, Stay at Home Orders and the guidance from the CDC.

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<sup>11</sup>[https://www.michigan.gov/documents/leo/COVID-19\\_Workplace\\_Guidelines\\_for\\_Restaurants\\_and\\_Bars\\_691404\\_7.pdf](https://www.michigan.gov/documents/leo/COVID-19_Workplace_Guidelines_for_Restaurants_and_Bars_691404_7.pdf), retrieved Sept. 10, 2020.

42. By the nature of Plaintiffs' businesses, EO 2020-9 and subsequent restrictions restricted access into the businesses and prevented the performance of Plaintiffs' normal operations. Plaintiffs' businesses suffered financial losses due to this, and other, Executive Orders.

43. Also, with respect Plaintiffs' claims under the Civil Authority coverage, the same analysis applies as stated above. The Governor of the State of Michigan issued Executive Orders which prohibit access to the insured properties or, at the very least, significantly restricted access to the insured properties. These orders also recognized the damage to the health and safety of persons, as well as to property damage, caused by the coronavirus. Beginning with EO 2020-21 and extended numerous times, "shelter in place" orders were issued as a direct result of the physical spread of COVID-19 in Plaintiffs' communities, which was causing physical loss or damage to Plaintiffs' properties or other properties nearby.

44. It is likely customers, employees, and/or other visitors to the insured properties over the months prior to, during, and after the government shutdown were infected with the coronavirus and thereby caused physical loss and damage to the property. Specifically, several of Plaintiffs' employees and customers tested positive for COVID-19, which were believed to be a result, in part, of their exposure to band members who played at Plaintiffs' restaurant. Said band

members tested positive for COVID-19 a few days after playing at the restaurant.

45. The transmission of COVID-19, Executive Orders, and the Stay at Home Orders have adversely affected Plaintiffs' businesses. For example, customers and employees could not access the property due to the Executive Orders and the Stay at Home Orders or fear of being infected with or spreading COVID-19 or subjected to penalties under Michigan law.

46. But Plaintiffs, like countless other small businesses, prepared for an unexpected event like the COVID-19 pandemic. Specifically, Plaintiffs purchased property insurance from Defendant, that did not exclude pandemic coverage. A true and accurate copy of the Policy purchased by Plaintiffs is in Defendant's possession.

47. Although the Policy defines "loss" as "physical loss or accidental physical damage," Michigan case law holds that physical damage was not a prerequisite to benefits under a business interruption policy when a civil authority order limited access to the property. Compare Policy at Building and Personal Property Coverage Form FM 101 05 16, Section G. Definitions, Loss, page 38 of 40 with *Southland Bowl, Inc. v Lumberman's Mutual Insurance Co.*, 208 N.W. 2d 569 (Mich. App. 1973).

48. Further, actual exposure to COVID-19, including actual, documented exposure to the droplets and aerosols containing COVID-19, constitutes physical

loss or damage.

49. The Policy is an all-risk or open peril policy, meaning the Policy cover all direct loss unless the loss is expressly excluded. Policy at Building and Personal Property Coverage Form FM 101 05 16, Section A. Coverage, 3. Covered Causes of Loss, a. Covered Causes of Loss, page 5 of 40.

50. As set forth below, the Policy also provides coverage for:

- a. losses sustained due to the necessary interruption of business conducted by the Plaintiffs and caused by direct physical loss or damage (“Business Income” coverage)
- b. extra expenses necessarily incurred to minimize interruption of business and to continue operations (“Extra Expense” coverage); and
- c. interruption of business caused by an order from a civil authority (“Civil Authority” coverage).

51. Plaintiffs timely submitted a claim to Defendant requesting payment of insurance benefits pursuant to the provisions of the policy and substantially complied with all the requirements of Defendant’s policy of insurance and applicable Michigan law, in making their claim for insurance proceeds, resulting from said loss.

52. Plaintiffs inquired whether Defendant’s insurance adjuster, Kellie Szewczyk, Claims Representative, needed additional information from Plaintiffs to support their claim and was advised that such information was not requested.

53. On or about June 22, 2020, in response to Plaintiffs' notice of claim, Defendant improperly and unlawfully denied coverage and refused to cover Plaintiffs' COVID-19 losses. Defendant indicated it was refusing to pay any money for the covered benefits. (**Exhibit A** – Denial Letter).

54. The Policy does not exclude or limit coverage for losses from COVID-19 or pandemics.

55. The risk of a virus like COVID-19 was foreseeable to, if not foreseen by, insurance companies like the Defendant. The Insurance Services Office ("ISO"), an organization that provides policy writing services to insurers, has recognized for years that a virus can constitute physical damage to property. Specifically, in 2006, it announced the submission of an "exclusion of loss due to disease-causing agents such as viruses and bacteria." A copy of ISO's July 6, 2006 Circular is attached hereto as **Exhibit B** and contains ISO's standard form virus or bacteria exclusion.

56. In issuing its Circular, ISO expressly noted that, notwithstanding the inclusion in policies of a broadly-worded exclusion for pollutants, "viral and bacterial contamination are specific types that appear to warrant particular attention at this point in time." *Id.*

57. In connection with circulating the virus exclusion, ISO sent the following statement to state insurance regulators:

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. *Id.*

58. Despite the availability of a specific exclusion for viruses, Plaintiffs' Policy contains no relevant exclusion. Nor does Plaintiffs' Policy contain an exclusion for "pandemics," "communicable disease," or anything similar.

59. Because damage due to viruses constitutes loss under the Policy and/or the Stay at Home Orders, Plaintiffs have suffered the loss of use of the premises for their intended purposes, Plaintiffs' loss is covered under the Policy.

60. The Policy provides coverage for several different types of losses arising from COVID-19 that are relevant here through specific Coverage Extensions.

61. Defendant is obligated to pay for actual loss of "**Business Income**" sustained due to direct physical loss or damage. Policy at Business Income (and Extra Expense) Coverage Form FA 213 05 18, Section A. Coverage, 1. Business Income, page 1 of 9. Such losses are defined as actual losses. *Id.* Plaintiffs have

suffered lost business income because they have reduced operations of their businesses due to COVID-19.

62. Defendant also agreed to pay for “**Extra Expense.**” *Id.* at Section A. Coverage 2. Extra Expense, page 1-2 of 9. Plaintiffs have suffered Extra Expenses because they have suspended operations due to COVID-19 to prevent physical damages to the premises by the presence or proliferation of the virus and the physical harm it could cause persons present there.

63. Defendant also agreed to provide coverage from an interruption to business caused by an order from a “**Civil Authority.**” *Id.* at Section A. Coverage 5. Additional Coverages, b. Civil Authority, page 2-3 of 9. Specifically, Defendant agreed to pay for “actual loss sustained” when access to the covered property is prohibited by order of civil authority. *Id.* Access has been restricted to the Plaintiffs’ properties due to the presence and threat of COVID-19 as customers have been prohibited from entering the office.

64. Plaintiffs have taken such steps by, for example, complying with the Stay-at-Home Orders.

65. Losses caused by COVID-19 and the related state and local Stay at Home Orders triggered these provisions of Defendant’s Policy. Specifically, Plaintiffs’ full operations have been largely suspended, and Plaintiffs have lost revenue and business opportunities.

66. Plaintiffs submitted claims to Defendant for coverage under the Policy, but Defendant has denied Plaintiffs' claim. **Exhibit A.**

**Count I: Declaratory and Injunctive Relief – Business Income**

67. The preceding paragraphs are incorporated by reference as if fully alleged herein.

68. The Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, allows this Court to declare the rights and other legal relations of the parties to this dispute.

69. An actual controversy has arisen and now exists between Plaintiffs, on the one hand, and Defendant, on the other hand, concerning the respective rights and duties of the parties under the Policy.

70. Plaintiffs contend that Defendant has breached the Policy in the following respects:

- a. Plaintiffs suffered loss covered by the Business Income coverage in the Policy.
- b. Defendant is obligated to pay Plaintiffs for that loss.
- c. Defendant has failed to pay Plaintiffs for that loss.

71. Plaintiffs therefore seek a declaration of the parties' respective rights and duties under the Policy and request the Court declare the aforementioned conduct of Defendant unlawful and in material breach of the Policy so that future controversies may be avoided.

72. Pursuant to a declaration of the parties' respective rights and duties under the Policy, Plaintiffs further seek an injunction enjoining Defendant (1) from continuing to engage in conduct in breach of the Policy in regards to coverage decisions under the Business Income coverage in the Policy; and (2) ordering Defendant to comply with the terms of the Policy in regards to coverage decisions.

**Count II: Breach of Contract – Business Income**

73. The preceding paragraphs are incorporated by reference as if fully alleged herein.

74. Plaintiffs purchased the Policy from Defendant.

75. The Policy is a valid and enforceable contract between Defendant and Plaintiffs.

76. Plaintiffs substantially performed their obligations under the terms of the Policy including giving Defendant timely notice of the claim. Alternatively, Defendant has waived any terms or conditions of coverage and may not assert any term or condition in the Policy as a defense to liability beyond the terms or conditions set forth in Defendant's letter of June 22, 2020.

77. Plaintiffs have sustained a loss under the Business Income coverage in the Policy arising from the COVID-19 virus and associated Stay at Home orders.

78. Defendant has not agreed to pay the claim for Business Income or requested a proof of loss and has denied coverage.

79. Defendant has unlawfully denied claims for Business Income related to COVID-19 in breach of the Policy.

80. As a direct and proximate result of Defendant's breaches, Plaintiffs sustained damages in an amount to be determined at trial or through appraisal.

81. Plaintiffs have also suffered and continue to suffer additional consequential damages that were within the reasonable contemplation of the parties when they entered into the contract of insurance or that were the natural consequence of Defendant's breach of the contract of insurance.

**Count III: Declaratory and Injunctive Relief – Civil Authority**

82. The preceding paragraphs are incorporated by reference as if fully alleged herein.

83. The Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, allows this Court to declare the rights and other legal relations of the parties to this dispute.

84. An actual controversy has arisen and now exists between Plaintiffs, on the one hand, and Defendant, on the other hand, concerning the respective rights and duties of the parties under the Policy.

85. Plaintiffs contend that Defendant has breached the Policy in the

following respects:

- a. Plaintiffs suffered loss covered by the Civil Authority coverage in the Policy.
- b. Defendant is obligated to pay Plaintiffs for that loss.
- c. Defendant has failed to pay Plaintiffs for that loss.

86. Plaintiffs therefore seek a declaration of the parties' respective rights and duties under the Policy and requests the Court declare the aforementioned conduct of Defendant unlawful and in material breach of the policy so that future controversies may be avoided.

87. Pursuant to a declaration of the parties' respective rights and duties under the Policy, Plaintiffs further seek an injunction enjoining Defendant (1) from continuing to engage in conduct in breach of the Policy in regards to coverage decisions under the Civil Authority coverage in the Policy; and (2) ordering Defendant to comply with the terms of the Policy in regards to coverage decisions.

#### **Count IV: Breach of Contract – Civil Authority**

88. The preceding paragraphs are incorporated by reference as if fully alleged herein.

89. Plaintiffs purchased the Policy from Defendant.

90. The Policy is a valid and enforceable contract between the Defendant and Plaintiffs. Plaintiffs substantially performed their obligations under the terms

of the Policy including giving Defendant timely notice of the claim. Alternatively, Defendant has waived any terms or conditions of coverage and may not assert any term or condition in the Policy as a defense to liability beyond the terms or conditions set forth in Defendant's letter of June 8, 2020.

91. Plaintiffs sustained a loss under the Civil Authority coverage in the Policy arising from the COVID-19 virus and associated Stay-at-Home Orders.

92. Defendant has not agreed to pay the claim for Civil Authority or requested a proof of loss. Instead, Defendant has requested information not necessary to determine coverage.

93. Defendant has denied claim for recovery under the Civil Authority coverage in the Policy related to COVID-19 and the Stay at Home Orders in breach of the Policy.

94. As a direct and proximate result of Defendant's breaches, Plaintiffs sustained damages in an amount to be determined at trial or through appraisal.

95. Plaintiffs have also suffered and continue to suffer additional consequential damages that were within the reasonable contemplation of the parties when they entered into the contract of insurance or that were the natural consequence of Defendant's breach of the contract of insurance.

**Count V: Declaratory and Injunctive Relief – Extra Expense**

96. The preceding paragraphs are incorporated by reference as if fully

alleged herein.

97. The Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, allows this Court to declare the rights and other legal relations of the parties to this dispute.

98. An actual controversy has arisen and now exists between Plaintiffs on the one hand, and Defendant, on the other hand, concerning the respective rights and duties of the parties under the Policy.

99. Plaintiffs contend that Defendant has breached the Policy in the following respects:

- a. Plaintiffs have suffered losses covered by the Extra Expense coverage in the Policy.
- b. Defendant is obligated to pay Plaintiffs for that loss.
- c. Defendant has failed to pay Plaintiffs for that loss.

100. Plaintiffs therefore seek a declaration of the parties' respective rights and duties under the Policy and requests the Court declare the aforementioned conduct of Defendant unlawful and in material breach of the policy so that future controversies may be avoided.

101. Pursuant to a declaration of the parties' respective rights and duties under the Policy, Plaintiffs further seek an injunction enjoining Defendant (1) from continuing to engage in conduct in breach of the Policy in regards to coverage decisions under the Extra Expense coverage in the Policy; and (2)

ordering Defendant to comply with the terms of the Policy in regards to coverage decisions.

**Count VI: Breach of Contract – Extra Expense**

102. The preceding paragraphs are incorporated by reference as if fully alleged herein.

103. Plaintiffs purchased the Policy from Defendant.

104. The Policy is a valid and enforceable contract between the Defendant and Plaintiffs.

105. Plaintiffs substantially performed their obligations under the terms of the Policy including giving Defendant timely notice of the claim. Alternatively, Defendant has waived any terms or conditions of coverage and may not assert any term or condition in the Policy as a defense to liability beyond the terms or conditions set forth in Defendant's letter of June 22, 2020.

106. Plaintiffs sustained a loss under the Extra Expense coverage in the Policy arising from the COVID-19 virus and associated Stay-at-Home Orders.

107. Defendant has not agreed to pay the claim for Extra Expense or requested a proof of loss.

108. Defendant has denied Plaintiffs' claim for recovery under the Extra Expense coverage in the Policy related to COVID-19 in breach of the Policy.

109. As a direct and proximate result of Defendant's breaches, Plaintiffs

sustained damages in an amount to be determined at trial or through appraisal.

110. Plaintiffs have also suffered and continue to suffer additional consequential damages that were within the reasonable contemplation of the parties when they entered into the contract of insurance or that were the natural consequence of Defendant's breach of the contract of insurance.

**Count VII: Declaratory and Injunctive Relief – Fire**

111. The preceding paragraphs are incorporated by reference as if fully alleged herein.

112. The Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, allows this Court to declare the rights and other legal relations of the parties to this dispute.

113. An actual controversy has arisen and now exists between Plaintiffs, on the one hand, and Defendant, on the other hand, concerning the respective rights and duties of the parties under the Policy.

114. Plaintiffs contend that Defendant has breached the Policy in the following respects:

- a. On or about August 18, 2020, Plaintiffs' property at 22740 Woodward Avenue in Ferndale, Michigan was damaged by an electrical fire. (**Exhibit C** – Fire Incident Report).
- b. On or about August 18, 2020, the Policy was in force and effect.

- c. One or more Plaintiffs suffered loss covered by the Commercial Property coverage in the Policy.
- d. Defendant is and was obligated to pay one or more Plaintiffs for that loss.
- e. Plaintiffs gave timely notice to Defendant and substantially complied with all the requirements of said Policy of insurance and applicable Michigan law, in making their claim for insurance proceeds, resulting from said loss.
- f. Defendant has failed to pay one or more Plaintiffs for that loss.

115. Plaintiffs therefore seek a declaration of the parties' respective rights and duties under the Policy and request the Court declare the aforementioned conduct of Defendant unlawful and in material breach of the Policy so that future controversies may be avoided.

116. Pursuant to a declaration of the parties' respective rights and duties under the Policy, Plaintiffs further seek an injunction enjoining Defendant (1) from continuing to engage in conduct in breach of the Policy in regards to coverage decisions under the Commercial Property coverage in the Policy; and (2) ordering Defendant to comply with the terms of the Policy in regards to coverage decisions.

**Count VIII: Breach of Contract – Fire**

117. The preceding paragraphs are incorporated by reference as if fully alleged herein.

118. Plaintiffs purchased the Policy from Defendant.

119. The Policy is a valid and enforceable contract between Defendant and Plaintiffs.

120. Plaintiffs substantially performed their obligations under the terms of the Policy including giving Defendant timely notice of the claim. Alternatively, Defendant has waived any terms or conditions of coverage and may not assert any term or condition in the Policy as a defense to liability beyond the terms or conditions set forth in Defendant's letter denying coverage.

121. Plaintiffs have sustained a loss under the Commercial Property coverage in the Policy arising from an electrical fire that occurred on or about August 18, 2020 at 22740 Woodward Avenue in Ferndale, Michigan.

122. Defendant has not agreed to pay the claim for Commercial Property coverage or requested a proof of loss and has denied coverage.

123. Defendant has unlawfully denied claims for Commercial Property coverage related to an electrical fire that occurred on or about August 18, 2020 at 22740 Woodward Avenue in Ferndale, Michigan.

124. As a direct and proximate result of Defendant's breaches, Plaintiffs sustained damages in an amount to be determined at trial or through appraisal.

125. Plaintiffs have also suffered and continue to suffer additional consequential damages that were within the reasonable contemplation of the parties when they entered into the contract of insurance or that were the natural

consequence of Defendant's breach of the contract of insurance.

**Count IX – Appraisal**

126. The preceding paragraphs are incorporated by reference as if fully alleged herein.

127. The Policy and Mich. Comp. Laws §500.2833(1)(m) provide the amount of a loss may be determined in appraisal at either party's request.

128. To date, the parties have not agreed to the amount of the insured loss.

129. Plaintiffs have suffered damages, in the amount of unpaid insurance proceeds, as a proximate result of Defendant's failure to pay Plaintiffs' claim in the amounts Plaintiffs are entitled to.

130. Plaintiffs demand appraisal of the loss sustained at the property.

**Count X - Violation of the Michigan Uniform Trade Practices Act**

131. The preceding paragraphs are incorporated by reference as if fully alleged herein.

132. At all relevant times, Defendant was and is subject to the Michigan Uniform Trade Practices Act, Mich. Comp. Laws §500.2001 *et seq.*

133. At all relevant times, Plaintiffs were and are entitled to benefits under the Policy.

134. Defendant failed to pay Plaintiffs' claim on a timely basis, in violation of the Michigan Uniform Trade Practices Act, Mich. Comp. Laws

§500.2006.

135. Plaintiffs claim penalty interest, as provided for in the Michigan Uniform Trade Practices Act, Mich. Comp. Laws §500.2006.

**Prayer for Relief**

Wherefore, Plaintiffs respectfully request this Court grant relief against Defendant as follows:

- a. For a judgment against Defendant for the causes of action alleged against it;
- b. For compensatory damages in an amount to be proven at trial or through appraisal;
- c. For a declaration that Defendant's conduct as alleged herein is unlawful and in material breach of the Policy;
- d. For appropriate injunctive relief, enjoining Defendant from continuing to engage in conduct related to the breach of the Policy;
- e. For pre-judgment and post-judgment interest at the maximum rate permitted by law, including penalty interest under Michigan's Uniform Trade Practices Act, Mich. Comp. Laws §500.2006;
- f. For Plaintiffs' attorney's fees;
- g. For Plaintiffs' costs incurred; and
- h. For such other relief in law or equity as the Court deems just and proper.

**Demand for Jury Trial**

Plaintiffs hereby demand a trial by jury on all issues so triable.

Respectfully submitted,

**Buckfire & Buckfire, P.C.**

/s/ Lawrence J. Buckfire

Lawrence J. Buckfire (P42841)

Attorney for Plaintiffs

Date: September 10, 2020

Respectfully submitted,

**Jim Kelly Law, PC**

/s/ James J. Kelly

James J. Kelly (P72111)

Attorney for Plaintiffs

Date: September 10, 2020

# Exhibit A



The Cincinnati Insurance Company ■ The Cincinnati Indemnity Company  
The Cincinnati Casualty Company ■ The Cincinnati Specialty Underwriters Insurance Company  
The Cincinnati Life Insurance Company

Kellie Szewczyk  
Claims Representative

June 22, 2020

**VIA EMAIL AND U.S. MAIL**

Dino Drop  
22736 Woodward Ave  
Ferndale, MI 48220  
Deanbach@msn.com

**Re: Insured:** Dino Drop DBA Dino's Lounge, DM Bach Enterprises LLC,  
Buccaroo LLC, MBrew  
**Policy No.:** EPP0157454  
**Claim No.:** 3520707  
**Date of Loss:** 03/15/2020

Dear Mr. Bach:

This letter provides Cincinnati Insurance Company's ("Cincinnati") coverage decision for the above-referenced claim made by Dino Drop DBA Dino's Lounge, DM Bach Enterprises LLC, Buccaroo LLC, MBrew ("you" or "Dino Drop"). As submitted, the claim involves the Novel Coronavirus known as SARS-CoV-2, which causes the viral infection known as COVID-19 ("Coronavirus"). The claim asserts loss of business income due to Coronavirus issues. Cincinnati has determined that coverage is unavailable for the claimed loss. Cincinnati regrets that this decision is necessary and wants to describe the basis for its decision. Should you have any disagreement with the basis for this decision, Cincinnati invites you to state the reasons for your disagreement in writing, including by submitting any additional information or documentation. Cincinnati will consider any further information or documents you may supply.

**I. SUMMARY**

The Cincinnati policy provides coverage for direct physical loss or damage to Covered Property at the premises. This direct physical loss or direct physical damage must be to property at the covered premises. Cincinnati's investigation has found no evidence of direct physical loss or damage at your premises. Similarly, there is no evidence of damage to property at other locations, precluding coverage for orders of civil authority.

Nothing in this letter is a waiver of any rights available to Cincinnati under the policy or applicable law. Cincinnati reserves the right to rely on additional rights and/or language in the policy whether or not discussed in this letter.

Dino Drop DBA Dino's Lounge, DM Bach Enterprises LLC, Buccarroo LLC, MBrew  
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## **II. THE CINCINNATI POLICY**

Cincinnati issued policy number EPP0157454 to Dino Drop DBA Dino's Lounge, DM Bach Enterprises LLC, Buccarroo LLC, MBrew (the "Policy"). The Policy's effective dates are from 08-28-2019 to 08-28-2020. The Commercial Property Coverage provides limits of insurance for Business Income With Extra Expense of 12 Months Actual Loss Sustained for the following locations: 22736 Woodward Ave #22740 Ferndale, MI 48220, 177 Vester St. Ferndale, MI 48220, and 4029 Old US Highway 27 S. Gaylord, MI 49735.

## **III. BACKGROUND**

On March 16, 2020 Dino Drop DBA Dino's Lounge, DM Bach Enterprises LLC, Buccarroo LLC, MBrew filed a claim for Business Income loss due to COVID-19 and reported that the loss began on March 15, 2020. A Reservation of Rights and Information Request was sent to you on March 23, 2020.

On April 27, 2020 we received a response from you stating that you believe Coronavirus was present on your property because some staff members and some customers have tested positive for having the Coronavirus. You indicated that some band members that were playing in Belle Iron Grille tested positive for the virus just a few days after playing in the restaurant. Per your email, two of your staff members fell ill within 48 hours of this exposure and did test positive for the virus. You also advised that you were aware of at least 6 customers that ultimately tested positive for Coronavirus after being exposed to the band members at your restaurant.

You have stated that Dino's Lounge and M-Brew are within a few hundred feet of each other and that staff are cross-trained to work at both locations. You advised that a daily customer of the restaurants had contracted the virus and had been in the restaurant the day before you were informed of the exposure. You also advised that one of the managers at these locations has fell ill with the virus and that staff are frightened of the threat of contamination and many have refused to come into work.

You have referenced multiple Executive Orders from Governor Gretchen Whitmer as orders to close or restrict access to your premises. The referenced orders include: Executive Order 2020-69, Executive Order 2020-21, Executive Order 2020-04, Executive Order 2020-59, and Executive Order 2020-09. These orders include temporary restrictions on the use of places of public accommodation, temporary requirement to suspend activities that are not necessary to sustain or protect life, and a declaration of the state of emergency.

## **IV. NO COVERAGE UNDER THE POLICY FOR LOSS OF INCOME DUE TO CORONAVIRUS**

### **A. No Direct Physical Loss**

The Policy's insuring agreement at Section A. Coverage provides the following coverage:

We will pay for direct "loss" to Covered Property at the "premises" caused by or resulting from any Covered Cause of Loss.

Dino Drop DBA Dino's Lounge, DM Bach Enterprises LLC, Buccarroo LLC, MBrew  
Page 3

(FM 101 05 16 at p. 3.) The Policy defines "loss" as "accidental physical loss or accidental physical damage." (FM 101 05 16 at p. 38.) The Policy defines "premises" as "the Locations and Buildings described in the Declarations." (FM 101 05 16 at p. 39.)

This claim does not satisfy the Policy's insuring agreement. The claim does not involve direct, physical loss to property at your premises caused by a Covered Cause of Loss.

Although you have indicated that a customers, employees and band performers at your properties have tested positive for Coronavirus, this does not establish direct physical loss to property. You have asserted that there is a possible exposure of Coronavirus and a threat of contamination to your premises due to Coronavirus, however that presence alone is not direct physical loss to property. You have not shown direct physical loss to property, as required by the Policy.

Accordingly, the Policy's insuring agreement is not met and coverage is unavailable under the Policy.

## **B. No Business Income and Extra Expense Coverage**

The Policy's Coverage Extensions section contains provisions for Business Income and Extra Expense coverage, included in Form FM 101 05 16:

### **(1) Business Income**

We will pay for the actual loss of "Business Income" and "Rental Value" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct "loss" to property at a "premises" caused by or resulting from any Covered Cause of Loss. With respect to "loss" to personal property In the open or personal property in a vehicle or portable storage unit, the "premises" include the area within 1,000 feet of the building or 1,000 feet of the "premises", whichever is greater.

With respect to the requirements of the preceding paragraph, if you are a tenant and occupy only part of the site at which the "premises" are located, for the purpose of this Coverage Extension only, your "premises" Is the portion of the building that you rent, lease or occupy, including:

- (a)** Any area within the building or on the site at which the "premises" are located if that area services or is used to gain access to the "premises"; and
- (b)** Your personal property in the open (or in a vehicle or portable storage unit) within 1,000 feet of the building or 1,000 feet of the "premises", whichever is greater.

### **(2) Extra Expense**

Dino Drop DBA Dino's Lounge, DM Bach Enterprises LLC, Buccarroo LLC, MBrew  
Page 4

- (a) We will pay Extra Expense you sustain during the "period of restoration". Extra Expense means necessary expenses you sustain (as described in Paragraphs **(2)(b)**, **(c)** and **(d)**) during the "period of restoration" that you would not have sustained if there had been no direct "loss" to property caused by or resulting from a Covered Cause of Loss.
- (b) If these expenses reduce the otherwise payable "Business Income" "loss", we will pay expenses (other than the expense to repair or replace property as described in Paragraph **(2)(c)**) to:
  - 1) Avoid or minimize the "suspension" of business and to continue "operations" either:
    - a) At the "premises"; or
    - b) At replacement "premises" or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location; or
  - 2) Minimize the "suspension" of business if you cannot continue "operations".
- (c) We will also pay expenses to:
  - 1) Repair or replace property; or
  - 2) Research, replace or restore the lost information on damaged "valuable papers and records";but only to the extent this payment reduces the otherwise payable "Business Income" "loss". If any property obtained for temporary use during the "period of restoration" remains after the resumption of normal "operations", the amount we will pay under this Coverage will be reduced by the salvage value of that property.
- (d) Extra Expense does not apply to "loss" to Covered Property as described in the **BUILDING AND PERSONAL PROPERTY COVERAGE FORM**.

(Form FM 101 05 16 at pp. 18-19, 21.)

Additionally, the Policy at Form FA 213 05 16 provides separate Business Income and Extra Expense coverage provisions:

**1. Business Income**

- a. We will pay for the actual loss of "Business Income" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct "loss" to property at "premises" which are described in the Declarations and

Dino Drop DBA Dino's Lounge, DM Bach Enterprises LLC, Buccarroo LLC, MBrew  
Page 5

- for which a "Business Income" Limit of Insurance is shown in the Declarations. The "loss" must be caused by or result from a Covered Cause of Loss. With respect to "loss" to personal property in the open (or personal property in a vehicle or portable storage unit), the "premises" include the area within 1,000 feet of the building or 1,000 feet of the "premises", whichever distance is greater.
- b.** With respect to the requirements set forth in the preceding paragraph, if you are a tenant and occupy only part of the site at which the "premises" are located, for the purposes of this Coverage Part only, your "premises" is the portion of the building which you rent, lease or occupy, including:
- (1)** Any area within the building or on the site at which the "premises" are located if that area services or is used to gain access to the described "premises".
  - (2)** Your personal property in the open (or in a vehicle or portable storage unit) within 1,000 feet of the building or 1,000 feet of the "premises", whichever distance is greater.

## **2. Extra Expense**

- a.** Extra Expense coverage is provided at the "premises" described in the Declarations only if the Declarations show that "Business Income" coverage applies at that "premises".
- b.** Extra Expense means necessary expenses you sustain (as described in Paragraphs **2.c.**, **d.** and **e.**) during the "period of restoration" that you would not have sustained if there had been no direct "loss" to property caused by or resulting from a Covered Cause of Loss.
- c.** If these expenses reduce the otherwise payable "Business Income" "loss", we will pay expenses (other than the expense to repair or replace property as described in Paragraph **2.d.**) to:
- (1)** Avoid or minimize the "suspension" of business and to continue "operations" either:
    - (a)** At the "premises"; or
    - (b)** At replacement "premises" or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location; or
  - (2)** Minimize the "suspension" of business if you cannot continue "operations".
- d.** We will also pay expenses to:
- (1)** Repair or replace property; or

Dino Drop DBA Dino's Lounge, DM Bach Enterprises LLC, Buccarroo LLC, MBrew  
Page 6

- (2) Research, replace or restore the lost information on damaged "valuable papers and records"

but only to the extent this payment reduces the otherwise payable "Business Income" "loss". If any property obtained for temporary use during the "period of restoration" remains after the resumption of normal "operations", the amount we will pay under this Coverage Form will be reduced by the salvage value of that property.

- e. Extra Expense as described in Paragraphs 2.a. thru 2.d. does not apply to "loss" to Covered Property as described in the **BUILDING AND PERSONAL PROPERTY COVERAGE FORM**.

(FA 213 05 16 at pp.1-2.)

Like the Policy's insuring agreement, the Business Income and Extra Expense coverages require that there be direct physical loss or damage to Covered Property at the premises or within 1,000 feet of those premises. There is no evidence of any such physical loss or damage. Accordingly, the Business Income and Extra Expense requirements are not satisfied and coverage is unavailable under the Policy.

### **C. Pollution Exclusion**

For the reasons stated above, there is no coverage here because there was no direct physical loss at the premises. But, even assuming that there was direct physical loss, there was no covered cause of loss. This is because the Policy's Exclusions section at FM 101 05 16 excludes from coverage any "loss" caused by or resulting from:

#### **(I) Pollutants**

Discharge, dispersal, seepage, migration, release, escape or emission of "pollutants" unless the discharge, dispersal, seepage, migration, release, escape or emission is itself caused by any of the "specified causes of loss". But if the discharge, dispersal, seepage, migration, release, escape or emission of "pollutants" results in a "specified cause of loss", we will pay for the "loss" caused by that "specified cause of loss".

(FM 101 05 16 at pp. 8, 10.)

The Policy defines "pollutants" as

any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, asbestos, chemicals, petroleum, petroleum products and petroleum by-products, and waste. . . . 'Pollutants' include but are not limited to substances which are generally recognized in industry or government to be harmful or toxic to persons, property, or the

Dino Drop DBA Dino's Lounge, DM Bach Enterprises LLC, Buccarroo LLC, MBrew  
Page 7

environment regardless of whether injury or damage is caused directly or indirectly by the 'pollutants' . . . .

(FM 101 05 16 at p. 39.)

The Coronavirus is a solid irritant or contaminant. Moreover, the government generally recognizes the Coronavirus as harmful to people. Accordingly, to the extent the Policy's insuring agreement was otherwise satisfied, coverage would ultimately be excluded because under the Pollutants exclusion there was no covered cause of loss.

#### **D. No Civil Authority Coverage**

The Policy's Coverage Extensions section contains provisions for Civil Authority coverage, included in Form FM 101 05 16:

When a Covered Cause of Loss causes damage to property other than Covered Property at a "premises", we will pay for the actual loss of "Business Income" and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the "premises", provided that both of the following apply:

- (a)** Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and
- (b)** The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

This Civil Authority coverage for "Business Income" will begin immediately after the time of that action and will apply for a period of up to 30 days from the date of that action.

This Civil Authority coverage for Extra Expense will begin immediately after the time of that action and will end:

- 1)** 30 consecutive days after the time of that action; or
  - 2)** When your "Business Income" coverage ends;
- whichever is later.

(Form FM 101 05 16 at pp. 19, 21.)

Additionally, the Policy at Form FA 213 05 16 provides separate Civil Authority coverage provisions:

When a Covered Cause of Loss causes direct damage to property other than Covered Property at the "premises", we will pay for the actual loss of "Business Income" you sustain and necessary Extra Expense you sustain caused by

Dino Drop DBA Dino's Lounge, DM Bach Enterprises LLC, Buccarroo LLC, MBrew  
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action of civil authority that prohibits access to the "premises", provided that both of the following apply:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Civil Authority coverage for "Business Income" will begin immediately after the time of the first action of civil authority that prohibits access to the "premises" and will apply for a period of up to 30 consecutive days from the date on which such coverage began.

Civil Authority coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the "premises" and will end 30 consecutive days after the date of that action; or when your Civil Authority coverage for "Business income" coverage ends, whichever is later.

(FA 213 05 16 at p. 2.)

Although you closed your business in response to a governmental order, there is no evidence that the order was entered because of direct damage to property at other locations or dangerous physical conditions at other locations. Moreover, the order does not restrict access to the area immediately surrounding your premises. Because these requisite elements of the Civil Authority coverage are not present here, coverage is unavailable under the Policy.

## **V. CONCLUSION**

For the reasons discussed above, Cincinnati has concluded that the Policy provides no coverage for your claim. Cincinnati therefore cannot indemnify Dino Drop DBA Dino's Lounge, DM Bach Enterprises LLC, Buccarroo LLC, MBrew for any loss of business income from Coronavirus.

You should note that the U.S. Small Business Administration ("SBA") may be providing assistance for citizens in your circumstances. I understand that the SBA's contact information is:

Website: <https://www.sba.gov/funding-programs/disaster-assistance>  
Phone: 1-800-659-2955

This letter is not intended to be a limitation or waiver of any rights available to Cincinnati. Cincinnati's position is based on the information available to date. Cincinnati

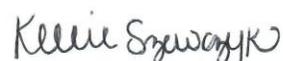
Dino Drop DBA Dino's Lounge, DM Bach Enterprises LLC, Buccarro LLC, MBrew  
Page 9

reserves all of its rights under the Policy and the applicable law. Cincinnati reserves the right to rely on any and all provisions of the Policy whether or not addressed in this letter.

If you have any information that you believe may impact any of the issues raised in this letter, please forward it to us as soon as possible. If you believe that we have misunderstood the facts or are in error regarding any of the statements set forth above, please notify us as soon as possible.

Please feel free to contact me if you have any questions or would like to discuss this matter.

Very truly yours,

A handwritten signature in black ink that reads "Kellie Szewczyk". The signature is written in a cursive, slightly slanted style.

Kellie Szewczyk  
Claims Representative

cc: Emerson Prew, Kblumenthal@epi-ins.com

# Exhibit B



# Circular

FORMS - FILED

JULY 6, 2006

FROM: LARRY PODOSHEN, SENIOR ANALYST

COMMERCIAL PROPERTY

LI-CF-2006-175

## NEW ENDORSEMENTS FILED TO ADDRESS EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

---

**This circular announces the submission of forms filings to address exclusion of loss due to disease-causing agents such as viruses and bacteria.**

---

### BACKGROUND

Commercial Property policies currently contain a pollution exclusion that encompasses contamination (in fact, uses the term *contaminant* in addition to other terminology). Although the pollution exclusion addresses contamination broadly, viral and bacterial contamination are specific types that appear to warrant particular attention at this point in time.

---

### ISO ACTION

We have submitted forms filing CF-2006-OVBEF in all ISO jurisdictions and recommended the filing to the independent bureaus in other jurisdictions. This filing introduces new endorsement [CP 01 40 07 06](#) - Exclusion Of Loss Due To Virus Or Bacteria, which states that there is **no coverage for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.**

**Note:** In Alaska, District of Columbia, Louisiana\*, New York and Puerto Rico, we have submitted a different version of this filing, containing new endorsement [CP 01 75 07 06](#) in place of CP 01 40. The difference relates to lack of implementation of the mold exclusion that was implemented in other jurisdictions under a previous multistate filing.

Both versions of CF-2006-OVBEF are attached to this circular.

\* In Louisiana, the filing was submitted as a recommendation to the Property Insurance Association of Louisiana (PIAL), the independent bureau with jurisdiction for submission of property filings.

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### PROPOSED EFFECTIVE DATE

Filing CF-2006-OVBEF was submitted with a proposed effective date of January 1, 2007, in accordance with the applicable effective date rule of application in each state, with the exception of various states for which the insurer establishes its own effective date.

Upon approval, we will announce the actual effective date and state-specific rule of effective date application for each state.

---

## RATING SOFTWARE IMPACT

New attributes being introduced with this revision:

- A new form is being introduced.

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## CAUTION

This filing has not yet been approved. If you print your own forms, do not go beyond the proof stage until we announce approval in a subsequent circular.

---

## RELATED RULES REVISION

We are announcing in a separate circular the filing of a corresponding rules revision. Please refer to the **Reference(s)** block for identification of that circular.

---

## REFERENCE(S)

[LI-CF-2006-176](#) (7/6/06) - New Additional Rule Filed To Address Exclusion Of Loss Due To Virus Or Bacteria

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## ATTACHMENT(S)

- Multistate Forms Filing CF-2006-OVBEP
- State-specific version of Forms Filing CF-2006-OVBEP (Alaska, District of Columbia, Louisiana, New York, Puerto Rico)

We are sending these attachments only to recipients who asked to be put on the mailing list for attachments. If you need the attachments for this circular, contact your company's circular coordinator.

---

## PERSON(S) TO CONTACT

If you have any questions concerning:

- the content of this circular, please contact:

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Senior Analyst  
Commercial Property  
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or

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Manager  
Commercial Property  
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[lnewman@iso.com](mailto:lnewman@iso.com)

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COMMERCIAL FIRE AND ALLIED LINES  
FORMS FILING CF-2006-OVBEF

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# Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

## About This Filing

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This filing addresses exclusion of loss due to disease-causing agents such as viruses and bacteria.

## New Form

We are introducing:

- ◆ Endorsement **CP 01 40 07 06** - Exclusion Of Loss Due To Virus Or Bacteria

## Related Filing(s)

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Rules Filing CF-2006- OVBBER

## Introduction

---

The current pollution exclusion in property policies encompasses contamination (in fact, uses the term *contaminant* in addition to other terminology). Although the pollution exclusion addresses contamination broadly, viral and bacterial contamination are specific types that appear to warrant particular attention at this point in time.

An example of bacterial contamination of a product is the growth of listeria bacteria in milk. In this example, bacteria develop and multiply due in part to inherent qualities in the property itself. Some other examples of viral and bacterial contaminants are rotavirus, SARS, influenza (such as avian flu), legionella and anthrax. The universe of disease-causing organisms is always in evolution.

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.

## Current Concerns

---

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. In addition, pollution exclusions are at times narrowly applied by certain courts. In recent years, ISO has filed exclusions to address specific exposures relating to contaminating or harmful substances. Examples are the mold exclusion in property and liability policies and the liability exclusion addressing silica dust. Such exclusions enable elaboration of the specific exposure and thereby can reduce the likelihood of claim disputes and litigation.

While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.

In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.

## Features Of New Amendatory Endorsement

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The amendatory endorsement presented in this filing states that there is **no coverage for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease**. The exclusion (which is set forth in Paragraph B of the endorsement) applies to property damage, time element and all other coverages; introductory Paragraph A prominently makes that point. Paragraphs C and D serve to avoid overlap with other exclusions, and Paragraph E emphasizes that other policy exclusions may still apply.

## Copyright Explanation

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## **Important Note**

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COMMERCIAL PROPERTY  
CP 01 40 07 06

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA**

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART  
STANDARD PROPERTY POLICY

- A.** The exclusion set forth in Paragraph **B.** applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
- B.** We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.  
However, this exclusion does not apply to loss or damage caused by or resulting from "fungus", wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.
- C.** With respect to any loss or damage subject to the exclusion in Paragraph **B.**, such exclusion supersedes any exclusion relating to "pollutants".
- D.** The following provisions in this Coverage Part or Policy are hereby amended to remove reference to bacteria:
  1. Exclusion of "Fungus", Wet Rot, Dry Rot And Bacteria; and
  2. Additional Coverage - Limited Coverage for "Fungus", Wet Rot, Dry Rot And Bacteria, including any endorsement increasing the scope or amount of coverage.
- E.** The terms of the exclusion in Paragraph **B.**, or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.

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ALASKA, DISTRICT OF COLUMBIA, LOUISIANA, NEW YORK, PUERTO RICO  
COMMERCIAL FIRE AND ALLIED LINES  
FORMS FILING CF-2006-OVBEF

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# Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

## About This Filing

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This filing addresses exclusion of loss due to disease-causing agents such as viruses and bacteria.

## New Form

We are introducing:

- ◆ Endorsement **CP 01 75 07 06** - Exclusion Of Loss Due To Virus Or Bacteria

## Related Filing(s)

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Rules Filing CF-2006-OVBER

## Introduction

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The current pollution exclusion in property policies encompasses contamination (in fact, uses the term *contaminant* in addition to other terminology). Although the pollution exclusion addresses contamination broadly, viral and bacterial contamination are specific types that appear to warrant particular attention at this point in time.

An example of bacterial contamination of a product is the growth of listeria bacteria in milk. In this example, bacteria develop and multiply due in part to inherent qualities in the property itself. Some other examples of viral and bacterial contaminants are rotavirus, SARS, influenza (such as avian flu), legionella and anthrax. The universe of disease-causing organisms is always in evolution.

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.

## Current Concerns

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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. In addition, pollution exclusions are at times narrowly applied by certain courts. In recent years, ISO has filed exclusions to address specific exposures relating to contaminating or harmful substances. Examples are the mold exclusion in property and liability policies and the liability exclusion addressing silica dust. Such exclusions enable elaboration of the specific exposure and thereby can reduce the likelihood of claim disputes and litigation.

While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.

In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.

## Features Of New Amendatory Endorsement

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The amendatory endorsement presented in this filing states that there is **no coverage for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease**. The exclusion (which is set forth in Paragraph B of the endorsement) applies to property damage, time element and all other coverages; introductory Paragraph A prominently makes that point. Paragraph C serves to avoid overlap with another exclusion, and Paragraph D emphasizes that other policy exclusions may still apply.

## Copyright Explanation

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## **Important Note**

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COMMERCIAL PROPERTY  
CP 01 75 07 06

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA**

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART  
STANDARD PROPERTY POLICY

- A.** The exclusion set forth in Paragraph **B.** applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
- B.** We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.  
However, this exclusion does not apply to loss or damage caused by or resulting from fungus. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.
- C.** With respect to any loss or damage subject to the exclusion in Paragraph **B.**, such exclusion supercedes any exclusion relating to "pollutants".
- D.** The terms of the exclusion in Paragraph **B.**, or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.

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# Exhibit C

Incident No: 200001601 Exposure: 000

**FERNDALE FIRE DEPARTMENT**

1635 Livernois St  
 Ferndale, MI 48220  
 Phone: 248-546-2510

**Incident Details**

Alarm Date & Time <b>08/18/2020 21:22:00</b>	Arrival Date & Time <b>08/18/2020 21:27:00</b>	Controlled Date & Time	Last Unit Cleared Date & Time <b>08/18/2020 22:15:00</b>
Response Time <b>00:05:00</b>	Priority Response? <b>Yes</b>		
Incident Type <b>100 - Fire, other</b>	Fire Dept. Station <b>ST12</b>	Shift <b>D-SHIFT D</b>	
Aid Given or Received <b>N - None</b>			
Action Taken 1 <b>86 - Investigate</b>	Action Taken 2 <b>12 - Salvage &amp; overhaul</b>	Action Taken 3	
Apparatus - Suppression Count <b>3</b>	Apparatus - EMS Count	Apparatus - Other Count	
Personnel - Suppression Count	Personnel - EMS Count	Personnel - Other Count <b>1</b>	
EMS Provided? <b>No</b>	Civilian Casualty? (Count) <b>No</b>	Personnel Casualty? (Count) <b>No</b>	
Property Use <b>162 - Bar or nightclub</b>	Mixed Use -		

**Location**

Location Type	Address <b>22740 WOODWARD</b>	City, State Zip Code <b>FERNDALE, MI 48220</b>			
District	Section No <b>34NW</b>	Directions <b>22740 WOODWARD AVE</b>	Latitude <b>42.4602270</b>	Longitude <b>-83.1338260</b>	Map Page

**Situation**

Initial Dispatch Code <b>100 - Fire, other</b>	Final Dispatch Code <b>100 - Fire, other</b>	Incident Delay			
Incident Reported By	Response Type	Critical Incident? <b>No</b>	Team Mobilized? <b>No</b>		

**Person Involved:**

<b>CROWE, BRYAN (Person Involved)</b>					
Involvement <b>BUILDING - Building Representative</b>	Civilian Fire Casualty? <b>No</b>	Owner? <b>No</b>	Occupies Property? <b>No</b>		
Last Name <b>Crowe</b>	First Name <b>Bryan</b>	Middle Name	Suffix	Mr/Mrs/Ms/etc.	
Street Address <b>22740 WOODWARD AVE</b>		City, State Zip <b>FERNDALE, MI 48220</b>		Apt./Unit No.	
Date Of Birth	Home Phone No. <b>2486886154</b>	Cell Phone No.	Work Phone No.		

**Fire:**

Incident No: 200001601 Exposure: 000



Property					
Structure Type	Roof Covering Type	Residential Count	Bldgs Involved	Bldgs Threatened	Not Residential?
		0	0	0	No
Ignition					
Cause of Ignition		Area of Origin		Heat Source	
3 - Failure of equipment or heat source		90 - Outside area, other		10 - Heat from powered equipment, other	
Fire Confined To Origin?		Acres Burned			
Yes		0			
Item First Ignited		Type of Material			
40 - Adornment, recreational material, signs, other		36 - Combustible metal, included are magnesium			
Contribution to Ignition 1		Contribution to Ignition 2			
30 - Electrical failure, malfunction, other					
On-Site Materials/Products					
Equipment Involved					
Type	Portability	Brand	Model/Year	Power	
			/		
Mobile Property Involved					
Ignition	Type	Make/Model/Year/Color	License	VIN/State	Stolen?
		/ / /		/	
Fire Suppression Factors					
Factor 1		Factor 2		Factor 3	
Human Factors					
Asleep?	Alcohol/Drugs?	Unattended Person?	Possibly Mentally Disabled?	Physically Disabled?	Multiple Persons Involved?
No	No	No	No	No	No
Age/Gender					
Resources:					
Unit: E115 - ENGINE 5					
Unit Code	Response Time	Dispatch Date	Enroute Scene Date	Arrival Date	Clear Date
E115	00:05:00	08/18/2020 21:22:00	08/18/2020 21:24:00	08/18/2020 21:27:00	08/18/2020 22:15:00
Unit Priority Response?	Number of People	Apparatus Use		Apparatus Type	
Yes	2	1 - Suppression		11 - Engine	
Action Taken 1			Action Taken 2		
86 - Investigate			12 - Salvage & overhaul		
Personnel 1				Position 1	
57 - Schwall, John				LT - Lieutenant	
Personnel 2				Position 2	
53 - Staub, Andrew				FF - Firefighter	
Unit: E116 - ENGINE 6					
Unit Code	Response Time	Dispatch Date	Enroute Scene Date	Arrival Date	Clear Date
E116	00:07:00	08/18/2020 21:22:00	08/18/2020 21:24:00	08/18/2020 21:29:00	08/18/2020 22:05:00
Unit Priority Response?	Number of People	Apparatus Use		Apparatus Type	
Yes	2	1 - Suppression		11 - Engine	
Action Taken 1			Action Taken 2		
86 - Investigate			12 - Salvage & overhaul		
Personnel 1				Position 1	
99 - Kail, David				FF-AEMT - Firefighter/Paramedic	
Personnel 2				Position 2	
31 - Light, Steven F				CAPT - Captain	

Incident No: 200001601 Exposure: 000



<b>Unit: R111 - RESCUE 111</b>					
Unit Code	Response Time	Dispatch Date	Enroute Scene Date	Arrival Date	Clear Date
R111	00:07:00	08/18/2020 21:22:00	08/18/2020 21:24:00	08/18/2020 21:29:00	08/18/2020 22:05:00
Unit Priority Response?	Number of People	Apparatus Use	Apparatus Type		
Yes	2	1 - Suppression	76 - ALS unit		
Action Taken 1			Action Taken 2		
86 - Investigate			12 - Salvage & overhauil		
Personnel 1				Position 1	
1022181 - Carr, Chad				FF - Firefighter	
Personnel 2				Position 2	
- Mihora, Ben				FF-AEMT - Firefighter/Paramedic	
<b>Narrative:</b>					
<b>200001601-001 (000) By: BEROUSEK, JARED On 8/19/2020 8:58:19 AM</b>					
Narrative Type		Narrative Description			Written By
INCIDENT					09SCHWALLJ
<p>Called to scene for sign on top of building on fire, on arrival found small glow from bottom of top part of sign. Dispatch notified to contact building holder( no knox box for occupancy). Ladder placed to gain access to roof, crew went to roof to find shut off for sign, no shut off found. Line from sign runs across roof to side of A/C unit and goes into a plug box with a ground fault plug, ground fault was tripped. Building rep arrived on scene and gave crew access to building, breaker panel found and breaker for sign already shut off,. Building has two panels, crew shut off main breaker in panel with breaker labeled for sign, no change. All breakers and main shut off in other panel and glow in sign went away. Turned main on other panel( to the right while facing the panels) so the freezer could be turned back on. Advised building rep they would need to get a hold a electrician the next day and have the sign fixed prior to turning power back on. Panel on the left while facing panels taped with caution tape and all breakers left in the off position. All crews cleared incident.</p>					