

THE KANCHER LAW FIRM, L.L.C.
BY: MARK S. KANCHER, ESQUIRE
ATTORNEY I.D. NO.38214
1101 North Kings Highway - Suite 211
Cherry Hill, New Jersey 08034
Ph.: 856-795-2440 * Fax: 856-295-8157
MKANCHER@KANCHERLAWFIRM.COM

*Filed and Attested by the
Office of Judicial Records
19 JUN 2020 07:59 am*
Attorney for Plaintiffs **A. SILEGRINI**



THE MARATHON GRILL, INC.;
MARATHON GRILL ASSOCIATES LP;
4 DELICIOUS LP;
1818 MARATHON STREET MARATHON
GRILL INC;
1818 MARATHON STREET MARATHON
GRILL ASSOCIATES, LP;
16TH STREET MARATHON GRILL INC.;
16TH STREET MARATHON GRILL
ASSOCIATES, LP;
1340 CHESTNUT STREET MARATHON
GRILL ASSOCIATES;
1340 CHESTNUT STREET MARATHON
GRILL INC.;
RITTENHOUSE GRILL, INC.;
RITTENHOUSE GRILL ASSOC. LP;
TWO COMMERCE SQUARE
MARATHON GRILL INC;
JAY & SHERYL BORISH;
TWO COMMERCE SQUARE MARATHON
GRILL ASSOC LLP;
MARATHON GRILL TJU LLC;
MARATHON GRILL TJU ASSOC LP;
MARATHON GRILL RITTENHOUSE
SQUARE LP;
CARY & JON BORISH HAMILTON
VILLAGE MARATHON GRILL LP;
HAMILTON VILLAGE MARATHON
GRILL ASSOC;
MARATHON GRILL ASSOCIATES LLC;
MARATHON LOVE PHILADELPHIA INC.;
MARATHON GRILL D/B/A MARATHON
ON THE SQUARE;
MARATHON FOOD GROUP INC;
MARATHON GRILL RITTENHOUSE
SQUARE INC.;

Plaintiffs

v.

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

Civil Action - Law

TERM

NO.

STATE AUTOMOBILE MUTUAL :
INSURANCE COMPANY, :
and :
STATE AUTO INSURANCE COMPANIES :
Defendants :

**COMPLAINT FOR DECLARATORY JUDGMENT, BREACH OF CONTRACT AND
STATUTORY BAD FAITH**

The Plaintiffs, THE MARATHON GRILL, INC.; MARATHON GRILL ASSOCIATES LP; 4 DELICIOUS LP; 1818 MARATHON STREET MARATHON GRILL INC; 1818 MARATHON STREET MARATHON GRILL ASSOCIATES, LP; 16TH STREET MARATHON GRILL INC.; 16TH STREET MARATHON GRILL ASSOCIATES, LP; 1340 CHESTNUT STREET MARATHON GRILL ASSOCIATES; 1340 CHESTNUT STREET MARATHON GRILL INC.; RITTENHOUSE GRILL, INC.; RITTENHOUSE GRILL ASSOC. LP; TWO COMMERCE SQUARE MARATHON GRILL INC; JAY & SHERYL BORISH; TWO COMMERCE SQUARE MARATHON GRILL ASSOC LLP; MARATHON GRILL TJU LLC; MARATHON GRILL TJU ASSOC LP; MARATHON GRILL RITTENHOUSE SQUARE LP; CARY & JON BORISH HAMILTON VILLAGE MARATHON GRILL LP; HAMILTON VILLAGE MARATHON GRILL ASSOC; MARATHON GRILL ASSOCIATES LLC; MARATHON LOVE PHILADELPHIA INC.; MARATHON GRILL D/B/A MARATHON ON THE SQUARE; MARATHON FOOD GROUP INC; MARATHON GRILL RITTENHOUSE SQUARE INC.; (hereinafter referred to collectively as “MARATHON”) and each of them, hereby aver by way of Complaint against the Defendants, State Automobile Mutual Insurance Company and State Automobile Insurance Companies, and each of them, as follows:

The Parties

1. The Plaintiffs, and some of them, are entities incorporated or otherwise organized under the laws of the Commonwealth of Pennsylvania which are the owners and operators of restaurants located at 1839-1841 Spruce Street; 119-121 South 16th Street; and 1818 Market Street within the City of Philadelphia.

2. The defendants are foreign insurance companies whose principal place of business is 4 Easton Oval, Columbus, Ohio 43219 which issued to the Plaintiffs a certain Commercial General Policy of Insurance, with a Restaurant Extension Endorsement, being policy number PBP 2836840 with effective policy dates from July 1, 2019, to July 1, 2020, inclusive. A copy of the Preferred Business Policy Declarations and the Restaurant Extension Endorsement delivered to the Plaintiffs by the Defendants are attached hereto as **Exhibit 1**.

Background

Plaintiffs' Losses

3. As of March 6, 2020, the Plaintiffs were actively operating their restaurant businesses at 1839-1841 Spruce Street; 119-121 South 16th Street; and 1818 Market Street within the City of Philadelphia.

4. At that time, and for several months before, the City of Philadelphia and other cities and states in the United States of America were suffering from a pandemic as a result of overwhelming infections of persons by the novel coronavirus.

5. The illnesses caused by the novel coronavirus was formally named Covid-19 by the World Health Organization (the "WHO") and Federal Government.

6. Notwithstanding the Covid-19 pandemic as of March 6, 2020, the Plaintiffs intended to continue to operate their restaurants while taking safety precautions related to Covid-19.

7. On or about March 6, 2020, Tom Wolf, Governor of the Commonwealth of Pennsylvania (the "Governor"), exercising the emergency powers granted to him by the Pennsylvania Legislature, issued a "Proclamation of Disaster Emergency," a copy of which is attached hereto as **Exhibit 2**, which ordered the closing of many places of public accommodation, including, but not limited to, Plaintiffs' several restaurants.

8. Furthermore, on March 23, 2020, the Governor issued an "Order for Individuals to Stay at Home," **Exhibit 3**, the effect of which was to prevent persons who would otherwise have been patrons at Plaintiffs' restaurants (but for the Governor's March 6 Proclamation) from patronizing them.

9. On or about March 17 and March 22, 2020, James F. Kenney, Mayor of Philadelphia (the “Mayor”) and Thomas M. Farley, MD, MPH, the Health Commissioner of Philadelphia (“Commissioner”) exercising their emergency powers issued Emergency Orders, a copy of which is attached hereto as **Exhibit 4**, which ordered the closing of many places of public accommodation, including, but not limited to, Plaintiffs’ several restaurants.

10. On March 23, 2020, the Secretary of Health of the Commonwealth of Pennsylvania (the “Secretary”) issued an “Order to Stay at Home,” **Exhibit 5**, the effect of which was to prevent persons who would otherwise have been patrons at Plaintiffs’ restaurants (but for the outstanding Proclamations of the Governor, Mayor and Commissioner, respectively) from patronizing them.

11. Each of the Governor, the Mayor, the Commissioner and the Secretary were at all relevant times “Civil Authorities.”

12. As a result of the several Orders and Proclamations of the Governor, the Mayor, the Commissioner and the Secretary acting as Civil Authorities, the Plaintiffs were compelled to shut their restaurants and cease business, which has continued to the present day and will likely continue into the indeterminate future.

13. Furthermore, having been open to the public for business up to and including March 6, 2020, during which time the spread and affects of the novel coronavirus which is a pollutant was well documented throughout Philadelphia, Pennsylvania, and the United States generally, contamination of the Plaintiffs’ properties, equipment, fixtures, goods and supplies was likely, as it was for eat-in restaurants generally, and the Plaintiffs suffered the losses of their respective properties as a result.

14. Contamination of the Plaintiffs’ properties, equipment, fixtures, goods and supplies is real physical loss of and physical damage to which the Plaintiffs which Plaintiffs have had to clean up and remove.

15. Furthermore, the contamination by the novel coronavirus is worsened as the virus remains

and physically infects surfaces of objects and materials (“fomites”) for up to twenty-eight (28) days.

Insurance

16. The policy of insurance issued by the Defendants to the Plaintiffs includes among other things insurance against loss by reason of spoilage; business income loss and extra expenses; pollutant clean-up and removal in addition to the coverage provided by the Restaurant Extension Endorsement. See Page 5 of 8 of the “Commercial Property Coverage Part Declarations” of th Policy, **Exhibit 6**.

17. The Restaurant Extension Endorsement specifically provides the following:

C. * * *

1. The Causes of Loss applicable to the Business Income Form attached to this policy shall also include the following:

a. The “suspension” of your “operations” at the described premises due to the order of a civil authority

18. Plaintiffs’ losses are covered by the Policy in general and by the Restaurant Extension Endorsement specifically and Plaintiffs had and have a reasonable expectation of their losses being covered.

Plaintiffs’ Losses

19. As a result of the pollution and contamination of the Plaintiffs’ real and personal property and supplies, Plaintiffs have had to incur expenses in cleaning up the pollution and contamination caused by the novel coronavirus and this clean-up continues to the present and likely will continue into the foreseeable future.

20. As a result of the Orders of the Governor, the Mayor, the Commissioner and the Secretary acting as Civil Authorities Plaintiffs have had to close their restaurants and will have to keep their restaurants closed or at best have them opened in a limited manner which varies from their ordinary method of business into the foreseeable future and accordingly the Plaintiffs have suffered and will suffer losses of business revenues and incomes and deprivation of their properties into the foreseeable future.

Causes of Action

I.

Declaratory Relief against the Defendants

21. Plaintiffs incorporate their assertions and averments set forth in Paragraphs 1 through 20 above, as if restated in full.

22. *42 Pa.C.S. § 7531, et seq.*, The Declaratory Judgment Acts of Pennsylvania (the “Act”), provides among other things for the courts of the Commonwealth acting within their respective jurisdiction, to declare rights, status and other legal relations between parties whether or not further relief is or could be claimed, per *42 Pa.C.S. § 7532*.

23. An actual controversy has arisen between the Plaintiffs, on the one hand, and the Defendants, on the other, as to the rights, obligations, responsibilities and duties of the Defendants to the Plaintiffs arising from the coverages of insurances sold by the Defendants to the Plaintiffs as the Defendants dispute the following:

- a. That the orders of the Governor, the Mayor, the Commissioner and/or the Secretary constitute a prohibition of access to the Plaintiffs’ properties;
- b. That the orders of the Governor, the Mayor, the Commissioner and/or the Secretary prohibit the Plaintiffs from carrying on their businesses;
- c. That the orders of the Governor, the Mayor, the Commissioner and/or the Secretary constitute orders of civil authorities prohibiting the Plaintiffs from carrying on their businesses;
- d. That the novel coronavirus has physically damaged the Plaintiffs’ properties;
- e. That the novel coronavirus has physically damaged and polluted and/or contaminated the Plaintiffs’ properties necessitating the clean-up of the properties;
- f. That as a result of the orders of the Governor, the Mayor, the Commissioner and/or the

Secretary have caused the Plaintiffs to close their businesses;

- g. That as a result of the orders of the Governor, the Mayor, the Commissioner and/or the Secretary the Plaintiffs have suffered spoilage of their inventories and other property;
- h. That as a result of having to close their businesses because of the orders of orders of the Governor, the Mayor, the Commissioner and/or the Secretary the Plaintiffs have suffered the loss of and physical damage to their real and personal property and revenues as aforesaid which requires the Defendants to pay the damages suffered by the Plaintiffs under the terms of the Policy and its endorsements.

WHEREFORE Plaintiffs herein respectfully pray for the following:

- 1. For a declaration that the damages and losses suffered by the Plaintiffs as set forth above are damages for which they are insured under the Policy and the Restaurant Extension Endorsement;
- 2. For a declaration that the contamination of the Plaintiffs' properties constitutes physical damage to those properties which is insured against by the Policy;
- 3. For a declaration that the various orders of the Governor, the Mayor, the Commissioner and the Secretary are orders of civil authorities which have caused the Plaintiffs to suffer losses of their businesses and that such losses are covered losses under the Policy and the Restaurant Extension Endorsement;
- 4. For such other relief as may be appropriate under the circumstances.

Breach of Insurance Contract against Defendants State Automobile Mutual Insurance Company and State Automobile Insurance Companies, and each of them

- 24. Plaintiffs incorporate their assertions and averments set forth in Paragraphs 1 through 23 above, as if restated in full.
- 25. Plaintiffs have made claim upon the Defendants for payment of their losses under the above insurance policy and its Restaurant Extension Endorsement, but the Defendants, without cause and without

having properly investigated the claims of the Plaintiffs, if they investigated at all, have failed and refused to honor their contractual obligations to the Plaintiffs to make payment for their losses.

WHEREFORE the Plaintiffs, and each of them as applicable, pray for the following relief against the Defendants State Automobile Mutual Insurance Company and State Automobile Insurance Companies, and each of them, jointly and severally:

- a. Damages in the amount sufficient to reimburse the Plaintiffs respectively for their loss by reason of spoilage; business income loss and extra expenses; pollutant clean-up and removal; and such other losses incidental and associated therewith;
- b. For attorneys fees and expenses; and,
- c. For all such other relief as may be appropriate under the circumstances.

II.

Bad Faith against Defendants State Automobile Mutual Insurance Company and State Automobile Insurance Companies, and each of them

26. Plaintiffs incorporate their assertions and averments set forth in Paragraphs 1 through 25 above, as if restated in full.

27. On April 20, 2020, Plaintiffs through their attorney gave notice to the Defendants of their claim for reimbursement under their insurance policy.

28. On April 21, 2020, Defendants sent a 15 page letter to Plaintiffs' attorney denying the Plaintiffs' claim which was received by Plaintiffs on May 4, 2020. By letter dated May 4, 2020, Plaintiffs reiterated their claims for payment under the insurance policy by letter of that date, to which Plaintiffs have never received a reply. See **Exhibits 7 and 8**.

29. Defendants had an obligation to the Plaintiffs as their insureds and with whom they stood in a fiduciary relationship to fully investigate in good faith the Plaintiffs' claims on the insurance policy.

30. Plaintiffs aver and therefore believe that the Defendants failed to undertake any steps to

investigate the Plaintiffs claims but, instead, had established a policy of denying claims due in whole or in part or arising out of the novel coronavirus infestation, of which Plaintiffs claims were a part.

31. Their failures to act and investigate the Plaintiffs' claims were done in bad faith and in violation of their obligations to act in good faith toward their insureds.

32. The bad faith conduct of the Defendants toward the Plaintiffs is the type of conduct for which *42 Pa.C.S. 8371* was intended to remedy.

WHEREFORE the Plaintiffs, and each of them as applicable, pray for the following relief against the Defendants State Automobile Mutual Insurance Company and State Automobile Insurance Companies, and each of them, jointly and severally pursuant to *42 Pa.C.S. 8371* :

- a. For compensatory damages;
- b. Punitive damages;
- c. Interest at the rate of 3% above the prime rate of interest from April 20, 2020, to the date upon which Defendants pay the compensatory and/or punitive damages awarded to the Plaintiffs;
- d. Court costs and attorneys fees; and,
- e. For such other relief as may be appropriate under the circumstances.

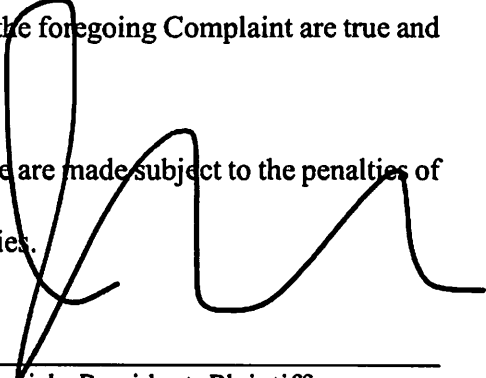
THE KANCHER LAW FIRM, LLC
Attorney for the Plaintiffs

by: /s/ Mark S. Kancher
MARK S. KANCHER, ESQUIRE
Attorney No. 38214
1101 North Kings Highway - Suite 211
Cherry Hill, NJ 08034
Mkancher@kancherlawfirm.com
Ph.: 856-795-2440 * Fax: 856-295-8157

VERIFICATION

The undersigned, being an authorized officer and representative of the Plaintiffs in the foregoing Complaint hereby verifies that the facts set forth in the foregoing Complaint are true and correct to the best of my knowledge, information and belief.

I understand that if any false statements herein are made are made subject to the penalties of *18 Pa.C.S. §4904* relating to unsworn falsification to authorities.



Jon Borish, President, Plaintiffs