

Assigned for all purposes to: Stanley Mosk Courthouse, Judicial Officer: Monica Bachner

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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF LOS ANGELES

12 MUSSO & FRANK GRILL CO., INC., a
13 California corporation,

14 Plaintiff,

15 vs.

16
17 MITSUI SUMITOMO INSURANCE
18 USA INC., a New York corporation;
19 HUB INTERNATIONAL INSURANCE
20 SERVICES INC., a California
21 corporation; and DOES 1 through 10,
22 inclusive,

23 Defendants.

Case No.: 20STCV16681

**COMPLAINT AND DEMAND FOR
JURY TRIAL**

1. BREACH OF THE IMPLIED
COVENANT OF GOOD FAITH AND
FAIR DEALING
2. BREACH OF CONTRACT
3. NEGLIGENCE



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I.
INTRODUCTION

1. Business Interruption coverage is an optional insurance benefit available to businesses to minimize their risk and sustain them when a suspension of business operations causes a loss of business income. This coverage allows businesses to pay continuing operating expenses, additional expenses incurred because of the suspension, and supplement their lost business income.

2. As California Insurance Commissioner Ricardo Lara stated in a notice on April 14, 2020 to all admitted and non-admitted insurance companies in California, “Many small and large California businesses purchase Business Interruption insurance to protect against the loss of income and other losses caused by an interruption to the normal operations of the business” (Exhibit 1).

3. Defendant Mitsui Sumitomo Insurance USA Inc. (“Mitsui”) advertises to the American public that it “offer[s] the tools, resources and expertise [that] businesses need[] to keep moving forward” (<http://www.msigusa.com/about-us/>, last accessed April 17, 2020). Mitsui promises that its products will “help minimize [the insureds’] risk [to] remain successful in the event of a loss” (rotating banner at <http://www.msigusa.com>, last accessed on April 17, 2020). It goes on to promise that it “has established a clear, consistent process for each type of claim” and assures potential insureds that its “primary goal is to ensure the early and equitable adjustment of all claims” (<http://www.msigusa.com/claims/claims-solutions/>, last accessed April 17, 2020). Regrettably for Plaintiff Musso & Frank Grill Co., Inc. (“Musso & Frank”), those promises were not the reality.

4. For over 100 years, Musso & Frank has been, and continues to be, an iconic Hollywood institution combining unparalleled service and ambience with gourmet cuisine. Indeed, it is the first restaurant ever to have its own star on the Hollywood Walk of Fame. Musso & Frank’s patrons have for decades included

1 entertainment celebrities and insiders, as well as devoted locals from throughout
2 Southern California.

3 5. Musso & Frank purchased, timely paid all premiums for and performed
4 all duties required of it to be performed under an “All Risk” commercial property and
5 general liability insurance policy issued by Mitsui, Policy No. PKG 3127372 (the
6 “Policy”). Under an “All Risk” policy, all risks of physical loss or damage are covered
7 unless specifically and unambiguously excluded. Stated differently, all non-excluded
8 perils are covered.

9 6. The Policy included “Business Income (and Extra Expense)” coverage in
10 the event there is a “loss of Business Income ... sustain[ed] due to the necessary
11 ‘suspension’ of [Musso & Frank’s] ‘operations’” and/or “necessary expenses ...
12 incur[red] ... that [Musso & Frank] would not have incurred if there had been no direct
13 physical loss or damage to property caused by or resulting from a Covered Cause of
14 Loss” (Exhibit 3, p. EX03-051).

15 7. The Coronavirus (“COVID-19”) originated in China in late 2019, spread to
16 Europe, and eventually came to the United States. Although COVID-19 was present in
17 California by late January 2020, all businesses and restaurants, including Musso &
18 Frank, were allowed to remain open throughout February and the first half of March.
19 On January 30, 2020 the World Health Organization (the “W.H.O.”) declared a public
20 health emergency of international concern. Six weeks later, on March 11, 2020, the
21 W.H.O. made the assessment that COVID-19 could be characterized as a pandemic.

22 8. On March 15, 2020, Los Angeles Mayor Eric Garcetti acted to protect the
23 public health and limit social interactions by issuing a “Public Order under City of Los
24 Angeles Emergency Authority” (the “Order”) effective at midnight that evening that,
25 among other things, prohibited restaurants from serving food on their premises and
26 prohibited bars from serving alcohol (Exhibit 2).

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1 9. This Order effectively closed Musso & Frank by excluding all on-premises
2 dining and caused a suspension of its operations, resulting in an immediate loss of
3 business income.

4 10. As a direct result of the Order, on March 19, 2020, Musso & Frank
5 promptly submitted a claim for its business income loss to its insurer Mitsui.

6 11. Engaging in the business of insurance in California imposes upon insurers
7 the legal obligation to promptly conduct fair, balanced and thorough investigations of
8 all bases of claims for benefits made by their insureds, with a view toward honoring the
9 claims. As part of these obligations, an insurance company is obligated to diligently
10 search for and consider evidence that supports coverage of the claimed loss, and in
11 doing so must give at least as much consideration to the interests of its insured as it
12 gives to its own interests.

13 12. During the COVID-19 Pandemic, Commissioner Lara issued a notice after
14 the California Department of Insurance “ha[d] received numerous complaints from
15 businesses, public officials, and other stakeholders asserting that certain insurers,
16 agents, brokers, and **insurance company representatives** [we]re attempting to dissuade
17 policyholders from filing a notice of claim under its Business Interruption insurance
18 coverage, or **refusing to** open and **investigate these claims** upon receipt of a notice of
19 claim” (Exhibit 1, p. 1, emphasis added).

20 13. The Commissioner’s notice reminded insurers facing these claims of the
21 importance of complying with their obligations, citing the California Fair Claims
22 Settlement Practices Regulations (Cal. Code Regs., tit. 10, §§ 2695.1 *et seq.*
23 (“Regulations”). His notice went on to state, “Therefore, Insurance Commissioner
24 Ricardo Lara finds it necessary to issue this Notice to ensure that all agents, brokers,
25 **insurance companies**, and other licensees accept, forward, acknowledge, and **fairly**
26 **investigate all business interruption insurance claims** submitted by businesses”
27 (Exhibit 1, p. 1-2, emphasis added). The Commissioner stated that “every insurer is
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1 required to conduct and diligently pursue a thorough, fair, and objective investigation
2 of the reported claim” (*Id.* at 2).

3 14. Amongst other information provided to insurers, the Commissioner
4 further reminded them that “[i]f the claim is denied in whole or in part, the insurer is
5 **required to** communicate the denial in writing to the policyholder **listing all the legal**
6 **and factual bases** for such denial. (Regulations, § 2695.7(b)(1).) Where the denial of a
7 first party claim is based on a specific statute, applicable law or policy provision,
8 condition, or exclusion, the written denial must include reference to and provide an
9 explanation of the application of the statute, applicable law, or policy provisions,
10 condition, or exclusion to the claim...Regulations, § 2695.7(b)(1)” (Exhibit 1, p. 3,
11 emphasis added).

12 15. Consistent with all of these well-established and non-controversial
13 California insurance claims handling standards, Musso & Frank had the right to rely on
14 Mitsui to handle its insurance claim for business interruption losses in a manner
15 consistent with these standards of good faith and fair dealing. Unfortunately for Musso
16 & Frank, Mitsui failed in all respects and abruptly, unreasonably and with a callous
17 disregard for the interests of its insured, denied the claim in its entirety.

18 16. Alternatively, although Musso & Frank believes that there is coverage
19 under the Policy, to the extent Mitsui’s interpretation of the Policy is upheld, Musso &
20 Frank brings this lawsuit against HUB International Insurance Services Inc. (“HUB
21 International”) for its negligent procurement of the Policy.

22 17. In order to obtain the benefits promised under its Policy and required by
23 California law, Musso & Frank was compelled to institute this lawsuit to pursue all
24 available legal and equitable remedies available to it.

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II.
PARTIES

18. Plaintiff Musso & Frank is, and at all relevant times was, a California corporation, with its principal place of business in Los Angeles, California.

19. Defendant Mitsui is, and at all relevant times was, a New York corporation with its principal place of business in the State of New Jersey. At all times relevant to the allegations contained herein, it was conducting business as an insurer in the State of California.

20. Defendant HUB International is, and at all relevant times was, a corporation duly organized and existing under the laws of the State of California and is an insurance agency authorized to transact, and is transacting, the business of insurance in the State of California, with its principal place of business in Riverside, California.

21. The true names or capacities, whether individual, corporate, associate, or otherwise, of defendants DOES 1 through 10, inclusive, are unknown to Musso & Frank, who therefore sues said defendants by such fictitious names. Musso & Frank is informed and believes and based on such information and belief alleges that each of the defendants sued herein as a DOE is legally responsible in some manner for the events and happenings referred to herein, and will ask leave of this Court to amend this complaint to insert their true names and capacities in place and instead of the fictitious names when the same become known to Musso & Frank.

22. Plaintiff is informed and believes and based thereon alleges that at all times mentioned herein, each of the defendants was the agent, partner, joint venturer, associate and/or employee of one or more of the other defendants and was acting in the course and scope of such agency, partnership, joint venture, association and/or employment when the acts giving rise to the cause of action occurred.

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III.
INSURANCE

23. Since in or about 2014, Musso & Frank has been working with HUB International to obtain insurance coverage. With HUB International's assistance, Musso & Frank obtained the Policy effective from June 30, 2019 to June 30, 2020 (Exhibit 3, p. EX03-003).

24. Musso & Frank timely paid all premiums that were due under the Policy. The premiums for one year of coverage totaled \$46,919.15 (*Id.*).

25. In exchange for payment of the premiums, Mitsui agreed to provide the insurance coverage described in the Policy.

26. The "Business Income (and Extra Expense) Coverage Form" is one of the coverage forms stated in the commercial property insurance portion of the Policy (Exhibit 3, p. EX03-051).

27. The Policy provides "All Risk" coverage for Business Income (Extra Expense) coverage through the following provisions:

"A. Coverage

...

We [Mitsui] 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 physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss" (*Id.*).

28. All terms in the Policy which appear in quotation marks are defined terms in the Policy. Notably, Mitsui chose not to define the term "direct physical loss."

- 1 29. “Business Income” is defined in the Policy as follows:
2 “Business Income means the:
3 a. Net Income (Net Profit or Loss before income taxes) that would
4 have been earned or incurred; and
5 b. Continuing normal operating expenses incurred, including
6 payroll” (*Id.*).
7
- 8 30. “Suspension” is defined in the Policy as follows:
9 “a. The slowdown or cessation of your business activities; or
10 b. That a part or all of the described premises is rendered
11 untenantable, if coverage for Business Income Including
12 ‘Rental Value’ or ‘Rental Value’ applies” (Exhibit 3, p. EX03-
13 059).
14
- 15 31. “Operations” is defined in the Policy as follows:
16 “a. Your business activities occurring at the described premises;
17 and
18 b. The tenantability of the described premises, if coverage for
19 Business Income Including ‘Rental Value’ or ‘Rental Value’
20 applies” (*Id.*).
21
- 22 32. “Period of restoration” is defined in the Policy as follows:
23 “3. ‘Period of restoration’ means the period of time that:
24 a. Begins:
25 (1) 72 hours after the time of direct physical loss or
26 damage for Business Income Coverage; or
27 (2) Immediately after the time of direct physical loss or
28 damage for Extra Expense Coverage;

- 1 caused by or resulting from any Covered Cause of Loss at
2 the described premises; and
3 b. Ends on the earlier of:
4 (1) The date when the property at the described should
5 be repaired, rebuilt or replaced with reasonable speed
6 and similar quality; or
7 (2) The date when business is resumed at a new
8 permanent location.

9 ...
10 The expiration date of this policy will not cut short the ‘period of
11 restoration’” (*Id.*).

12 33. When defining “Covered Causes of Loss, Exclusions and Limitations” in
13 the Business Income (Extra Expense) portion of the Policy, the insured is directed to
14 “See applicable Causes Of Loss form as shown in the Declarations” (*Id.* at EX03-052).
15 The Declarations makes the following “Cause of Loss” form part of the Policy: “MS
16 5202 12-12 CAUSES OF LOSS – ENHANCED FORM” (*Id.* at EX03-012). That form
17 states, “**When Enhanced is shown in the Declarations, Covered Causes of Loss means**
18 **direct physical loss unless the loss is excluded or limited in this policy**” (*Id.* at EX03-
19 065, emphasis added).

20 34. The Policy, as amended by an endorsement, also provides additional
21 coverage for Civil Authority. This Civil Authority coverage states:

22 **“Civil Authority**

23 In this Additional Coverage, Civil Authority, the described
24 premises are premises to which this Coverage Form applies, as
25 shown in the Declarations.

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27 When a Covered Cause of Loss causes damage to property other
28 than property at the described premises and the BUSINESS

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INCOME (AND EXTRA EXPENSE) COVERAGE FORM or the BUSINESS INCOME (WITHOUT EXTRA EXPENSE) COVERAGE FORM is a part of this policy, we will pay for the actual loss of Business Income you sustain caused by action of civil authority that prohibits access to the described premises.

When a Covered Cause of Loss causes damage to property other than property at the described premises and the BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM or the EXTRA EXPENSE COVERAGE FORM is a part of this policy, we will pay for the actual and necessary Extra Expense you incur caused by action of civil authority that prohibits access to the described premises.

We will pay for the actual loss of Business Income you sustain and/or actual and necessary Extra Expense you incur under this Additional Coverage, Civil Authority, 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 the described premises are within that area but are not more than one mile from the damaged property; 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.

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Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described 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 described premises and will end:

- (1) 30 consecutive days after the date of that action; or
- (2) When your Civil Authority Coverage for Business Income ends;

whichever is later (*Id.* at EX03-101, emphasis in original).

35. An endorsement to the Policy entitled “Business Income Changes – Time Period” reduces the 72-hour time frame in the additional coverage for Civil Authority to 24 hours. It states as follows:

“This endorsement modifies insurance provided under the following:
BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM
BUSINESS INCOME (WITHOUT EXTRA EXPENSE) COVERAGE FORM

For insurance provided under the BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM or the BUSINESS INCOME (WITHOUT EXTRA EXPENSE) COVERAGE FORM, the following applies:

- 1. The 72-hour time period in the definition of ‘period of restoration’ is replaced by 24 hours.
- 2. The 72-hour time period in the Civil Authority Additional Coverage is replaced by 24 hours” (*Id.* at EX03-83).

1 36. One of the exclusions in the Policy is for “Government Action.” But the
2 scope of the “Government Action” exclusion is expressly limited to governmental
3 orders regarding the “seizure or destruction of property” (*Id.* at EX03-066). Specifically,
4 the “Government Action” exclusion reads as follows:

5 **“c. Government Action**

6 Seizure or destruction of property by order of government authority.

7
8 But we will pay for loss or damage caused by or resulting from acts of
9 destruction ordered by governmental authority and taken at the time of a
10 fire to prevent its spread, if the fire would be covered under this Coverage
11 Part” (*Id.*, emphasis in original).

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13 37. The Policy also states an “Exclusion Of Loss Due To Virus Or Bacteria.”
14 (“Virus Exclusion”). Specifically, the Virus Exclusion in the Policy provides the
15 following:

16 “We will not pay for loss or damage caused by or resulting from any
17 virus, bacterium or other micro-organism that induces or is capable of
18 inducing physical distress, illness or disease” (*Id.* at EX03-078).

19
20 **IV.**

21 **FACTUAL BACKGROUND**

22 **A. History of the Musso & Frank Restaurant**

23 38. Frank Toulet opened “Frank’s Francois Cafe” on September 27, 1919. In
24 1923, Joseph Musso partnered with Toulet and they renamed the restaurant “The
25 Musso & Frank Grill.”

26 39. In 1928, Musso and Toulet incorporated the business as “The Musso &
27 Frank Grill Company, Inc.” and sold the business to John Mosso and Joseph Carissimi,
28 who maintained the restaurant’s name because of its already established goodwill and

1 reputation. In 2009, the Mosso family bought out the Carissimi family and Musso &
2 Frank is now owned by the families of the three granddaughters of Mosso. The
3 restaurant is now run by the third and fourth generation of the Mosso descendants.

4 40. Musso & Frank has also served as a backdrop for television shows and
5 movies. Movies such as *Once Upon a Time in Hollywood*, *Ed Wood* and *Ocean's Eleven*;
6 and, television shows such as *Mad Men* and *The Kominsky Method* have been filmed
7 there.

8 41. The iconic Musso & Frank restaurant was frequented by a literal “Who’s
9 Who” from the Golden Age of Hollywood. Charlie Chaplin, Humphrey Bogart,
10 Douglas Fairbanks, Mary Pickford, Frank Sinatra and Marilyn Monroe are amongst the
11 many celebrities that dined at Musso & Frank. To this day, Musso & Frank remains a
12 popular gathering point for many well-known celebrities. But, it also caters to local
13 customers from a demographic cross-section of California.

14 42. Musso & Frank recently celebrated its 100-year anniversary. During that
15 time, it always lived up to its motto, “we treat locals like celebrities and celebrities like
16 locals.” It has been a constant, reliable fixture that has linked the Golden Era of
17 Hollywood to the present-day entertainment industry.

18 43. When all of this was brought to a sudden halt by the mandated shut
19 down, Musso & Frank made a legitimate claim to its insurance company for the help
20 and protection it had been promised only to have it rejected without even the slightest
21 of an investigation of its claim and a complete and utter violation of California
22 insurance law, regulations and standards.

23
24 **B. The COVID-19 Pandemic**

25 44. It has been widely reported that COVID-19 has its origins in Wuhan,
26 China. The first public reports were on December 31, 2019 of an “outbreak of
27 respiratory illness.”
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1 45. By January 8, 2020, the United States Centers for Disease Control and
2 Prevention (“CDC”) issued warnings to American travelers going to China for a
3 “pneumonia of unknown etiology” (<https://emergency.cdc.gov/han/han00424.asp>, last
4 accessed April 17, 2020).

5 46. Starting January 17, 2020, the CDC and the United States Department of
6 Homeland Security’s Customs and Border Protection implemented enhanced health
7 screenings for passengers who came from or connected through Wuhan, China
8 (<https://www.cdc.gov/media/releases/2020/p0117-coronavirus-screening.html>, last
9 accessed April 17, 2020).

10 47. On January 20, 2020, the W.H.O. reported the first confirmed cases outside
11 mainland China in Japan, South Korea and Thailand ([https://www.nytimes.com/article/
12 coronavirus-timeline.html](https://www.nytimes.com/article/coronavirus-timeline.html), last accessed April 17, 2020). The following day, on January
13 21, 2020, the first American COVID-19 case was confirmed in the State of Washington
14 (<https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html>,
15 last accessed April 17, 2020).

16 48. According to news reports, shortly thereafter, by January 26, 2020, the
17 CDC confirmed the first COVID-19 case in California ([https://web.archive.org/web/
18 20200128205456/https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/
19 ncov2019.aspx](https://web.archive.org/web/20200128205456/https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx), last accessed April 17, 2020).

20 49. On January 30, 2020, the W.H.O declared a “public health emergency of
21 international concern. The following day, on January 31, 2020, all travel from China to
22 the United States was blocked.

23 50. During February, COVID-19 began spreading rapidly throughout Europe,
24 with Italy initially becoming the most impacted country. That same month, an
25 increasing number of cases were being reported in the United States, with the largest
26 concentration of cases in the Seattle area of Washington State. The first cluster of
27 COVID-19 cases was reported at a nursing home in Kirkland, Washington in late
28 February, where the first COVID-19 death was announced on February 28, 2020.

1 51. COVID-19 also continued to spread throughout California during
2 February 2020. In early February, several COVID-19 cases were announced in Northern
3 California. During February, the number of reported COVID-19 cases in California
4 increased. On February 26, 2020, the CDC announced the first reported California
5 COVID-19 case resulting from community spread ([https://www.cdc.gov/media/
6 releases/2020/s0226-Covid-19-spread.html](https://www.cdc.gov/media/releases/2020/s0226-Covid-19-spread.html), last accessed April 17, 2020).

7 52. On March 4, 2020, the first COVID-19 fatality was reported in California.

8 53. As COVID-19 cases continued to increase in certain areas of the United
9 States, on March 4, 2020 Congress passed emergency funding of \$8.3 billion to aid in the
10 immediate health response to COVID-19.

11 54. On March 11, 2020, travel from Europe to the United States was restricted,
12 and the W.H.O. declared COVID-19 a pandemic. The term “pandemic” does not appear
13 anywhere as an excluded peril in this “All Risk” Policy.

14 55. On March 13, 2020, the President of the United States declared a national
15 emergency.

16 56. Yet, throughout this entire period from December 2019 until March 15,
17 2020, Musso & Frank had not suffered an interruption of its thriving business.

18
19 **C. The March 15, 2020 Public Order by Los Angeles Mayor Eric Garcetti (the**
20 **“Order”) causes Musso & Frank to close its doors, resulting in an interruption**
21 **of business.**

22 57. More than ten weeks after the first reported COVID-19 case, on March 15,
23 2020, Mayor Garcetti issued the Order based on a public health crisis. It mandated that
24 restaurants close by midnight of that date:

25 “3. All restaurants and retail food facilities in the City of Los Angeles
26 shall be prohibited from serving food for consumption on premises.
27 Restaurants and retail food facilities may continue to operate for purposes
28 of preparing and offering food to customers via delivery service, to be

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picked up or for drive-thru. For those establishments offering food pick-up options, proprietors are directed to establish social distancing practices for those patrons in the queue for pick-up (Exhibit 2).

58. Musso & Frank has never prepared or offered food to customers via delivery service, to be picked up or for drive-thru. Accordingly, the Order effectively forced Musso & Frank to shut its doors, resulting in a loss of functional use of its premises and an interruption of its business. The Order was the predominant cause of the suspension of Musso & Frank’s operation.

59. As of the date of the Order, March 15, 2020, Musso & Frank was not aware of the presence of any COVID-19 virus on its premises, and no employee or customer had reported a COVID-19 infection.

60. Four days later, on March 19, 2020, Mayor Garcetti issued a “safer at home” order where citizens were ordered to remain in their homes except for “essential activities or infrastructure,” and all public and private gatherings were prohibited (Exhibit 4). This order referenced the prior emergency orders prohibiting, among other things, restaurants from serving to dine-in customers and continued to prevent this activity. This “safer at home” order was extended to May 15, 2020 by Mayor Garcetti in another order on April 10, 2020 (Exhibit 5). These further orders constitute a continuing predominant cause of Musso & Frank’s losses.

D. After initially promising an investigation, Mitsui suddenly denies the claim with none whatsoever.

61. On March 19, 2020, Musso & Frank submitted a Property Loss Notice to Mitsui. The description of the loss stated “Business Income Loss/Civil Authority” (Exhibit 6).

62. On March 20, 2020, Jeff Kinkead, a Property Claims Specialist at Mitsui sent an e-mail purporting to conduct an investigation:

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“We have assigned the independent adjusting firm of Engle Martin and Associates to contact you to **begin our investigation** into this matter. Someone from Engle Martin will contact you shortly.

Please provide us with the following:

- A brief description of what happened and or loss or damage, if any.
- What was the location: 6663-6667 Hollywood Blvd., Los Angeles, CA or 6715 Hollywood Blvd, Ste. 201, Los Angeles CA.
- A brief description of the nature of your business at the above locate[i]on.
- Are there any other locations involved.
- A copy of any supporting documents for the business loss related to COVID-19.
- The total amount for which you are making claim.

The above should not be considered totally inclusive as we may request additional information once we review the above” (Exhibit 7, emphasis added).

63. Contrary to the promise by Mitsui, no one at Engle Martin ever contacted Musso & Frank to investigate the claim.

64. Instead, only one week later and without any further contact to Musso & Frank, on March 27, 2020, Mr. Kinkead sent a second e-mail, this time indicating that Engle Martin would **not** be investigating the loss and that he would be doing so himself: “I called you today and left a voicemail message in follow-up to my email below. **I will be investigating this loss** and Engle Martin will not be contacting you” (Exhibit 8, emphasis added).

65. And then, on April 1, 2020, without any further contact or investigation whatsoever, Mitsui denied the claim as follows:

1 “The MSI Policy does not provide coverage for the Policyholder’s Claim
2 because COVID-19 is not a covered cause of loss.... Here, the MSI Policy
3 specifically excludes coverage for ‘loss or damage caused by or resulting
4 from *any virus*, bacterium or other microorganism that induces or is
5 capable of inducing physical distress, illness or disease’ (the “Virus
6 Exclusion”). (Form CP 01 40 07 06 - Exclusion Of Loss Due To Virus Or
7 Bacteria) (emphasis added). Based on the information provided to date, it
8 appears that the Policyholder’s Claim arises out of a virus – COVID-19 –
9 and thus is excluded under the Policy. MSI, therefore, respectfully
10 declines coverage for the Claim under the Virus Exclusion” (Exhibit 9, p.
11 2, emphasis in original, footnote removed).

12
13 66. In the same April 1, 2020 denial letter, Mitsui also stated that COVID-19
14 did not cause the property to suffer “‘direct physical loss of or damage’ to insured
15 property” (*Id.*).

16 67. Pursuant to § 2695.7(b)(1) of the Regulations, Mitsui was required to state
17 in its April 1, 2020 denial letter all the factual, contractual, and legal grounds for
18 denying the claim (see, e.g., Exhibit 1, p. 3), thus forfeiting the right to raise additional
19 grounds to attempt to justify its denial of Musso & Frank’s claim.

20 68. As a result of Mitsui’s wrongful denial of the claim, at a time when the
21 government action required Musso & Frank to suspend all business operations, Musso
22 & Frank has been compelled to retain counsel and pursue this litigation in order to
23 obtain the benefits promised under the Policy.

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1 **FIRST CAUSE OF ACTION**

2 **(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

3 PLAINTIFF MUSSO & FRANK GRILL, INC. FOR A FIRST CAUSE OF ACTION
4 AGAINST DEFENDANTS MITSUI SUMITOMO INSURANCE USA INC. AND DOES 1
5 THROUGH 5 INCLUSIVE, FOR BREACH OF THE IMPLIED COVENANT OF GOOD
6 FAITH AND FAIR DEALING ALLEGES:

7 69. Musso & Frank incorporates by reference all paragraphs above as if set
8 forth in full in this cause of action.

9 70. Mitsui and DOES 1 through 5, inclusive, have breached their duty of good
10 faith and fair dealing owed to Musso & Frank in the following respects:

- 11 a. Unreasonably acting or failing to act in a manner that deprives Musso
12 & Frank of the benefits of the Policy;
- 13 b. Unreasonably engaging in a pattern and practice of acting or failing to
14 act in a manner that deprives their insureds of the benefits of policies
15 they issue;
- 16 c. Unreasonably failing to conduct a prompt, fair, balanced and thorough
17 investigation of all of the bases of Musso & Frank's claim;
- 18 d. Unreasonably engaging in a pattern and practice of failing to conduct a
19 prompt, fair, balanced and thorough investigation of all of the bases of
20 claims made under policies they issue;
- 21 e. Unreasonably failing to diligently search for and consider evidence
22 that supports coverage of Musso & Frank's claim;
- 23 f. Unreasonably engaging in a pattern and practice of failing of failing to
24 diligently search for and consider evidence that supports coverage of
25 claims;
- 26 g. Unreasonably failing to conduct an investigation to determine the
27 efficient proximate cause (predominant cause) of Musso & Frank's
28 loss;

- 1 h. Unreasonably engaging in a pattern and practice of failing to conduct
- 2 an investigation to determine the efficient proximate cause
- 3 (predominant cause) on claims made by insureds;
- 4 i. Unreasonably failing to give at least as much consideration to the
- 5 interests of Musso & Frank as they give to their own interests;
- 6 j. Unreasonably engaging in a pattern and practice of failing to give at
- 7 least as much consideration to the interests of their insureds as they
- 8 give to their own interests;
- 9 k. Unreasonably placing their own financial interests above the interests
- 10 of Musso & Frank;
- 11 l. Unreasonably engaging in a pattern and practice of placing their own
- 12 financial interests above the interests of their insureds;
- 13 m. Unreasonably failing to comply with the Regulations, including
- 14 § 2695.7(b)(1);
- 15 n. Unreasonably failing to apply the Policy's definitions and terms to
- 16 determine whether Musso & Frank's claim was covered; and
- 17 o. Unreasonably compelling Musso & Frank to institute this action to
- 18 obtain benefits due under the Policy.

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20 71. Musso & Frank is informed and believes, and thereon alleges, that the

21 foregoing unreasonable, malicious, oppressive and/or fraudulent misconduct was not

22 limited to Mitsui's and DOES 1 through 5's, inclusive, evaluation of this particular

23 claim, but represents an ongoing pattern and practice, which they apply to all of their

24 policyholders, that is specifically designed by Mitsui and DOES 1 through 5 to earn

25 illicit profits at the expense of their policyholders' rights. This ongoing pattern of

26 conduct constitutes institutional bad faith.

27 72. Mitsui's and DOES 1 through 5's, inclusive, institutional bad faith

28 constitutes reprehensible conduct because it is part of a repeated pattern of unfair

1 practices and not an isolated occurrence. The pattern of unfair practices constitutes a
2 conscious course of wrongful conduct that is firmly grounded in Mitsui's and DOES 1
3 through 5's, inclusive, established company policies and practices. Musso & Frank is
4 informed and believes and thereon alleges that Mitsui and DOES 1 through 5, inclusive,
5 have engaged in similar wrongful conduct as to other insureds and that they have
6 substantially increased its profits as a result of causing similar harm to others.

7 73. As a proximate result of the aforementioned conduct of Mitsui and DOES
8 1 through 5, inclusive, Musso & Frank has suffered, and will continue to suffer in the
9 future, damages under the Policy, plus interest and other economic and consequential
10 damages, for a total amount to be shown at the time of trial.

11 74. As a further proximate result of the aforementioned unreasonable conduct
12 of Mitsui and DOES 1 through 5, inclusive, Musso & Frank was compelled to retain
13 legal counsel to obtain the benefits due under the Policy. Therefore, Mitsui and DOES 1
14 through 5, inclusive, are liable to Musso & Frank for the attorneys' fees reasonably
15 necessary and incurred by Musso & Frank in order to obtain the Policy benefits. (*Brandt*
16 *v. Superior Court* (1985) 37 Cal.3d 812; *Cassim v. Allstate* (2004) 33 Cal.4th 780.)

17 75. The conduct of Mitsui and DOES 1 through 5, inclusive, was intended by
18 them to cause injury to Musso & Frank; and/or was despicable conduct carried on by
19 them with a willful and conscious disregard of Musso & Frank's rights, subjected
20 Musso & Frank to cruel and unjust hardship in conscious disregard of its rights; and/or
21 constituted an intentional misrepresentation or concealment of a material fact known to
22 Mitsui and DOES 1 through 5, inclusive, with the intention to deprive Musso & Frank of
23 property or legal rights or to otherwise cause injury, such as to constitute malice,
24 oppression or fraud under California Civil Code, § 3294. Musso & Frank is therefore
25 entitled to an award of punitive damages in an amount appropriate to punish and set
26 an example for other similarly situated insurers.

27 76. Mitsui's conduct was undertaken by its corporate officers, directors or
28 managing agents, identified herein as DOES 1 through 5, who were responsible for

1 claims supervision and operations, underwriting, communications, and/or decisions;
2 and/or this conduct was authorized by one or more of Mitsui's officers, directors or
3 managing agents; and/or one or more of Mitsui's officers, directors or managing agents
4 knew of the actions and adopted or approved that conduct after it occurred. This
5 conduct was, therefore, undertaken on behalf of Mitsui.

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7 **SECOND CAUSE OF ACTION**

8 **(Breach of Contract)**

9 PLAINTIFF MUSSO & FRANK GRILL, INC. FOR A SECOND CAUSE OF
10 ACTION AGAINST DEFENDANTS MITSUI SUMITOMO INSURANCE USA INC.
11 AND DOES 1 THROUGH 5, INCLUSIVE, FOR BREACH OF CONTRACT ALLEGES:

12 77. Musso & Frank incorporates by reference all paragraphs above as if set
13 forth in full in this cause of action.

14 78. Musso & Frank entered into a contract, the Policy, with Mitsui and DOES
15 1 through 5, inclusive. Mitsui and DOES 1 through 5, inclusive owed duties and
16 obligations to Musso & Frank under the Policy.

17 79. Musso & Frank did all, or substantially all, of the significant things that
18 the Policy required it to do.

19 80. Mitsui's and DOES 1 through 5's, inclusive, denial of Musso & Frank's
20 claim is not in accordance with the terms of the Policy and California law.

21 81. As a direct and proximate result of Mitsui's and DOES 1 through 5's,
22 inclusive, conduct and breach of their contractual obligations, Musso & Frank has
23 suffered damages under the Policy in an amount to be determined according to proof at
24 the time of trial, plus pre-judgment interest pursuant to California Civil Code, § 3289(b),
25 and other foreseeable and consequential damages according to proof and in amounts to
26 be determined at the time of trial.

1 THIRD CAUSE OF ACTION

2 (Negligence)

3 PLAINTIFF MUSSO & FRANK GRILL, INC. FOR A THIRD CAUSE OF
4 ACTION AGAINST DEFENDANTS HUB INTERNATIONAL INSURANCE SERVICES
5 INC. AND DOES 6 THROUGH 10, INCLUSIVE, FOR NEGLIGENCE ALLEGES:

6 82. Musso & Frank incorporates by reference all paragraphs above as if set
7 forth in full in this cause of action.

8 83. Musso & Frank brings this third cause of action in the alternative to its
9 first and second causes of action.

10 84. As set forth in Musso & Frank’s first and second causes of action and the
11 factual allegations of this Complaint, it asserts that there is full coverage under the
12 Policy for its loss. However, to the extent that there is a finding that the Policy does not
13 provide coverage, then Musso & Frank alleges in the alternative that HUB International
14 was negligent in the procurement of the Policy.

15 85. At all relevant times, HUB International, by and through its authorized
16 employees, and DOES 6 through 10, inclusive, represented to be registered, licensed
17 and authorized insurance brokers, who undertook the obligations to place insurance
18 coverage for Musso & Frank and to assist it with any questions or concerns it had about
19 the Policy.

20 86. In that process, HUB International and DOES 6 through 10, inclusive had
21 a duty to use reasonable care, diligence and judgment in procuring the insurance that
22 Musso & Frank requested.

23 87. HUB International and DOES 6 through 10, inclusive, sold the Policy to
24 Musso & Frank. In the process, they held themselves out to be experts in the field of
25 insurance, and in particular, experts in the field of insurance for restaurants.

26 88. For example, HUB International dedicates a section of its website to
27 “Restaurant Insurance” and promises that it will “serve up complete protection for your
28 business, your reputation and your livelihood” if the restaurant “contact[s] a HUB

1 broker,” and that “You prepare the dishes—we’ll prepare the protection”
2 ([https://www.hubinternational.com/ industries/hospitality-insurance/restaurant-](https://www.hubinternational.com/industries/hospitality-insurance/restaurant-insurance/)
3 [insurance/](https://www.hubinternational.com/industries/hospitality-insurance/restaurant-insurance/), last visited April 30, 2020). HUB International advertises its expertise in
4 insuring restaurants as follows:

5 “A **dining experience should not include food poisoning** or a kitchen fire
6 that forces staff and guests out into the street, but they can happen despite
7 your best efforts to prevent them. As a restaurateur, your reputation and
8 livelihood are on the line every day and there are countless matters to be
9 vigilant about.

10 That’s why you need a **plan that covers your entire business**. Our team of
11 hospitality risk professionals will help you develop a restaurant insurance
12 and risk management program that protects against physical property
13 catastrophes or damages, covers your liability in the event of lawsuits for
14 injury, and **insulates you from other events that could disrupt your
15 business or harm your restaurant’s good name**” (*Id.*, emphasis added).

16 89. During the procurement process of the Policy, HUB International
17 assumed additional duties by express agreement and/or holding itself out as an expert
18 in procuring business interruption coverage for restaurants.

19 90. HUB International and DOES 6 through 10, inclusive, undertook the
20 obligation and assumed a duty to place business interruption insurance coverage for
21 Musso & Frank. Accordingly, they owed Musso & Frank a duty of due care to see that
22 its interests were fully protected by the coverage that was requested by Musso & Frank
23 and promised by HUB International and DOES 6-10, inclusive. However, if Mitsui’s
24 interpretation is upheld, HUB International and DOES 6 through 10, inclusive,
25 misrepresented the nature, extent or scope of the coverage being offered and then
26 ultimately provided under the Policy.

27 91. HUB International and DOES 6 through 10, inclusive, knew that Musso &
28 Frank would rely, and it did justifiably rely, upon the experience, skill, and expertise of

1 HUB International, its office employees and DOES 6 through 10, inclusive, to obtain and
2 place sufficient coverage for the restaurant, even in the event of a virus.

3 92. HUB International and DOES 6 through 10, inclusive, represented that
4 they were ready and willing to perform the professional service of procuring insurance
5 coverage for Musso & Frank, which desired to obtain business interruption coverage
6 that would protect it against losses, including viruses. Viruses are one of the common
7 business interruption risks that restaurants face. For example, asymptomatic employees
8 or employees who fail to use proper sanitary practices may cause food poisoning of or
9 transmission of a virus to the restaurant's patrons, such as if the employee has hepatitis.
10 Hence, any business interruption policy with an exclusion for virus-related losses is of
11 suspect value to a restaurant. A restaurant buying coverage would reasonably expect
12 that if the policy being offered included such an exclusion, the broker would bring it to
13 its attention.

14 93. To the extent the coverage procured by HUB International and DOES 6
15 through 10, inclusive, for Musso & Frank does not provide coverage for the damages
16 suffered as alleged in this Complaint, HUB International and DOES 6 through 10,
17 inclusive, were negligent in their procurement and placement of the insurance.

18 94. As a proximate result of the aforementioned negligent conduct of HUB
19 International and DOES 6 through 10, inclusive, Musso & Frank has suffered damages,
20 including economic losses, for a total amount to be shown at the time of trial.

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PRAYER FOR RELIEF

WHEREFORE, Musso & Frank prays for judgment against Mitsui as follows:

AS TO THE FIRST CAUSE OF ACTION AGAINST DEFENDANTS MITSUI SUMITOMO INSURANCE USA INC. AND DOES 1 THROUGH 5, INCLUSIVE, FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING:

1. For damages for failure to pay benefits owed under the Policy, plus interest, in a sum to be determined at the time of trial;
2. For prejudgment interest on all damages awarded to Musso & Frank in accordance with California Civil Code, § 3287;
3. For attorneys' fees, witness fees, and costs of litigation incurred by Musso & Frank to obtain the Policy benefits in an amount to be determined at the time of trial;
4. For economic and consequential damages arising out of Mitsui's unreasonable failure to pay benefits owed under the Policy;
5. For punitive and exemplary damages in an amount appropriate to punish or set an example of Mitsui;
6. For costs of suit herein; and
7. For such other relief as the Court deems just and proper.

AS TO THE SECOND CAUSE OF ACTION AGAINST DEFENDANTS MITSUI SUMITOMO INSURANCE USA INC. AND DOES 1 THROUGH 5, INCLUSIVE, FOR BREACH OF CONTRACT:

1. For economic and consequential damages, in an amount to be determined according to proof at the time of trial;
2. For prejudgment interest on all damages awarded to Musso & Frank in accordance with California Civil Code, § 3289(b);
3. For costs of suit incurred herein; and
4. For such other and further relief as the Court deems just and proper.

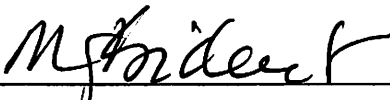
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AS TO THE THIRD CAUSE OF ACTION AGAINST DEFENDANTS HUB
INTERNATIONAL INSURANCE SERVICES INC. AND DOES 6 THROUGH 10,
INCLUSIVE, FOR NEGLIGENCE:

1. For damages, including economic losses, in an amount to be determined according to proof at the time of trial;
2. For an award of interests and costs; and
3. For such other and further relief as the Court deems just and proper.

Dated: May 1, 2020

SHERNOFF BIDART ECHEVERRIA LLP

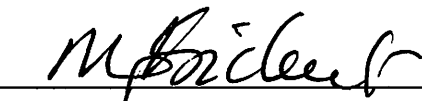
By: 
MICHAEL J. BIDART
RICARDO ECHEVERRIA
Attorneys for Plaintiff

JURY DEMAND

Plaintiff hereby demands a jury trial.

Dated: May 1, 2020

SHERNOFF BIDART ECHEVERRIA LLP

By: 
MICHAEL J. BIDART
RICARDO ECHEVERRIA
Attorneys for Plaintiff