

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION**

LDWB #2 LLC dba Lonesome Dove
Austin, a limited liability company,

Plaintiff,

vs.

FCCI INSURANCE COMPANY, a
corporation,

Defendant.

CASE NO. 1:20-cv-00425

COMPLAINT AT LAW

Plaintiff, LDWB #2 LLC dba Lonesome Dove Austin (hereinafter “Plaintiff” or “Lonesome Dove”), by and through its attorneys, for its cause of action against Defendant, FCCI INSURANCE COMPANY (“FCCI” or “Defendant”), states as follows:

PARTIES

1. At all relevant times, Lonesome Dove is a Texas limited liability company, with its principal place of business in Austin, TX authorized to do business in the State of Texas, County of Travis. Lonesome Dove owns, operates, manages, and/or controls the restaurant Lonesome Dove Austin.

2. At all relevant times, FCCI is a Florida corporation doing business in the County of Travis, State of Texas. FCCI’s principal place of business is located at 6300 University Parkway, Sarasota, FL 34240. FCCI is transacting the business of insurance in the state of Texas and the basis of this suit arises out of such conduct. Specifically, FCCI issued Policy Number CPP100048360-00 (“The Policy”) for Plaintiff’s property for the period of June 15, 2019 through June 15, 2020. A true and correct copy of The Policy is attached hereto as **Exhibit 1**.

3. All allegations in this Petition are based on information and belief and/or are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. Whenever allegations in this Petition are contrary or inconsistent, Plaintiff intends such allegations to be plead in the alternative.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(2), as there exists complete diversity of citizenship between the parties, and the value of Plaintiff's claims against Defendant exceeds the sum of \$75,000, exclusive of interest and costs.

5. Venue is proper in the United States District Court for the Western District of Texas, Austin Division pursuant to 28 U.S.C. § 1391(a) because a substantial part of the events giving rise to Plaintiff's claim occurred in this District, and specifically in the county of Travis.

FACTUAL BACKGROUND

6. On or around June 15, 2019, FCCI entered into a contract of insurance with Plaintiff in the event of a covered loss or damage.

7. Under this contract, Plaintiff agreed to make premium payments to FCCI in exchange for FCCI's promise to indemnify the Plaintiff for losses including, but not limited to, business income losses at the insured property located at 121 W. 5th Street, Austin, TX 78701-2908 a/k/a 419 Colorado Street, Austin, TX 78701 (hereinafter "Insured Premises).

8. The Insured Premises includes the well-known restaurant The Lonesome Dove Austin which is located in the City of Austin, County of Travis – specifically at 121 W. 5th Street, Austin, TX 78701-2908 a/k/a 419 Colorado Street, Austin, TX 78701, which is owned, leased by, managed and/or controlled by Plaintiff.

9. The Insured Premises is covered under The Policy. The Policy lists that address as an Insured Premises as shown in Exhibit 1 and Image 1 below:

SCHEDULE OF LOCATIONS			Policy Number CPP100048360-00
FCCI Insurance Company			
Named Insured LDWB #2 LLC		Effective Date: 06-15-19 12:01 A.M., Standard Time	
Agent Name HIGGINBOTHAM INSURANCE AGENCY INC		Agent No. 07014-001	
Loc. No.	Bldg. No.	Designated Locations (Address, City, State, Zip Code)	Occupancy
001	001	121 W 5th St, Austin, TX 78701-2908	

Image 1

10. The Policy is currently in full effect, providing property, business personal property, business income and extra expense, and additional coverages for Plaintiff between the period of June 15, 2019 through June 15, 2020.

11. The Business Income (And Extra Expense) Coverage Form of The Policy provides, in part, the following as shown in **Exhibit 1** and Image 2 below:

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 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. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.

Image 2

12. The Business Income (And Extra Expense) Coverage Form of The Policy also provides, in part, the following as to Extra Expense shown in **Exhibit 1** and Image 3 on the following page:

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 incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss.

We will pay Extra Expense (other than the expense to repair or replace property) to:

- (1) Avoid or minimize the "suspension" of business and to continue operations at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location.
- (2) Minimize the "suspension" of business if you cannot continue "operations".

We will also pay Extra Expense to repair or replace property, but only to the extent it reduces the amount of loss that otherwise would have been payable under this Coverage Form.

Image 3

13. The Policy applies to the actual loss of business income sustained and necessary and reasonable extra expenses incurred when the operations of the business are suspended due to the direct physical loss of or damage to the Insured Premises that is not excluded.

14. The Policy also includes "Civil Authority" additional coverages as shown in **Exhibit 1** and in part in Image 4 on the following page:

5. Additional Coverages

a. Civil Authority

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

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

Image 4

15. The Policy further provides for additional coverages regarding “Claims Expense.” This includes reasonable and necessary expenses incurred by an insured for attorney fees, accounting fees, investigation costs, expert witness fees, and similar expenses necessary to prepare a proof of loss or providing exhibits or documentation in connection with a covered claim.

16. Plaintiff faithfully paid policy premiums to FCCI to specifically provide all risk coverage, including the actual loss of business income due to the necessary interruption of business

operations due to direct physical loss of or direct physical damage to property as well as a civil authority shutdown.

17. On March 11, 2020, the World Health Organization officially recognized the COVID-19 pandemic.

18. It is the public policy intent and intent of each county to close businesses including Plaintiff's for the public good, welfare, and benefit.

19. On March 14, 2020, in order to protect the public, "promote the health and safety of Austin residents", and "protect the health and welfare of Texans", Steve Adler, the Mayor for the City of Austin, issued an order banning community gatherings of 250 people or more ("Adler Gatherings Order"). The order specifically included restaurants as one of the applicable locations. A true and correct copy of the Community Gatherings Order is attached hereto as **Exhibit 2**.

20. On March 19, 2020, in order to protect the public, Greg Abbott, the Governor of Texas issued Executive Order No. GA-08 relating to COVID-19 preparedness and mitigation ("Abbott Order GA-08"). The order prohibited eating and drinking at bars and restaurants. A true and correct copy of Abbott Order GA-08 is attached hereto as **Exhibit 3**.

21. On March 24, 2020, in order to protect the public, Mayor Adler issued an order directing all individuals living in the City of Austin to stay at home except that they may leave to provide or receive certain essential services or engage in certain essential activities ("Adler Shelter at Home Order"). A true and correct copy of the Adler Shelter at Home Order is attached hereto as **Exhibit 4**.

22. As a result of the Adler Gatherings Order, Abbott Order GA-08, and Adler Shelter at Home Order (collectively "Orders"), Plaintiff has sustained actual loss of business income and necessary extra expenses due to its necessary suspension of its operations and the prohibited access to its premises. This is a business interruption as defined in The Policy.

23. It is the public policy intent and intent of each county and state to close businesses including Plaintiffs' for the public good, welfare, and benefit. The Orders were reasonably

necessary to protect the public good, welfare, and benefit. The Orders were specifically tailored to the nature of the COVID-19 pandemic.

24. The necessary suspension of Plaintiff's business operations caused by the Orders constitute a Covered Cause of Loss as defined in The Policy. Because The Policy covers all risk of direct physical loss that is not excluded, the governmental order prevented the business from operating which is a physical loss of use which is not excluded.

25. A declaration by the Court determining that The Orders trigger coverage under the insurance policy provided by FCCI will prevent the Plaintiff from being left without vital coverage it acquired to ensure the survival of its business due to the shutdown caused by the governmental authorities' response. As a result of the Orders, Plaintiff has incurred, and continues to incur, a substantial loss of business income and additional expenses.

COUNT I
DECLARATORY RELIEF

26. Plaintiff re-alleges and incorporates by reference into this cause of action each and every allegation set forth in each and every paragraph of this Complaint.

27. Under 28 U.S.C. § 2201 *et seq.*, the court may declare rights, and other legal relations whether or not further relief is or could be claimed.

28. An actual controversy has arisen between Plaintiff and FCCI as to their rights, duties, responsibilities, and obligations of the parties under The Policy as a result of the Orders that is within the jurisdiction of this Court. Resolution of the duties, responsibilities, and obligations of the parties is necessary as no adequate remedy at law exists and a declaration of the Court is needed to resolve the dispute and controversy.

29. Plaintiff seeks a Declaratory Judgment to determine whether the Orders constitute a direct physical loss of or damage to The Premises as defined in the Policy.

30. Plaintiff seeks a Declaratory Judgment to determine whether the necessary suspension of Plaintiff's business operations caused by the Orders constitute a direct physical loss as defined in The Policy.

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

32. Plaintiff further seeks a Declaratory Judgment to determine whether the Adler Gatherings Order, Abbott Order GA-08, and Adler Shelter at Home Order trigger coverage under The Policy if Plaintiff can prove that there has been a direct physical loss of or damage to the property as defined in The Policy.

33. Plaintiff further seeks a Declaratory Judgment to determine whether claim preparation coverage is available for making a claim under The Policy.

PRAYER FOR RELIEF

Wherefore, Plaintiff herein, LDWB #2 LLC dba Lonesome Dove Austin, prays as follows:

- 1) For a Declaration that the Orders constitute a direct physical loss of or damage to The Premises as defined in The Policy;
- 2) For a Declaration that the necessary suspension of Plaintiff's business operations caused by the Orders constitute a direct physical loss as defined in The Policy;
- 3) For a Declaration that the Orders constitute a prohibition of access to Plaintiff's Insured Premises by a Civil Authority as defined in The Policy;
- 4) For a Declaration that the Orders trigger coverage under The Policy if Plaintiff can prove that there has been a direct physical loss of or damage to the property as defined in the policy;
- 5) For a declaration that the Orders trigger coverage under The Civil Authority provision of the Policy if Plaintiff can prove that there has been a physical loss of or damage to the property;

- 6) For a declaration that claim preparation coverage is available for making a claim under The Policy; and
- 7) For such other relief as the Court may deem proper.

DEMAND FOR A JURY TRIAL

Plaintiff herein, LDWB #2 LLC dba Lonesome Dove Austin, requests a jury trial.

DATED: April 22, 2020

Respectfully submitted,

By: /s/ Scott M. Hendler

Attorneys for Plaintiff

HENDLER FLORES LAW, PLLC

Scott M. Hendler

Rebecca Ruth Webber

1301 West 25th Street, Suite 400

Austin, Texas 78705

Tel: (512) 439-3202

shendler@hendlerlaw.com

rwebber@hendlerlaw.com

OF COUNSEL:

KABATECK LLP

Brian S. Kabateck (*Pro Hac Vice to be Submitted*)

Christopher Noyes (*Pro Hac Vice to be Submitted*)

Michael Childress (*Pro Hac Vice to be Submitted*)

Marina R. Pacheco (*Pro Hac Vice to be Submitted*)

633 West Fifth Street, Suite 3200

Los Angeles, California 90071

Tel: (213) 217-5048

bsk@kbklawyers.com

cn@kbklawyers.com

mc@kbklawyers.com

mp@kbklawyers.com

HART McLAUGHLIN & ELDRIDGE, LLC

Steven A. Hart (*Pro Hac Vice to be Submitted*)

Robert J. McLaughlin (*Pro Hac Vice to be Submitted*)

John (Jack) B. Prior (*Pro Hac Vice to be Submitted*)

22 W. Washington Street, Suite 1600

Chicago, Illinois 60602
Tel: (312) 955-0545
shart@hmelegal.com
rmclaughlin@hmelegal.com
jprior@hmelegal.com