

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

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MANGIA RESTAURANT CORP.,

Index No.

Plaintiffs,

**VERIFIED COMPLAINT**

-against-

UTICA FIRST INSURANCE COMPANY,

Defendants.

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The Plaintiff, by its attorneys of record, Sacco & Fillas, LLP, as and for its Verified Complaint against the Defendant, respectfully alleges, upon information and belief, as follows:

### **I. PARTIES AND JURISDICTION**

1. That, at all times hereinafter mentioned, the Plaintiff MANGIA RESTAURANT CORP., dba OVELIA (“OVELIA”) is located at 3401 30<sup>th</sup> Avenue Astoria, NY 11103.
2. That, at all times hereinafter mentioned, the Defendant UTICA FIRST INSURANCE COMPANY (“UTICA”) is located at 5981 Airport Rd., Oriskany, NY 13424.
3. Jurisdiction exists in the Supreme Court, County of Queens because Queens County is the county in which the subject premises of this action is located.
4. The basis of venue is CPLR § 503(c): Venue Based on Corporation. Plaintiff is a domestic corporation authorized to transact business in the state and as such is deemed a resident of the county in which its principal office is located, that being Queens County.

### **II. NATURE OF THE ACTION**

5. Plaintiff Mangia Restaurant Corp., owns and operates a full-service bar and restaurant known as OVELIA, also known as “OVEILA” in the Policy. OVELIA’s futures are

now threatened by COVID-19 (a.k.a. the “coronavirus” or “SARS-CoV-2”).

6. To protect its business in the event that they suddenly had to suspend operations for reasons outside of its control, or in order to prevent further property damage, Plaintiff purchased insurance coverage from UTICA, including special property coverage, as set forth in UTICA’s Business Income (and Extra Expense) Coverage Form (“Coverage Policy Form BP-200”).

7. UTICA’s Coverage Policy Form BP-200 provides “Business Income” coverage, which promises to pay for loss due to the necessary suspension of operations following physical loss or damage to property.

8. UTICA’s Coverage Policy Form BP-200 also provides “Civil Authority” coverage, which promises to pay for loss caused by the action of a civil authority that prohibits access to the insured premises.

9. UTICA’s Coverage Policy Form BP-200 also provides “Extra Expense” coverage, which promises to pay the expense incurred to minimize the suspension of business and to continue operations.

10. UTICA’s Coverage Policy Form BP-200, under a section entitled “Duties in the Event of Loss” mandates that the insured “must see that the following are done in the event of loss”. . . [t]ake all reasonable steps to protect the Covered Property from further damage and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim.”

11. Plaintiff OVELIA was forced to suspend or reduce business due to COVID-19 and the resultant orders issued by civil authorities in New York mandating the suspension of business for on-site services, as well as in order to take necessary steps to prevent further damage

and minimize the suspension of business and continue operations.

12. Upon information and belief, UTICA has denied Plaintiff's claim submitted pursuant to its policy, and refused to pay its insured under its Business Income, Civil Authority, Extra Expense, and Sue and Labor coverages for losses suffered due to COVID-19, any executive orders by civil authorities that have required the necessary suspension of business, and any efforts to prevent further property damage or to minimize the suspension of business and continue operations.

### **III. FACTUAL BACKGROUND**

#### A. The Coverage Policy Form BP-200

13. In return for the payment of a premium, UTICA issued Policy No. BOP 4469347 to OVELIA, for a policy period of June 1, 2019 to June 1, 2020. Policy No. BOP 4469347 is attached hereto as **Exhibit A**. OVELIA has performed all of its obligations under Policy No. BOP 4469347, including the payment of premiums.

14. In context to the insurance industry in the majority of the world, property insurance is sold on a specific peril basis. Such policies cover a risk of loss if that risk of loss is specifically listed (e.g., hurricane, earthquake, H1N1, etc.). Most property policies sold in the United States, however, including those sold by UTICA insurance, are all-risk property damage policies. These types of policies cover all risks of loss except for risks that are expressly and specifically excluded. Under the heading "Covered Causes of Loss," UTICA agreed to pay for direct physical loss "unless the loss is excluded or limited" in the policies.

15. In the Coverage Policy Form BP-200, UTICA agreed to pay for its insured's actual loss of Business Income sustained due to the necessary suspension of its operations during

the “period of restoration” caused by direct physical loss or damage. A “slowdown or cessation” of business activities at the Covered Property is a “suspension” under the policy, for which UTICA agreed to pay for loss of Business Income during the “period of restoration” that begins 72 hours after the time of direct physical loss or damage.

16. “Business Income” means net income (or loss) before tax that Plaintiff would have earned and continuing normal operating expenses incurred, including payroll.

17. The presence of virus or disease can constitute physical damage to property, as the insurance industry has recognized since at least 2006. When preparing so-called “virus” exclusions to be placed in some policies, but not others, the insurance industry drafting arm, ISO, circulated a statement to state insurance regulators that included the following:

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.

18. In the Coverage Policy Form BP-200, UTICA also agreed to pay necessary Extra Expense that its insureds incur during the “period of restoration” that the insureds would not have incurred if there had been no direct physical loss or damage to the Covered Property.

19. “Extra Expense” includes expenses to avoid or minimize the suspension of business, continue operations, and to repair or replace property.

20. UTICA also agreed to “pay for the actual loss of Business Income” that Plaintiff sustains “and any Extra Expense caused by action of civil authority that prohibits access to” the Covered Property when a Covered Cause of Loss causes damage to property near the Covered

Property, the civil authority prohibits access to property immediately surrounding the damaged property, the Covered Property is within the prohibited area, and the civil authority action is taken “in response to dangerous physical conditions.”

21. UTICA’s Coverage Policy Form BP-200, under a section entitled “Duties in the Event of Loss” mandates that UTICA’s insured “must see that the following are done in the event of loss. . . [t]ake all reasonable steps to protect the Covered Property from further damage and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim.” This is commonly referred to as “Sue and Labor” coverage.

22. Losses caused by COVID-19 and the related orders issued by local, state, and federal authorities triggered the Business Income, Extra Expense, Civil Authority, and Sue and Labor provisions of the UTICA policy.

### ***B. The Covered Cause of Loss***

23. In December 2019, a novel (new) coronavirus known as SARS-CoV-2 was first detected in Wuhan, Hubei Province, China, and which caused an outbreak of a disease now known as COVID-19.

24. The coronavirus causing COVID-19 is thought to spread mainly from person to person, primarily through respiratory droplets produced when an infected person coughs or sneezes.<sup>1</sup>

25. The coronavirus spread globally, and on January 30, 2020, the World Health Organization designated the COVID-19 outbreak as a Public Health Emergency of International

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<sup>1</sup> See generally CDC Coronavirus Disease 2019 (COVID-19), <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last visited June 1, 2020).

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