



NAILAH K. BYRD
CUYAHOGA COUNTY CLERK OF COURTS
1200 Ontario Street
Cleveland, Ohio 44113

Court of Common Pleas

New Case Electronically Filed: COMPLAINT
April 3, 2020 15:40

By: ROBERT P. RUTTER 0021907

Confirmation Nbr. 1980421

MITCHELL BROTHERS ICE CREAM, INC., ET AL

CV 20 931683

vs.

CINCINNATI INSURANCE COMPANY

Judge: NANCY A. FUERST

Pages Filed: 11

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MITCHELL BROTHERS ICE CREAM, INC.
MITCHELL'S HOMEMADE ICE CREAM, INC.
P AND M AVON, LLC
MITCHELL TENANTS, LLC
MITCHELLS MANAGER, LLC
P AND M OHIO CITY, LLC
P AND M STRONGSVILLE, LLC
P AND M WESTLAKE, LLC
1867 West 25th Street
Cleveland, Ohio 44113

Plaintiffs

vs.

THE CINCINNATI INSURANCE COMPANY
6200 South Gilmore Road
Fairfield, Ohio 45014-5141

Defendant

CASE NO.:

JUDGE:

**COMPLAINT FOR DECLARATORY
RELIEF**

(With Jury Demand)

REQUEST FOR DECLARATORY RELIEF

1. Plaintiff Mitchell Brothers Ice Cream, Inc. is a corporation organized under Ohio law with its principal place of business at 1867 West 25th Street, Cleveland, Ohio. Mitchell's business is ice cream. It manufactures its own brand which it sells at various retail locations in Cuyahoga and Lorain counties.

2. Defendant The Cincinnati Insurance Company ("CIC") is also an Ohio corporation with its principal place of business in Ohio that sells insurance in Ohio.

3. At all relevant times, CIC insured Mitchell Brothers Ice Cream, Inc. A copy of the declarations page of the relevant policy, number EPP 040 15 36/EBA 040 15 36, is attached as Exhibit 1 ("the Policy"). The remaining plaintiffs are all additional named insureds in the policy, and all plaintiffs will be collectively referred to as "Mitchell."

4. The Policy provides coverage for Business Income (“BI”) loss, Extra Expense (“EE”), and loss due the actions of Civil Authority. The Policy addresses BI and EE coverage in the following forms:

- Building and Personal Property Coverage Form, FM 101 05 16. Coverage under this form includes Rental Value. The coverage limit is \$25,000. But this form is supplemented by CinciPlus Commercial Property Power XC+ (Expanded Coverage Plus) Endorsement, FA 258, to include BI from Dependent Properties.
- Business Income From Dependent Properties—Limited Form, FA 466 04 04, with a separate \$1,000,000 limit. The Dependent Property is the manufacturing location at 1867 West 25th Street, Cleveland.
- CinciPlus Commercial Property Power XC+ (Expanded Coverage Plus) Endorsement, FA 258. Per the Summary of Coverage Limits, FA 4098 01 09, the expanded coverage under this form has a blanket limit of \$150,000 and a \$100,000 limit for BI and EE.
- Business Income Changes—Waiting Period, FA 458 04 04, which sets the Waiting Period at 72 hours.
- Business Income (and Extra Expense) Coverage Form, FA 213 05 16, with a blanket limit of \$5,044,200. This form includes additional coverage for loss due to Civil Authority.

5. While the Policy was in force, Mitchell sustained a loss due to coronavirus, also referred to as COVID-19, and the civil authority orders issued by the Governor of Ohio that have addressed the state and nation-wide spread of the coronavirus (the “Pandemic”).

6. It has been widely reported that coronavirus can live on inert surfaces. Exactly how long it can live on various surfaces is disputed and/or not yet fully known and is the subject of ongoing research. The same is true of airborne particles containing the virus.

7. In consequence of the danger posed by the coronavirus and the Pandemic, the Governor of Ohio issued several executive orders. Executive Order 2020-01D, issued on March 9, 2020, declared a state of emergency “for the entire State to protect the well-being of the citizens of Ohio from the dangerous effects of COVID-19 . . .” The order declared that:

It may be possible that individuals can get COVID-19 by touching a surface or object that has virus on it and then touching their own mouth, nose or eyes.

8. On March 15, 2020, Ohio restricted food and beverage sales to carry-out and delivery only, with no onsite consumption permitted. The stated goal of this order was to slow the spread of the virus by minimizing in-person interaction “in an environment with a multitude of hard surfaces.” The order reiterated that “It may be possible that individuals can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose or eyes.” Also that:

Previously studied human coronaviruses (including SARS, which is very closely related to COVID-19) can survive on paper, wood, glass, plastic up to 4-5 days. *Persistence of coronaviruses on inanimate surfaces and their inactivation with biocidal agents*, The Journal of Hospital Infection, March 2020, Volume 104, Issue 3, Pages 246-251.

9. Effective March 23rd, 2020, Ohio civil authority ordered Ohio residents to stay at home and ordered all non-essential businesses in Ohio to cease all activities. Mitchell’s does not qualify as an Essential Business, and so had to cease retail operations at all of its locations. It maintained a limited staff to continue the manufacture of ice cream for resale to grocery stores.

10. Coronavirus and the Pandemic cause direct physical loss and property damage. COVID-19 and the Pandemic are physically impacting public and private property in Ohio and throughout the country. The executive orders issued by the Governor of Ohio in response to the Pandemic have caused direct physical loss to Mitchell’s properties and premises. Any effort for CIC to deny that COVID-19 and/or the Pandemic and/or the executive orders at issue cause physical loss and/or damage would constitute a false representation that could endanger policyholders and the public.

11. As of April 3, 2020, Ohio had 2,902 confirmed cases of coronavirus. Cuyahoga County has more coronavirus cases than any other county in the state—a total of 663. Coronavirus has killed at least 81 people in Ohio as of the date of this filing; at least 12 from Cuyahoga County.

12. It is readily apparent that people and property throughout Cuyahoga County are infected with the virus, and that the virus has done, and continues to do, significant property damage in Cuyahoga County.

13. Based on the prevalence of the virus in Cuyahoga County, it is probable that Mitchell's insured locations have sustained direct physical loss or damage due to the presence of coronavirus, and has unquestionably sustained direct physical loss of and at those locations as the result of the Pandemic and/or civil authority orders issued by the Governor of Ohio.

14. Mitchell submitted a timely insurance claim to CIC.

15. CIC issued a reservation of rights letter in which it questioned whether Mitchell sustained a loss covered by the Policy.

16. Since there is a dispute about whether or not Mitchell has coverage under CIC's policy for the loss sustained and to be sustained in the future, Mitchell is entitled to declaratory relief from this Court pursuant to Ohio Civil Rule 57 and R.C. §2721.01 to 2721.15.

17. Mitchell is entitled to a declaration that (1) Mitchell sustained direct physical loss or damage as a result of the coronavirus pandemic; (2) coronavirus is a covered cause of loss under the Policy; (3) the losses incurred by Mitchell as the result of the executive orders issued by the Governor of Ohio are covered losses under the Policy; (4) CIC has not and cannot prove the application of any exclusion or limitation; (5) Mitchell is entitled to coverage for its **Business Income** loss and **Extra Expense** resulting from coronavirus; (6) Mitchell is entitled to coverage

for loss due to the actions of Ohio's civil authorities; (7) Mitchell has coverage for any substantially similar civil authority order in the future that limits or restricts the public's access to Mitchell's stores; and (8) any other issue that may arise during the course of litigation that is a proper issue on which to grant declaratory relief.

18. Mitchell does not seek a determination of its damages resulting from the coronavirus pandemic. If there is a dispute between the parties as to the amount of the loss, the Policy provides that such a dispute should be resolved by **Appraisal**:

Appraisal

If we and you disagree on the amount of "Business Income" or Extra Expense "loss", either may make written demand for an appraisal of the "loss". In this event, each party will select a competent and impartial appraiser.

The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the amount of "Business Income" or Extra Expense "loss". If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding.

Each party will:

- a. Pay its chosen appraiser; and
- b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we still retain our right to deny the claim. (FA 213 0516, pages 4-5 of 9)

19. Mitchell demanded appraisal before filing this lawsuit. Plaintiff prays for declaratory relief from the Court that CIC must resolve any dispute about the amount of loss via Appraisal. Mitchell also requests the Court to appoint the umpire if the appraisers cannot agree.

20. Plaintiff prays for any further relief the Court deems proper, including attorney fees, interest, and costs as allowed by law or in the exercise of the Court's equitable jurisdiction.

WHEREFORE, plaintiff Mitchell Brothers Ice Cream, Inc. and the other plaintiffs seek judgment against the defendant, as set forth above, plus interest, costs, and attorney fees as allowed by law.

Respectfully submitted,

/s/ Robert P. Rutter

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JURY DEMAND

Plaintiff hereby requests, pursuant to Civil Rule 38(B), a trial by jury of any of the issues in the within lawsuit that are properly triable to a jury.

/s/ Robert P. Rutter

ROBERT P. RUTTER
Attorney for Plaintiff



The Cincinnati Insurance Company

A Stock Insurance Company

Headquarters: 6200 S. Gilmore Road, Fairfield, OH 45014-5141

Mailing address: P.O. Box 145496, Cincinnati, OH 45250-5496

www.cinfin.com ■ 513-870-2000

COMMON POLICY DECLARATIONS

Billing Method: DIRECT BILL

POLICY NUMBER EPP 040 15 36 / EBA 040 15 36

NAMED INSURED MITCHELL BROTHERS ICE CREAM INC

REFER TO IA905

ADDRESS 1867 W 25TH ST
(Number & Street, CLEVELAND, OH 44113-3406
Town, County,
State & Zip Code)

Previous Policy Number:

EPP0401536

Policy Period: At 12:01 A.M., STANDARD TIME AT YOUR MAILING ADDRESS SHOWN ABOVE

All coverages except Automobile and / or Garage

Policy number: EPP 040 15 36 FROM: 09-01-2019 TO: 09-01-2022

Automobile and / or Garage

Policy number: EBA 040 15 36 FROM: 09-01-2019 TO: 09-01-2020

Agency ASSURED PARTNERS OF OHIO, LLC 34-466
City RICHFIELD, OH

Legal Entity / Business Description

ORGANIZATION (ANY OTHER)

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

FORMS APPLICABLE TO ALL COVERAGE PARTS:

IL0017	11/98	COMMON POLICY CONDITIONS
IA102A	09/08	SUMMARY OF PREMIUMS CHARGED
IA904	04/04	SCHEDULE OF LOCATIONS
IA905	02/98	NAMED INSURED SCHEDULE
IA4236	01/15	POLICYHOLDER NOTICE TERRORISM INSURANCE COVERAGE
IA4493	09/17	NOTICE TO POLICYHOLDERS - EXTERIOR INSULATION AND FINISH SYSTEMS ("EIFS") AND DIRECT-APPLIED EXTERIOR FINISH SYSTEMS ("DEFS") EDITION 09 17
IP446	08/01	NOTICE TO POLICYHOLDERS
IA4006	07/10	SPECIAL PER OCCURRENCE DEDUCTIBLE ENDORSEMENT
IA4121OH	01/16	OHIO CHANGES - CANCELLATION AND NONRENEWAL
IA4238	01/15	CAP ON LOSSES FROM CERTIFIED ACTS OF TERRORISM
IA4338	05/11	SIGNATURE ENDORSEMENT
IA460	01/16	PROTECTIVE SAFEGUARDS
FM502	07/08	COMMERCIAL PROPERTY COVERAGE PART DECLARATIONS
GA532	07/08	COMMERCIAL GENERAL LIABILITY COVERAGE PART DECLARATIONS
GA536OH	03/10	OHIO EMPLOYERS LIABILITY DEFENSE EXPENSES COVERAGE PART DECLARATIONS
CA519XCP	03/09	CINCIPLUS® CRIME XC+® (EXPANDED COVERAGE PLUS) COVERAGE PART DECLARATIONS
CA516	03/09	CRIME AND FIDELITY COVERAGE PART DECLARATIONS (COMMERCIAL ENTITIES)

FORMS APPLICABLE TO ALL COVERAGE PARTS:

AA505 03/06 BUSINESS AUTO COVERAGE PART DECLARATIONS

USC513 05/10 COMMERCIAL UMBRELLA LIABILITY COVERAGE PART DECLARATIONS

08-19-2019 10:01

Countersigned _____ (Date) By _____ (Authorized Representative)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SCHEDULE OF LOCATIONS

<u>LOC.</u>	<u>STREET ADDRESS</u>	<u>CITY</u>	<u>STATE</u>	<u>ZIP CODE</u>
1	19700 DETROIT RD ROCKY RIVER, OH 44116-1814			
2	26161 DETROIT RD WESTLAKE, OH 44145-2430			
3	6130 KRUSE DR SOLON, OH 44139-2300			
4	2101 RICHMOND RD BEACHWOOD, OH 44122-1391			
5	35520 DETROIT RD AVON, OH 44011-1640			
6	500 SOUTHPARK CTR # HU1400 STRONGSVILLE, OH 44136-9320			
7	1867 W 25TH ST CLEVELAND, OH 44113-3406			
8	11444 UPTOWN AVE CLEVELAND, OH 44106-4363			
9	18832 WESTWOOD DR STRONGSVILLE, OH 44136-3432			
10	27155 DETROIT RD WESTLAKE, OH 44145-2375			
11	998 CENTER RD AVON, OH 44011-1204			
12	3400 TUTTLE ROAD SHAKER HEIGHTS, OH 44122			

THE CINCINNATI INSURANCE COMPANY

A Stock Insurance Company

COMMERCIAL PROPERTY COVERAGE PART DECLARATIONS

Attached to and forming part of POLICY NUMBER: EPP 040 15 36

Named Insured is the same as it appears on the Common Policy Declarations unless otherwise stated here.

Loc. (address)
 PER STATEMENT OF VALUES ON FILE
 REFER TO IA904

COVERAGE PROVIDED					OPTIONAL COVERAGES Applicable only when an entry is made				
Item	Coverage	Limits	Coin- surance	Covered Cause Of Loss	Business Income Indemnity				
					Inflation Guard (%)	Replace- ment Cost (x)	Replace- ment Cost Ind. Stock (x)	Agreed Value (x)	Monthly Limit (fraction)
	BLANKET BUILDING	6,579,797	100%	SPECIAL		X		X	
	BLANKET BUSINESS PERSONAL PROPERTY	4,680,810	100%	SPECIAL		X		X	
	BLANKET BUSINESS INCOME W/EXTRA EXPENSE (b)	5,044,200	90%	SPECIAL				X	

DEDUCTIBLE: \$500.00 unless otherwise stated \$ 1,000

MORTGAGE HOLDER

Item	Name and Address
5-1	GROWTH CAPITAL CORP, U S SMALL BUSINESS ADMIN ATIMA 1360 E 9TH ST STE 950 CLEVELAND, OH 44114-1737
7-1	KEYBANK NATIONAL ASSOCIATION 4910 TIEDEMAN RD BROOKLYN, OH 44144-2338

FORMS AND / OR ENDORSEMENTS APPLICABLE TO THIS COVERAGE PART:

CP1515	06/95	BUSINESS INCOME REPORT/WORK SHEET
FM101	05/16	BUILDING AND PERSONAL PROPERTY COVERAGE FORM (INCLUDING SPECIAL CAUSES OF LOSS)
FA466	04/04	BUSINESS INCOME FROM DEPENDENT PROPERTIES LIMITED FORM
FA4168	05/16	NOTICE TO POLICYHOLDERS COMMERCIAL PROPERTY COVERAGE PART DESCRIPTION OF REVISIONS EDITION 05 16
FA4078OH	05/17	OHIO CHANGES - COMMERCIAL PROPERTY
FA4098	01/09	CINCIPLUS® COMMERCIAL PROPERTY POWER XC+® (EXPANDED COVERAGE PLUS) ENDORSEMENT SUMMARY OF COVERAGE LIMITS
FA450	05/16	COMMERCIAL PROPERTY CONDITIONS
FA458	04/04	BUSINESS INCOME CHANGES - WAITING PERIOD
FA472	05/16	UTILITY SERVICES - DIRECT DAMAGE
FA480	02/16	LOSS PAYABLE PROVISIONS
FM201	05/16	BUSINESS PERSONAL PROPERTY EXTENSION OF COVERAGE ENDORSEMENT
FA258	05/16	CINCIPLUS® COMMERCIAL PROPERTY POWER XC+® (EXPANDED COVERAGE PLUS) ENDORSEMENT
FA260	05/16	MANUFACTURERS' ADDITIONAL COVERAGE

FORMS AND / OR ENDORSEMENTS APPLICABLE TO THIS COVERAGE PART:

FA223 05/16 WATER BACKUP DISCHARGED FROM SEWERS, DRAINS, SEPTIC OR SUMP PUMP
SYSTEMS ENDORSEMENT
FA245 05/11 EQUIPMENT BREAKDOWN COVERAGE (INCLUDING PRODUCTION MACHINERY)
FA213 05/16 BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM
