

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

GRO HOLDCO LLC,

Plaintiff,

Case No.: _____

v.

Hon. _____

THE HARTFORD INSURANCE
COMPANY,

Defendant.

Jeffrey G. Muth (P65041)
James A. Buster (P81186)
MILLER JOHNSON
45 Ottawa Avenue, S.W., Suite 1100
Grand Rapids, MI 49503
(616) 831-1700
muthjg@millerjohnson.com
busterj@millerjohnson.com
Attorneys for Plaintiff

Daniel I. Schlessinger (322102)
Tamra J. Miller (6285032)
JASZCZUK P.C.
30 South Wackerk Drive, Suite 2200
Chicago, Illinois 60606
(312) 442-0509
dschlessinger@jaszczuk.com
tmiller@jaszczuk.com
*To be Admitted Pro Hac Vice Counsel for
Plaintiff*

Michael T. Small (Bar No. 33650)
HARVEY KRUSE, P.C.
3210 Eagle Run Drive NE, Suite 204
Grand Rapids, Michigan 49525
(616) 771-0050
msmall@harveykruse.com
Attorneys for Defendant

Sarah D. Gordon
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429-8005
sgordon@steptoe.com
*Pro Hac Vice Application Forthcoming for
Defendant*

DEFENDANT'S NOTICE OF REMOVAL

DEFENDANT’S NOTICE OF REMOVAL

Defendant “The Hartford Insurance Company” (“Defendant”),¹ by and through its undersigned counsel, hereby provides notice pursuant to 28 U.S.C. §§ 1332, 1441, and 1446 of the removal of *GRO Holdco LLC v. The Hartford Insurance Company*, No. 20-07345-CBB (“State Court Action”) from the Circuit Court for the County of Kent, Michigan, to the United States District Court for the Western District of Michigan. Defendant removes this case based on diversity of citizenship in accordance with 28 U.S.C. § 1332. In support of this Notice of Removal, pursuant to 28 U.S.C. § 1446(a), Defendant provides the following short and plain statement of the grounds for removal:

I. INTRODUCTION

1. On October 5, 2020, Plaintiff GRO Holdco LLC (“Plaintiff”) commenced this action in the Circuit Court of Kent County, Michigan, with the filing of a Complaint, captioned *GRO Holdco LLC v. The Hartford Insurance Company*, assigned Case No. 20-07345-CBB. (*See* Affidavit of Michael T. Small (“Small Aff.”), Ex. 1 (“Complaint” or “Compl.”).) Plaintiff served Defendant on October 15, 2020. This Notice of Removal is timely filed within thirty (30) days of service in accordance with 28 U.S.C. § 1446(b).

¹ Counsel for Hartford Fire Insurance Company (“Hartford Fire”) notified Plaintiff’s counsel that “The Hartford Insurance Company” is a non-existent entity. (*See* Small Aff., ¶ 15, Ex. 13.) *See* The Hartford Legal Notice, <https://www.thehartford.com/legal-notice> <last accessed on Nov. 5, 2020>. The Complaint and its attachments allege that the loss or damage Plaintiff suffered was as to property. Hartford Fire issued the Property Choice portion of the policy at issue in this lawsuit – Policy No. 35 UUN BM2812. (Compl., Ex. A at Form HM 00 10 01 17 at p. 1.) Hartford Fire also is identified as the Writing Company in the June 5, 2020 denial letter attached as Exhibit C to the Complaint. (*See id.*, Ex. C at p. 2.) Counsel for Hartford Fire requested that Plaintiff’s counsel dismiss the lawsuit against The Hartford Insurance Company and refile the action against the party to the insurance policy. Plaintiff’s counsel indicated that they would be willing to amend the Complaint and substitute in the correct defendant, but as of the date of the filing of this Notice of Removal, no amended complaint has been filed. (Small Aff., ¶ 15.) Therefore, Defendant removes this action out of an abundance of caution so as to avoid waiving its right to removal.

2. Plaintiff alleges that it “owns and operates 28 ophthalmology and optometry clinics and 3 ambulatory surgical centers across the State of Michigan.” (Compl. ¶ 1.) Plaintiff further alleges that in March 2020, Michigan state officials “issued a series of orders closing businesses that did not offer essential services, including most of Plaintiff’s facilities, and directing citizens to stay at home.” (*Id.* ¶¶ 2, 16-17.) According to the Complaint, these government orders prevented Plaintiff’s “patients, doctors and employees from physically occupying its eyecare facilities, and prevented Plaintiff from operating its businesses,” except for limited essential services at some of the clinics. (*Id.* ¶¶ 3, 18-19.) Plaintiff purports that as a result of these government orders, it has “suffered a staggering loss of business income” and “suffered severe interruption to its business and critical loss of income,” for which it submitted a claim to Defendant, attached as Exhibit B to the Complaint. (*Id.* ¶¶ 4, 20, 37; *id.*, Ex. B.) Plaintiff seeks to recover this purported “staggering loss” and “critical loss of income” from Defendant. Plaintiff also seeks declaratory relief.

3. The Complaint alleges four counts against Defendant – three counts for breach of contract and one count for declaratory judgment. (*See id.* ¶¶ 67-92.)

II. THE PROCEDURAL REQUIREMENTS OF REMOVAL ARE MET

4. True and correct copies of all process, pleadings, and orders served on Defendant in the State Court Action are attached as **Exhibits 1** and **2** to the Affidavit of Michael T. Small. 28 U.S.C. § 1446(a).

5. This Notice of Removal is filed within 30 (thirty) days after the receipt by Defendant, through service, of a copy of the Complaint in the State Court Action. Accordingly, removal is timely. *See* 28 U.S.C. § 1446(b).

6. This Court presides in the locality in which the State Court Action was filed. It is therefore a proper forum for removal. *See* 28 U.S.C. § 102(b)(1).

7. No defendant is a citizen of Michigan, the state where this action was brought. *See* 28 U.S.C. § 1441(b)(2).

8. A copy of this Notice of Removal will be served on Plaintiff to its counsel of record in the State Court Action, and a copy is being filed with the state court. *See* 28 U.S.C. § 1446(d).

III. THIS COURT HAS SUBJECT MATTER JURISDICTION

9. An action may be removed from state court to federal court if the action could have originally been brought in federal court. *See* 28 U.S.C. § 1441(a). Here, federal jurisdiction exists based upon diversity of citizenship in accordance with 28 U.S.C. § 1332, as this action involves a dispute between citizens of different states, and the amount in controversy exceeds \$75,000, exclusive of interest and costs. *See* 28 U.S.C. §§ 1332, 1441, 1446.

A. The Amount in Controversy Requirement is Satisfied

10. The amount in controversy in this action exceeds the \$75,000 threshold required by 28 U.S.C. § 1332(a). Where, as here, a complaint does not seek a specific amount of damages, a defendant's notice of removal "need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold." *Dart Cherokee Basin Op. Co., LLC v. Owens*, 574 U.S. 81, 89 (2014); *see id.* at 84 ("When the plaintiff's complaint does not state the amount in controversy, the defendant's notice of removal may do so.") (citing 28 U.S.C. § 1446(c)(2)(A)). If that amount is challenged, a court must determine whether the jurisdictional threshold is satisfied based on a preponderance of the evidence. *See id.* at 88.

11. Although the Complaint does not quantify Plaintiff's alleged damages, the Complaint's allegations and attachments make clear that the amount in controversy exceeds \$75,000, exclusive of interests and costs. Plaintiff alleges that it owns and operates 28 ophthalmology and optometry clinics and 3 ambulatory surgical centers in Michigan. (*See* Compl. ¶ 1.) Due to government closure orders issued in response to the COVID-19 pandemic, Plaintiff contends it was required to close its facilities "for a period of several weeks" and thus suffered "a staggering loss of business income," a "severe interruption to its business," and a "critical loss" of income. (*Id.* ¶¶ 4, 18, 20.)

12. In addition, the Complaint attaches a claim titled "Property Loss Notice" that Plaintiff submitted for "losses suffered as a result of the Executive Orders." (*Id.* ¶ 37; *id.* at Ex. B.) The Property Loss Notice lists limits of insurance under the policy, including a "Blanket Limit" for "Business Personal Property" of \$37,329,272. (*Id.* at Ex. B; *see also* Ex. A (Form PC 00 02 01 19 T at 1).) The Property Choice policy limit of insurance in any one occurrence for business income and extra expense is \$22,500,000. (*Id.* at Ex. A (Form PC 00 02 01 19 T at 1).) In light of these limits, the loss Plaintiff sustained for closure during a period of several weeks clearly exceeds \$75,000 (*e.g.*, \$22,500,000 divided by 52 weeks equals approximately \$432,692 per week). Thus, based on the Complaint and its attachments, the unspecified and unliquidated damages sought by Plaintiff exceed \$75,000. *See Hayes v. Equitable Energy Res. Co.*, 266 F.3d 560, 573 (6th Cir. 2001); 28 U.S.C. § 1446(c)(2)(A) & (B).

13. Plaintiff also seeks a cause of action for declaratory judgment. The amount in controversy for Plaintiff's request for declaratory relief is the "value of the object of the litigation." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 347 (1977); *Northrup Properties, Inc. v. Chesapeake Appalachia, L.L.C.*, 567 F.3d 767, 770 (6th Cir. 2009) (principle

is well-settled that for actions seeking declaratory judgment, the amount in controversy is measured by “the value of the object of the litigation”). In this case, the object of the litigation is the value of Plaintiff’s claim under the insurance policy, *i.e.*, the amount of money Defendant would pay to Plaintiff if the claim is covered under the policy. Plaintiff alleges it suffered “staggering” business income loss, “severe” business interruption, and “critical” income loss to, ostensibly, its 31 ophthalmology and optometry clinics and ambulatory surgical centers. Such losses plausibly exceed the \$75,000 jurisdictional threshold.

14. Although Defendant denies Plaintiff is entitled to any recovery at all, as alleged, the amount in controversy plausibly exceeds \$75,000, exclusive of interests and costs.

B. There Is Complete Diversity Of Citizenship Between The Parties

15. Plaintiff and Defendant are the only two parties named in this lawsuit.

16. The Complaint alleges that Defendant is a Connecticut corporation that maintains its principal place of business in Hartford, Connecticut. (*See* Compl. ¶ 12.) Defendant is deemed to be a citizen of Connecticut for purposes of federal diversity jurisdiction.² *See* 28 U.S.C. 1332(c)(1).

17. Plaintiff is a limited liability company. The citizenship of a limited liability company is determined by the citizenship of its members. *See Delay v. Rosenthal Collins Grp., LLC*, 585 F.3d 1003, 1005 (6th Cir. 2009). Plaintiff was organized under the laws of Delaware. (*See* Small Aff., Ex. 3.) Delaware does not require domestic liability companies to identify their members in public filings. *See* 6 Del. C. § 18-201(a)(1)-(3). The only entity or individual required to be identified in any public filings of a Delaware LLC is its registered agent. *Id.*

² Even assuming Plaintiff meant to name Hartford Fire as the defendant, Hartford Fire is a Connecticut corporation that maintains its principal place of business in Connecticut. *See* The Hartford Legal Notice, available at <https://www.thehartford.com/legal-notice> <last accessed Nov. 4, 2020>. Hartford Fire is a citizen of Connecticut.

§§ 18-201(a)(2), 18-104. None of the public-facing information on file with the Delaware Division of Corporations identifies Plaintiff's members. (*See* Small Aff., Ex. 3.)

18. Plaintiff, however, alleges that it is doing business as Blue Sky Vision with its principal place of business in Grand Rapids, Michigan.³ (Compl. ¶ 10.) A business entity search for "Blue Sky Vision" on the State of Michigan's LARA Corporations Online Filing System produced a result for Blue Sky Vision, LLC.⁴ (*See* Small Aff., Ex. 5.) Blue Sky Vision, LLC is organized under the laws of Delaware and has registered with the State of Michigan's Department of Licensing and Regulatory Affairs to do business in Michigan. (*See id.*, Exs. 8-9.) The name and address of Blue Sky Vision, LLC's resident agent is CSC-Lawyers Incorporating Service, 601 Abbot Road, East Lansing, Michigan 48823. (*See id.*, Ex. 9.) Michigan does not require limited liability companies to identify their members in public filings. *See* M.C.L.A. §§ 450.4103, 450.4202, 450.4203, 450.4207, 450.4603. None of the public-facing information on file with the Delaware Division of Corporations or Michigan Department of Licensing and Regulatory Affairs identifies Blue Sky Vision, LLC's members. (*See* Small Aff., Ex. 8-10.) Blue Sky Vision, LLC's 2019 and 2020 Annual Statements, however, identify Dan Shoemaker as a manager of the LLC. (*See id.*, Ex. 10.) Publicly available information, including Mr.

³ A search on the State of Michigan's Department of Licensing and Regulatory Affairs ("LARA") Corporations Online Filing System produced no results for "GRO Holdco." (*See* Small Aff., Ex. 4.)

⁴ The search also produced a result for three other entities containing "Blue Sky Vision" in their names. (*See* Small Aff., Ex. 5.) Blue Sky Vision Eye Care, P.C. was formerly known as Grand Rapids Ophthalmology, P.C., one of the entities Plaintiff alleges it owns and/or operates. (Compl. ¶ 11.) Blue Sky Vision Optical, LLC was formerly known as GRO Optical, LLC (Small Aff., Ex. 6), which Plaintiff alleges it owns and/or operates. (Compl. ¶ 11.) Blue Sky Vision – Three Rivers appears to be the same entity as Blue Sky Vision Optical, LLC according to the 2019 Certificate of Assumed Name. (*See* Small Aff., Ex. 7.) Defendant thus assumes Plaintiff is conducting business in Michigan as Blue Sky Vision, LLC.

Shoemaker's own personal page on LinkedIn, suggests that he is a resident of Michigan. (*Id.*, Ex. 11.)

19. Business registry searches for "GRO Holdco" and "Blue Sky Vision" on the State of Connecticut's Secretary of State website produces no records for either name. (*See* Small Aff., ¶ 13.) Therefore, based on the information reasonably available to Defendant at this stage of the proceeding, Defendant believes that Plaintiff is not a citizen of Connecticut.

20. Defendant has been unable to locate information on Plaintiff's membership through a reasonable review of publicly available sources. Counsel for Defendant contacted Plaintiff's counsel for information on Plaintiff's members and their citizenship, but received no substantive response. (Small Affidavit ¶ 14, Ex. 12.) As such, information about the identity and citizenship of all members of Plaintiff is not reasonably available to Plaintiff at this stage of the proceedings.⁵ Nonetheless, based on the information reasonably available to Defendant, it believes Plaintiff is a citizen of a state different than Hartford Fire and this action is "between— (1) citizens or different States." *See* 28 U.S.C. § 1332(a)(1). As a result, Section 1332's requirement of complete diversity has been satisfied.

21. Complete diversity between the parties exists, and the Court has jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1441.

IV. CONCLUSION

WHEREFORE, notice is given that the State Court Action is removed from the Circuit Court of Kent County, Michigan to the United States District Court for the Western District of Michigan.

⁵ If the Court requires additional information regarding the identity of Plaintiff's members, Defendant will seek leave to take limited jurisdictional discovery on this issue.

Dated: November 12, 2020

Respectfully submitted,

/s/ Michael T. Small

Michael T. Small (Bar No. 33650)

HARVEY KRUSE, P.C.

3210 Eagle Run Drive NE, Suite 204

Grand Rapids, Michigan 49525

Phone: (616) 771-0050

Email: msmall@harveykruse.com

Sarah D. Gordon

STEPTOE & JOHNSON LLP

1330 Connecticut Avenue, NW

Washington, DC 20036

Phone: (202) 429-8005

Email: sgordon@steptoe.com

Pro Hac Vice Application Forthcoming

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November 2020, I electronically filed the foregoing with the Court using the CM/ECF system, and delivered the foregoing to all counsel of record by email.

/s/Julie Schafer

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

GRO HOLDCO LLC, d/b/a BLUE SKY
VISION,

Plaintiff,

Case No. 20- 07345-CB3

v.

Hon.

THE HARTFORD INSURANCE
COMPANY,

Defendant,

Rec'd & Filed

OCT 05 2020

KENT COUNTY
CIRCUIT COURT

Daniel I. Schlessinger (3122102)
Tamra J. Miller (6285032)
JASZCZUK P.C.
30 South Wacker Drive, Suite 2200
Chicago, Illinois 60606
(312) 442-0509
dschlessinger@jaszczuk.com
tmiller@jaszczuk.com
*To be Admitted Pro Hac Vice Counsel for
Plaintiff*

Jeffrey G. Muth (P65041)
James A. Buster (P81186)
MILLER JOHNSON
45 Ottawa Avenue, S.W., Suite 1100
Grand Rapids, MI 49503
(616) 831-1700
Attorneys for Plaintiff
muthjg@millerjohnson.com
busterj@millerjohnson.com

COMPLAINT

NOW COMES GRO Holdco LLC, d/b/a Blue Sky Vision ("Plaintiff" or "Blue Sky Vision") for its Complaint against The Hartford Insurance Company ("Defendant" or "Hartford"), and alleges as follows:

Introduction

1. GRO Holdco, LLC is a limited liability company that owns and operates 28 ophthalmology and optometry clinics and 3 ambulatory surgical centers across the State of Michigan.

2. Beginning in March 2020, state officials in Michigan issued a series of orders closing businesses that did not offer essential services, including most of Plaintiff's facilities, and directing citizens to stay at home.

3. These orders prevented Blue Sky Vision's patients, doctors and employees from physically occupying its eyecare facilities, and prevented Plaintiff from operating its businesses.

4. Plaintiff suffered a staggering loss of business income as a result of these orders.

5. Plaintiff is insured under a business insurance policy, issued by Defendant as a Special Multi-Flex Policy, which provides for reimbursement of lost business income in the event Plaintiff's business operations are suspended or experience a slowdown.

6. Plaintiff purchased the policy to protect it in the event of an unforeseen interruption of its businesses, and Plaintiff faithfully paid premiums over the years to obtain this protection.

7. The recent government-mandated shutdowns of Plaintiff's eyecare facilities are precisely the sort of unforeseen, economically calamitous events Plaintiff sought to insure itself against when it purchased insurance from Defendant. But when Plaintiff made a claim for coverage as a result of the shutdowns that physically deprived Plaintiff of its businesses, Defendant made clear from the outset that coverage would not likely be available, and ultimately, without investigation, denied Plaintiff's claim.

8. Defendant's denial of Plaintiff's claim was arbitrary, unreasonable, contrary to the language of Plaintiff's insurance policy, contrary to the undisputed facts, and contrary to law.

9. Due to Defendant's wrongful denial of coverage, Plaintiff brings this action for a declaratory judgment establishing that it is entitled to receive the benefit of the insurance coverage it purchased, for indemnification of the business losses it has sustained, and for breach of contract.

Parties

10. Plaintiff GRO Holdco, LLC; d/b/a Blue Sky Vision is a limited liability company with its principal place of business in Grand Rapids, Michigan.

11. GRO Holdco LLC owns and/or operates the other Additional Named Insureds: Grand Rapids Ophthalmology P.C. (n/k/a Blue Sky Vision Eye Care, PC), GRO Investment Co., EBSC Holding Inc., GRO Sub Holdco LLC, GRO Optical LLC, EBSC LLC, Blue Sky Vision LLC, Great Lakes Surgery Centers LLC, Walker Surgical Center LLC, GRO Intermediate Holdco LLC, GRO Mid Holdco LLC, Shoreline Ophthalmology, PLLC, Shoreline Optical, LLC, Shoreline ASC LLC, GRO Shoreline MSO LLC, Vitreo-Retinal Associates PLLC, Vitreo-Retinal GRO Ophthalmology Inc., and GRO Vitreo-Retinal MSO, LLC.

12. Upon information and belief, Defendant Hartford Insurance Company is a Connecticut insurance company with its principal place of business in Hartford.

Jurisdiction and Venue

13. Upon information and belief, Defendant is a licensed insurance company in the State of Michigan and regularly underwrites coverage for and insures risks in this state.

14. Venue is proper in Michigan and specifically in Kent County because the policy at issue was delivered to Plaintiff here, Plaintiff is headquartered here, Plaintiff suffered damages here, and many of the risks insured under the policy at issue are located in Kent County.

Factual Background

15. In March 2020, officials in Michigan ordered the closing of all non-essential businesses, including eyecare clinics.

16. Effective March 21, 2020, Michigan Governor Whitmer ordered that medical facilities suspend all non-essential procedures. (Michigan Executive Order 2020-17.)

17. By Executive Order 2020-21, Michigan Governor Whitmer ordered “all individuals currently living within the State of Michigan . . . to stay at home or at their place of residence.” (The government orders referenced in paragraphs 16 and 17 are hereinafter referred to as the “Executive Orders.”)

18. Under these Executive Orders, Plaintiff was required to close its clinics, ambulatory surgical centers and administrative offices for a period of several weeks.

19. During this time, Plaintiff could not allow its patients, doctors or employees to enter its premises, nor could it operate its businesses, except to provide limited essential services at some of the clinics.

20. As a result of the Executive Orders, Plaintiff suffered severe interruption to its business and critical loss of income.

The Policy

21. Plaintiff is insured by The Hartford Company Insurance Policy No. 35 UUN BM2812 for the period February 17, 2020 to February 17, 2021 (the “Policy,” attached as Exhibit A).

22. Plaintiff obtained the Policy to ensure that it would be reimbursed for lost income in the event that its business operations were interrupted.

23. Plaintiff faithfully paid premiums to Defendant on the Policy.

24. The Policy is an “all-risk” property insurance policy, meaning that it broadly covers risk of loss of or damage to Plaintiff’s property, unless a coverage exclusion applies.

25. Under the terms of the Policy, Defendant agreed to pay for “direct physical loss of or direct physical damage to . . . Covered Property caused by or resulting from a Covered Cause of Loss.” (Ex. A, Form PC 00 10 01 18, pg. 1 of 6.)

26. “Covered Cause of Loss” is defined as “direct physical loss or direct physical damage that occurs during the Policy Period and in the Coverage Territory unless the loss or damage is excluded or limited in this policy.” (Ex. A, Form PC 10 10 01 18, pg. 1 of 7.) “Direct physical loss” and “direct physical damage” are not defined in the Policy.

27. As part of this coverage, Defendant agreed to pay Plaintiff “for the actual loss of Business Income you sustain and the actual, necessary and reasonable Extra Expense you incur due to the necessary interruption of your business operations during the Period of Restoration due to direct physical loss of or direct physical damage to property caused by or resulting from a Covered Cause of Loss” (Ex. A, Form PC 00 20 01 18, pg. 1 of 4.)

28. The policy defines “interruption” as “the slowdown or cessation of any part of your business activities. . . .”

29. “Period of Restoration” is defined, in pertinent part, as “the period of time that: (1) Begins at the time the Covered Cause of Loss occurred; and (2) Ends on the earlier of: (a) The date when the property should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (b) The date when business is resumed at a new permanent location.” (*Id.*, pg. 2 of 4.)

30. Business Income is defined as “a. Net Income (Net Profit or Net Loss before income taxes), . . . that would have been earned or incurred; and b. Continuing normal operating expenses incurred, including Payroll Expenses.” (*Id.*, pg. 1 of 4.)

31. In summary, under the Policy, when a Covered Cause of Loss—such as an unanticipated crisis and governmental shutdown of Plaintiff’s businesses—causes “direct physical loss of or direct physical damage” to Plaintiff’s property—such as Plaintiff’s inability to access its facilities, to allow patients on its premises, and to otherwise operate its businesses—Defendant is

obligated to pay Plaintiff for its actual loss of Business Income incurred while its business operations are suspended or experience a slowdown.

32. The Policy also provides for recovery of Plaintiff's lost business income when a "Covered Cause of Loss" occurs at property other than Plaintiff's properties, causing Plaintiff to be denied access to its properties.

33. For example, the Policy contains a "Civil Authority" provision, which provides that Defendant will pay Plaintiff's lost business income when a "civil authority" takes action that prohibits access to Plaintiff's premises, where that action is taken as the result of a Covered Cause of Loss occurring somewhere other than Plaintiff's premises.

34. Specifically, the Policy provides as follows:

This insurance is extended to apply to the actual loss of Business Income you sustain and the actual, necessary and reasonable Extra Expense you incur when access to your "Scheduled Premises" is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your "Scheduled Premises".

(Ex. A, Form PC 26 02 01 18, pg. 2 of 9.)

35. The Policy further provides for lost business income coverage where ingress and/or egress to Plaintiff's property is prohibited as the result of a Covered Cause of Loss occurring elsewhere.

36. Specifically, the Policy provides:

This insurance is extended to apply to the actual loss of Business Income you sustain when ingress or egress to your "Scheduled Premises" is specifically prohibited as the direct result of a Covered Cause of Loss to property at premises that is contiguous to your "Scheduled Premises".

(*Id.*, pg. 5 of 9.)

Plaintiff's Claim and Defendant's Response

37. On or about June 2, 2020, Plaintiff made a claim under the Policy for losses suffered as a result of the Executive Orders (the "Claim"). (A copy of Plaintiff's June 2, 2020 claim is attached as Exhibit B.)

38. On June 5, 2020, Defendant responded to Plaintiff's Claim. (A copy of Defendant's June 5, 2020 letter is attached as Exhibit C.) In its response, Defendant stated that "since COVID-19 did not cause property damage at your place of business or in the immediate area, this business income loss is not covered," and denied Plaintiff's claim. (*See Ex. C, p. 1.*)

39. Defendant's response to Plaintiff's Claim misrepresented both the terms of the Policy and the true cause of Plaintiff's losses.

40. To justify its denial, Defendant misquoted the relevant Policy language, stating "[t]his property policy protects your business personal property and/or building against risks of direct physical loss or damage at your Scheduled Premises. You have not identified any direct physical loss to any property at a scheduled premises." (*Ex. C, pg. 3 of 8.*)

41. Contrary to Defendant's statements, however, the Policy requires "direct physical loss of," or "direct physical damage to," Plaintiff's property. "Direct physical loss of" property is a legally distinct concept from "direct physical loss to" property, as Defendant is undoubtedly aware.

42. Plaintiff's lost business income was not the result of COVID-19 causing property damage on Plaintiff's premises. Plaintiff suffered business losses as a result of the Executive Orders, which physically prevented Plaintiff, their doctors, their employees, and their patients from occupying Plaintiff's facilities, and prevented Plaintiff from operating its businesses.

43. Under the terms of the Policy, Plaintiff has suffered “direct physical loss of or direct physical damage to” its property as a result of the Executive Orders.

44. The Policy does not define “damage” or “loss;” therefore, under well-recognized, undisputed rules of construction, those terms are to be given their generally understood meaning, and any ambiguity should be construed in favor of coverage for Plaintiff and against Defendant, who selected the language for inclusion in its adhesion contracts.

45. “Loss” and “damage” are two distinct concepts; indeed, if the terms were synonymous, there would be no need to include both in the Policy language, separated by the disjunctive “or.”

46. Common dictionary definitions of “loss” include “deprivation” and “the harm or privation resulting from loss or separation.”¹

47. Common dictionary definitions of “damage” include the “harm caused to something in such a way as to impair its value, usefulness or normal function.”²

48. The events described herein have unquestionably deprived Plaintiff access to, and have separated Plaintiff from, its facilities. Accordingly, Plaintiff has suffered “loss of” its premises.

49. Additionally, these events have impaired the value of the businesses and have prevented them from serving their normal function. Therefore, under commonly accepted English usage, Plaintiff has also suffered “damage to” its premises.

¹ See <https://www.merriam-webster.com/dictionary/loss>.

² See <https://www.lexico.com/en/definition/damage>.

50. Plaintiff's damages are "direct" in that they were directly caused by the Executive Orders; and they are "physical" in that Plaintiff's clinics and operations have been physically impacted by governmental shutdowns.³

51. Put simply, the Executive Orders caused Plaintiff to suffer both (a) direct physical loss of, and, (b) direct physical damage to, its properties because the Executive Orders deprived Plaintiff of access to its properties, prevented patients from physically occupying Plaintiff's facilities, and prohibited Plaintiff from operating its businesses, thereby impairing, and in fact nearly eliminating entirely, the normal function and value of Plaintiff's business property.

52. Because Plaintiff suffered both direct physical loss of and direct physical damage to its properties, it has experienced a "Covered Cause of Loss," and Plaintiff is entitled to reimbursement under the Policy.

53. For these same reasons, Defendant is obligated to provide coverage under the "Civil Authority" and "Ingress/Egress" provisions in the Policy.

54. As set forth above, the Executive Orders are a Covered Cause of Loss. Moreover, there are numerous establishments within the "immediate area" of each of Plaintiff's clinics or offices that have also suffered direct physical loss of and direct physical damage to their premises caused by this Covered Cause of Loss. Accordingly, the Executive Orders that have prohibited access to Plaintiff's premises trigger the "Civil Authority" provision of the Policy.

³ See <https://www.lexico.com/en/definition/direct> (defining "direct" as "[w]ithout intervening factors or intermediaries"); see also <https://www.lexico.com/en/definition/physical> (defining "physical" as "[r]elating to things perceived through the senses as opposed to the mind; tangible or concrete.").

55. Further, coverage is similarly provided under the “Ingress/Egress” provision of the Policy, as the Executive Orders requiring the shutdown of businesses located “contiguous” to Plaintiff’s premises prevented physical ingress or egress to Plaintiff’s facilities.

Exclusions

56. In its denial, Defendant asserted that Plaintiff is not entitled to coverage under the Policy for the additional reason that Plaintiff’s Claim is precluded by the “‘Fungus’, Wet Rot, Dry Rot, Bacteria or Virus” exclusion in the Policy. (See Ex. C, pp. 7-8.)

57. This exclusion states that “We will not pay for loss or damage caused by” the “[p]resence, growth, proliferation, spread or any activity of ‘fungus,’ wet rot, dry rot, bacteria or virus.” (Ex. A, Form PC 10 10 01 18, pp. 1-2 of 7.)

58. In its denial, Defendant also argued that Plaintiff is not entitled to coverage based on the “Pollutants and Contaminants” exclusion. (Ex. C, pp 5-6.)

59. That exclusion states Defendant will not pay for loss or damage related to the “[d]ischarge, dispersal, seepage, migration, release or escape of ‘Pollutants and Contaminants.’” (*Id.* pg. 3 of 7.)

60. As explained above, Plaintiff’s damages are the result of the Executive Orders and not the COVID-19 virus itself, so neither of these exclusions preclude coverage.

61. Plaintiff has made no claim of any type of contamination and is in fact unaware of any “actual presence” of COVID-19 or any other virus in its facilities.

62. Plaintiff did not lose any business income due to viral contamination.

63. As a result, Plaintiff’s losses fall outside the ambit of the virus and contamination exclusions, because they were not caused by contamination by Covid-19. To the contrary,

Plaintiff's loss of business income was caused by, and the direct result of, the Executive Orders of civil authorities closing Plaintiff's facilities and directing patients to stay at home.

64. In its denial, Defendant also claims coverage is excluded based on the "Delay, Loss of Use or Loss of Market" provision, which states: "We will not pay for loss or damage caused by, resulting from, or arising out of delay, loss of use, or loss of market." (*Id.*, pg. 4 of 7.)

65. This exclusion contradicts the very terms of the property coverage, including coverage for Civil Authority and Ingress/Egress. Any time an insured loses access to its property it is unable to use it. Here, Plaintiff's losses are due to the Executive Orders, which required everyone in the State of Michigan to stay home except for essential services. The resulting loss of use of Plaintiff's properties cannot be excluded or the entire property portion of the Policy, for which Defendant has been collecting premiums, is superfluous.

66. It is Defendant's burden to prove that Plaintiff's Claim is precluded by any exclusions, and that burden cannot be met here.

COUNT ONE

BREACH OF CONTRACT: COVERAGE OF PROPERTY LOSS AND DAMAGE CLAIMS

67. Plaintiff repeats and realleges the allegations of paragraphs 1 through 66 as if fully set forth herein.

68. The Policy is an insurance contract under which Plaintiff paid premiums in exchange for Defendant's promise to pay Plaintiff's claims for losses covered by the Policy, such as business income losses incurred as a result of government orders impairing Plaintiff's business operations.

69. The Policy requires Defendant to pay Plaintiff "for the actual loss of Business Income [Plaintiff] sustain[ed] and the actual, necessary and reasonable Extra Expense" while Plaintiff's business was impaired due to the Executive Orders.

70. Plaintiff has complied with all applicable provisions of the Policy, including payment of premiums in exchange for coverage under the Policy, and yet Defendant has failed to fulfill its insurance coverage obligations under the terms of the Policy.

71. By indicating that it would not provide coverage for any loss of or damage to Plaintiff's property that occurred as a result of the Executive Orders, Defendant has breached its coverage obligations under the Policy.

WHEREFORE, Plaintiff seeks an award of compensatory damages in the amount of its Business Income losses, together with costs sustained herein and reasonable attorneys' fees.

COUNT TWO

BREACH OF CONTRACT: COVERAGE OF CIVIL AUTHORITY CLAIMS

72. Plaintiff repeats and realleges the allegations of paragraphs 1 through 71 as if fully set forth herein.

73. The Policy is an insurance contract under which Plaintiff paid premiums in exchange for Defendant's promise to pay Plaintiff's claims for losses covered by the Policy, such as business income incurred as a result of government orders impairing Plaintiff's business operations.

74. The Policy requires Defendant to pay the "actual loss of Business Income" incurred when access to Plaintiff's "Scheduled Premises" is specifically prohibited by order of a civil authority."

75. The Executive Orders constitute actions of civil authorities prohibiting access to Plaintiff's property, and Plaintiff's Claim otherwise meets the requirements for coverage under the Civil Authority provision of the Policy.

76. Plaintiff has complied with all applicable provisions of the Policy, including payment of premiums in exchange for coverage under the Policy, and yet Defendant has failed to fulfill its insurance coverage obligations under the terms of the Policy.

77. By indicating that it would not provide coverage for any losses or damage incurred by Plaintiff in connection with the Executive Orders, Defendant has breached its coverage obligations under the Policy.

WHEREFORE, Plaintiff seeks an award of compensatory damages in the amount of their Business Income losses, together with costs sustained herein and reasonable attorneys' fees.

COUNT THREE

BREACH OF CONTRACT: COVERAGE OF INGRESS/EGRESS CLAIMS

78. Plaintiff repeats and realleges the allegations of paragraphs 1 through 77 as if fully set forth herein.

79. The Policy is an insurance contract under which Plaintiff paid premiums in exchange for Defendant's promise to pay Plaintiff's claims for losses covered by the Policy, such as business income losses incurred as a result of government orders impairing Plaintiff's business operations.

80. The Policy requires Defendant to provide "actual loss of Business Income" sustained when ingress or egress to your "Scheduled Premises" is specifically prohibited where the obstruction resulted from a Covered Cause of Loss occurring at property other than Plaintiff's property that is located within the vicinity of Plaintiff's properties.

81. The Executive Orders operated as obstructions preventing ingress and egress to Plaintiff's clinics and Plaintiff's Claim otherwise meets the requirements for coverage under the Ingress/Egress provision of the Policy.

82. Plaintiff has complied with all applicable provisions of the Policy, including payment of premiums in exchange for coverage under the Policy, and yet Defendant has failed to fulfill its insurance coverage obligations under the terms of the Policy.

83. By indicating that it would not provide coverage for any losses or damage incurred by Plaintiff in connection with the Executive Orders, Defendant has breached its coverage obligations under the Policy.

WHEREFORE, Plaintiff seeks an award of compensatory damages in the amount of its Business Income losses, together with costs sustained herein and reasonable attorneys' fees.

COUNT FOUR

DECLARATORY JUDGMENT: THE POLICY HAS BEEN TRIGGERED BY DIRECT PHYSICAL LOSS OF AND/OR DAMAGE TO PLAINTIFF'S PROPERTY AND THE POLICY'S EXCLUSIONS DO NOT APPLY

84. Plaintiff repeats and realleges the allegations of paragraphs 1 through 83 as if fully set forth herein.

85. The Policy requires Defendant to provide coverage to Plaintiff, as part of which Defendant is obligated to pay Plaintiff the loss of business income suffered while its businesses were impaired as the result of the Executive Orders.

86. Plaintiff has made a Claim for coverage for its lost business income under the terms of the Policy.

87. Defendant has asserted that Plaintiff is not entitled to its lost business income because Plaintiff did not suffer direct physical loss of or damage to its property.

88. Plaintiff suffered both direct physical loss of its properties, and direct physical damage to its properties, as it was deprived of access to, and the full value of, its properties.

89. Defendant has also asserted that Plaintiff's Claim for coverage under the Policy is precluded by exclusions in the Policy.

90. The virus and contamination exclusions are not applicable to Plaintiff's Claim because Plaintiff's business losses were not caused by, and did not result from, contamination by the SARS-CoV-2 virus.

91. The "loss of use" exclusion is not applicable because it contradicts the very nature of Business Income coverage.

92. As set forth above, true controversy exists between the parties concerning the parties' rights and obligations under the Policy.

WHEREFORE, Plaintiff seeks a declaratory ruling that the Business Interruption, Civil Authority, and Ingress/Egress provisions of the Policy have been triggered by direct physical loss of and direct physical damage to Plaintiff's property and the property of others, and that the exclusions cited by Defendant do not bar coverage of Plaintiff's claim.

JURY DEMAND

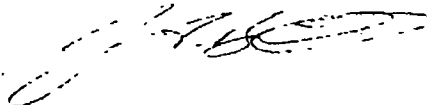
Plaintiff demands a trial by jury of all claims in this Complaint so triable.

Respectfully Submitted,

MILLER JOHNSON
Attorneys for Plaintiffs

Dated: October 5, 2020

By



James A. Buster (P81186)
Business Address:
45 Ottawa Ave. SW, Suite 1100
Grand Rapids, MI 49503
Telephone: (616) 831-1700
muthjg@millerjohnson.com
busterj@millerjohnson.com

Dated: October 5, 2020

By /s/

Daniel I. Schlessinger (3122102)

Tamra J. Miller (6285032)

To be admitted pro hac vice

JASZCZUK P.C.

30 South Wacker Drive, Suite 2200

Chicago, Illinois 60606

(312) 442-0509

dschlessinger@jaszczuk.com

tmiller@jaszczuk.com