

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Contains various legal categories and checkboxes.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION**

LEMONTREE ACADEMY, LLC,

Plaintiff,

v.

UTICA MUTUAL INSURANCE
COMPANY and REPUBLIC FRANKLIN
INSURANCE COMPANY,

Defendants.

**CIVIL ACTION FILE
NO.:**

Removed from
Superior Court of Morgan
County
Case No. 2020-SU-CA-230

NOTICE OF REMOVAL

Defendants Utica Mutual Insurance Company and Republic Franklin Insurance Company hereby remove this action from the Superior Court of Morgan County, Docket No. 2020-SU-CA-230, to the United States District Court for the Middle District of Georgia, Athens Division pursuant to 28 U.S.C. §§ 1332, 1441, and 1446.

1. True and correct copies of the Summonses and Complaint, as found on the docket for the Superior Court of Morgan County, are attached as Exhibit A to the accompanying declaration of Cody M. McCollum.¹

Removal Is Timely

2. On or around October 9, 2020, Plaintiff filed the Complaint. Defendants have not been served. However, Defendants became aware of the Complaint on or around October 16, 2020.

3. Removal of this case is timely because it is “within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the [complaint and summons.]” 28 U.S.C. § 1446.

4. Pursuant to 28 U.S.C. § 1446(d), Defendants will promptly serve a copy of this Notice of Removal on counsel for Plaintiff and will file a copy of this Notice of Removal with the clerk of the state court.

The Court Has Diversity Jurisdiction Pursuant To 28 U.S.C. §§ 1332,

1441(a)

5. Section 1441(a) provides that “[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the

¹ All citations to “Ex. A–C” refer to exhibits to the Declaration of Cody M. McCollum, dated November 13, 2020.

district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.” 28 U.S.C. § 1441(a).

6. This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332(a) in that there is complete diversity between the parties and the amount in controversy in this matter exceeds the sum or value of \$75,000, exclusive of interest and costs.

7. Venue in this Court is proper under 28 U.S.C. § 1441(a) because this action is being removed from the state court in which it was originally filed, the Superior Court of Morgan County.

The Parties Are Citizens of Different States

8. Plaintiff is a citizen of Georgia and Defendants are citizens of New York and Ohio.

9. Plaintiff is a Georgia limited liability company with its principal address located at 4270 Henry Road SW, Snellville, GA 30039. Compl. ¶ 3, Ex. B. On information and belief, all members of Lemontree Academy, LLC are citizens of Georgia. According to the Georgia Secretary of State, the Organizer,

Authorizer, and Registered Agent of Lemontree Academy LLC is a citizen of Georgia. Ex. B.

10. Defendant Utica Mutual Insurance Company is a New York Corporation with its principal place of business in New Hartford, New York.

11. Defendant Republic Franklin Insurance Company is an Ohio Corporation with its principal place of business in New Hartford, New York.

The Amount in Controversy Exceeds \$75,000

12. Plaintiff is asking this Court to order Defendant to provide more than \$75,000 of insurance coverage to Plaintiff. That shows the amount in controversy is in excess of \$75,000.

13. Plaintiff operates Lemontree Academy, a childcare center in Madison, Georgia. Compl. ¶¶ 3, 6. Plaintiff seeks to recover under its property insurance policy money it contends it lost due to government action taken as a result of the COVID-19 virus. *Id.* ¶¶ 15, 17. The Complaint alleges that Plaintiff “has incurred, and continue[s] to incur, a substantial loss of business income and additional expenses” as a result of a declaration of public health state of emergency issued by the Governor of Georgia. *Id.* ¶ 17. Plaintiff seeks declaratory judgment, among other things, that Plaintiff’s policy “provides coverage to the Plaintiff for any current and future civil authority closures of premises in Georgia due to physical

loss or damage from the Coronavirus and the policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the insured premises.” *Id.* ¶ 23.

14. The amount in controversy requirement is satisfied because the value of the declaratory relief Plaintiff seeks exceeds \$75,000. *Owners Ins. Co. v. Bryant*, No. CIV.A. 305CV48CAR, 2006 WL 50488, at *2 (M.D. Ga. Jan. 9, 2006) (“In a declaratory judgment action, the amount in controversy is the monetary value of the object of the litigation from the plaintiff’s perspective.”). The allegations of the Complaint demonstrate beyond a preponderance of the evidence that the value of the action from the perspective of Plaintiff exceeds \$75,000.

15. The Policy contains a limit of insurance of actual loss sustained for 12 consecutive months for Business Income and Extra Expense. In its letter from counsel emailed June 23, 2020, attached hereto as Exhibit C, Plaintiff estimated its average weekly sales at \$8,236. Ex. C at 1. Plaintiff’s counsel also stated that Plaintiff suspended operations on March 14, 2020 and “re-opened [its] doors with [a] limited ratio on June 1st, per the state requirements.” *Id.* 2–3. As such, Plaintiff remained closed for approximately eleven weeks, totaling losses of approximately \$90,600 as well as additional business income losses from June 1, 2020 to the date of removal stemming from Plaintiff’s reopening on a limited basis. Plaintiff’s

counsel also stated that Plaintiff spent in excess of \$2,000 on professional cleaning and “invested heavily in PPE equipment i.e. u/v sanitation lights, mask, face shield, air humidifiers.” *Id.* at 2.

16. This shows that the amount in controversy in this case exceeds \$75,000 because if Plaintiff recovers the entirety of its stated loss it will recover in excess of \$75,000. *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 754 (11th Cir. 2010) (holding that a removing defendant may demonstrate the amount in controversy with “specific factual allegations” supported by “evidence combined with reasonable deductions, reasonable inferences, or other reasonable extrapolations,” and making clear that this “kind of reasoning is not akin to conjecture, speculation, or star gazing”).

Reservation of Defenses

17. As of the filing of this Notice of Removal, no further proceedings have been had in the state court action.

18. Nothing in this Notice of Removal shall be interpreted as a relinquishment of Defendants’ right to assert any defense or affirmative matter.

19. Defendants reserve the right to amend or supplement this Notice of Removal.

WHEREFORE, Defendants hereby remove the above-captioned action from the Superior Court of Morgan County, to this Court, and request that all further proceedings be conducted in this Court, as required by law.

Dated: November 13, 2020

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FILED IN OFFICE
CLERK OF SUPERIOR COURT
MORGAN COUNTY, GEORGIA
2020-SU-CA-230

OCT 09, 2020 12:10 PM



Jody M. Higdon, Clerk
Morgan County, Georgia

**IN THE SUPERIOR COURT OF MORGAN COUNTY
STATE OF GEORGIA**

LEMONTREE ACADEMY, LLC,)
)
Plaintiff,)
)
vs.)
)
UTICA MUTUAL INSURANCE)
COMPANY and REPUBLIC FRANKLIN)
INSURANCE COMPANY,)
)
Defendants.)
_____)

CIVIL ACTION
FILE NO. _____

COMPLAINT

COMES NOW Plaintiffs Lemontree Academy, LLC and respectfully files this complaint as follows:

JURISDICTION AND VENUE

1.

Defendant Utica Mutual Insurance Company ("Utica"), is a New York insurance company whose principal place of business is located at 180 Genesee Street, New Hartford, New York 13413. Defendant Utica can be served through its registered agent, C T Corporation System at 289 South Culver Street, Lawrenceville, Georgia 30046. By conducting regular and continuous business in the State of Georgia through contract, Defendant Utica is subject to the venue and jurisdiction of this Court.

2.

Defendant Republic Franklin Insurance Company ("Republic"), is a New York insurance company whose principal place of business is at 180 Genesee Street, New Hartford, New York. Defendant Republic can be served through its registered agent, C T Corporation System at 289

South Culver Street, Lawrenceville, Georgia 30046. By conducting regular and continuous business in the State of Georgia through contract, Defendant Utica is subject to the venue and jurisdiction of this Court.

3.

Plaintiff Lemontree Academy, LLC (“Lemontree”) is a Georgia Limited Liability Company providing childcare services to the residents of Morgan County. Furthermore, Plaintiff Lemontree operates its childcare facility at 1031 Fairground Road, Madison, Georgia 30650 in Morgan County which is the subject of this Complaint.

4.

This Court has jurisdiction over all Defendants and matters in this action, and venue properly rests in Morgan County, Georgia based upon the location of Plaintiff’s facility, which is the subject of this dispute, and the Defendants’ regular and continuous business activity.

FACTS

5.

On or around July 2019, Defendants Utica and Republic (collectively, “Defendants”) entered into a contract of insurance with the Plaintiff, whereby plaintiffs agreed to make payments to the Defendants in exchange for Defendants’ promise to indemnify the Plaintiffs for losses including, but not limited to business income losses Plaintiff’s properties.

6.

The insured properties include Plaintiff’s childcare center, Lemontree Academy, located in Morgan County Georgia. Lemontree Academy has upheld a stellar reputation by gaining and maintaining the confidence and trust of the community by rendering the quality childcare services through various day care programs, summer camps, enrichment programs, and Pre-K programs.

Lemontree Academy's reputation is evidenced by its consistent 5-star customer reviews. Lemontree is open five days a week, Monday through Friday, from 7:00am to 6:00pm.

The Insurance Policy

7.

The Insured Properties are covered under a policy issued by the Defendants with policy number believed to be CPP 5303330 (hereinafter "policy").

8.

The policy is currently in full effect, providing property, business personal property, business income and extra expense, and additional coverages.

9.

Plaintiffs faithfully paid policy premiums to the Defendants, specifically to provide additional coverages under Business Income and Extra Expense Form in the event of business closures by order of Civil Authority.

10.

Under the policy, insurance is extended to apply to the actual loss of business income sustained and the actual, necessary and reasonable extra expenses incurred when access to the scheduled premises is specifically prohibited by order of civil authority as the direct result of a covered cause of loss to property in the immediate area of plaintiffs' scheduled premises. This additional coverage is identified as coverage under "Civil Authority.

11.

The policy is an all-risk policy, insofar as it provides that covered causes of loss under the policy means direct physical loss or direct physical damage unless the loss is specifically excluded or limited in the policy.

12.

Based on information and belief, the Defendants have accepted the policy premiums with no intention of providing any coverage under the Business Income and Extra Expense Coverage or the Civil Authority extension due to a loss and shutdown from a virus pandemic.

Impact of COVID-19

13.

The scientific community, and those personally affected by the virus, recognize the Coronavirus as a cause of real physical loss and damage.

14.

The global Coronavirus pandemic is exacerbated by the fact that the deadly virus physically infects and stays on surfaces of objects or materials, “fomites,” for up to twenty-eight days.

15.

On March 14, 2020, the Governor of Georgia, Brian Kemp, issued an order directing all individuals living in the state to stay at home except that they may leave to provide or receive certain essential services or engage in certain essential activities (“The Order”). The Order further requires all non-essential businesses located within the state to “cease all activities at facilities located within the state, except Minimum Basic Operations.”

16.

The virus is physically impacting public and private property, and physical spaces in cities around the world and the United States. Any effort by the Defendants to deny the reality that the virus causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger policyholders and the public.

17.

A declaratory judgment determining that the coverage provided under the policy will prevent the Plaintiff from being left without vital coverage acquired to ensure the survival of their

businesses due to the shutdown caused by the civil authorities' response is necessary. As a result of the Order, Plaintiff has incurred, and continue to incur, a substantial loss of business income and additional expenses covered under the policy.

COUNT ONE

Declaratory Relief

18.

Plaintiff incorporates by reference Paragraphs 1 through 17 of the Complaint, as if set forth fully herein.

19.

Under O.C.G.A § 9-4-2 et seq., the court may declare rights, status, and other legal relations whether or not further relief is or could be claimed.

20.

An actual controversy has arisen between Plaintiff and the Defendants as to the rights, duties, responsibilities and obligations of the parties in that Plaintiff contend and, on information and belief, the Defendants dispute and deny, that: (1) the Order by Governor Kemp, in his official capacity, constitutes a prohibition of access to Plaintiff's Insured Premises; (2) the prohibition of access by the Order is specifically prohibited access as defined in the Policy; (3) the Order triggers coverage because the policy does not include an exclusion for a viral pandemic and actually extends coverage for loss or damage due to virus; and (4) the policy provides coverage to the Plaintiff for any current and future civil authority closures in Georgia due to physical loss or damage from the Coronavirus under the Civil Authority coverage parameters and the policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the insured premises or immediate area of the insured premises. Resolution of the duties,

responsibilities, and obligation 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.

21.

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

22.

Plaintiff further seeks a Declaratory Judgment to affirm that the Order triggers coverage because the policy does not include an exclusion for a viral pandemic and actually extends coverage for loss or damage due to virus.

23.

Plaintiff further seeks a Declaratory Judgment to affirm that the policy provides coverage to the Plaintiff for any current and future civil authority closures of premises in Georgia due to physical loss or damage from the Coronavirus and the policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the insured premises.

24.

Plaintiffs do not seek any determination of whether the Coronavirus is physically in the insured premises, amount of damages, or any other remedy other than declaratory relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that Defendant be served with process and that Plaintiff be awarded judgment as follows:

- (a) TRIAL BY JURY OF TWELVE;
- (b) Pursuant to Count One, for a declaration that the Order by Governor Brian Kemp, in his official capacity, constitutes a prohibition of access to Plaintiff's Insured Premises.
- (c) For a declaration that the prohibition of access by the Order is specifically prohibited access as defined in the Policy.

- (d) For a declaration that the Order triggers coverage because the policy does not include an exclusion for a viral pandemic and actually extends coverage for loss or damage due to virus.
- (e) For a declaration that the policy provides coverage to Plaintiff for any current and future civil authority closures of premises in the State of Georgia due to physical loss or damage from the Coronavirus under the Civil Authority coverage parameters and the policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the insured premises or immediate area of the insured premises.
- (f) For such other relief as the Court may deem proper
- (g) That all costs of this action be taxed upon Defendants;
- (h) That this Court enter and award such other and further relief to Plaintiff as it deems just and appropriate.

Submitted this 8th day of October, 2020.



Harold L. Johnson
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