

IN THE COURT OF COMMON PLEAS  
STARK COUNTY, OHIO

DIANE H. GIAVASIS  
CLERK OF COURTS  
STARK COUNTY, OHIO  
2020 MAY 21 PM 12:49

**MCKINLEY DEVELOPMENT LEASING COMPANY, LTD** CASE NO:

8230 Pittsburg Ave NW  
North Canton, OH 44720

JUDGE: **2020 CV 00815**  
**Forchione**

and

**COMPLAINT:**  
DECLARATORY JUDGMENT; BREACH  
OF CONTRACT; BAD FAITH

**MCKINLEY DEVELOPMENT LEASING COMPANY (A), LTD**

8230 Pittsburg Ave NW  
North Canton, OH 44720

and

**MCKINLEY DEVELOPMENT LEASING COMPANY (D), LTD**

8230 Pittsburg Ave NW  
North Canton, OH 44720

Plaintiffs,

-vs.-

**WESTFIELD INSURANCE COMPANY**

c/o Frank Carrino, Statutory Agent  
1 Park Circle  
Westfield Center, OH 44251

**COMPLAINT**

Now come Plaintiffs, McKinley Development Leasing Company, Ltd., McKinley Development Leasing Company (A), Ltd., and McKinley Development Leasing Company (D), Ltd. (collectively "Plaintiffs" or "McKinley"), and for their Complaint against Defendant Westfield Insurance Company ("Defendant" or "Westfield"), hereby state as follows:

**INTRODUCTION**

1. Plaintiffs are local real estate development and leasing companies owned by well-known developers, Robert J. DeHoff and William J. Lemmon, who are both Stark County residents and natives.

ENTERED BY 28

Plaintiffs own several commercial properties located in North Canton, OH. Plaintiffs' properties have been a long and continuous home to multiple successful small businesses including, but not limited to, a day-care center, several restaurants, medical offices, a clothing outlet, beauty and self-care stores, such as a tanning salon, a nail salon, and multiple hair salons, and other mixed-use office spaces.

2. Like most Stark County businesses, McKinley's operations, the operations of its tenants, and its tenants' ability to make rent payments to McKinley were severely affected by the recent government mandated shutdown orders that began in March of 2020.

3. Specifically, the inability of McKinley and McKinley's tenants to conduct operations due to the Governor's and Department of Health's orders led to a sharp decline and/or total elimination of revenue that McKinley tenants were able to generate. Without such revenues, McKinley was unable to collect rents owed and has suffered and will continue to suffer substantial financial hardship.

4. To prudently insure against unexpected events such as the one McKinley and many other businesses are currently experiencing, for years McKinley faithfully paid tens of thousands of dollars' worth of insurance premiums to Westfield, and believed that it was insured to the fullest extent possible to protect itself from the losses it has incurred.

5. In recent weeks, McKinley has learned that Westfield claims that McKinley does not have any insurance coverage for the staggering losses it has suffered and continues to suffer.

### **THE PARTIES**

6. McKinley Development Leasing Company, Ltd., McKinley Development Leasing Company (A), Ltd., and McKinley Development Leasing Company (D), Ltd. are Ohio limited liability companies with their principal places of business in North Canton, Stark County, OH.

7. Westfield is an Ohio domestic insurance corporation with its principal office located at 1 Park Circle, Westfield Center, OH

## JURISDICTION AND VENUE

8. This Honorable Court has jurisdiction over the parties and this dispute, including for declaratory relief, pursuant to Ohio Revised Code § 2307.382, et seq., Ohio Revised Code § 2721.02, et seq. and Rule 57 of the Ohio Rules of Civil Procedure.

9. An actual controversy between McKinley and Westfield exists within the meaning of Ohio Revised Code § 2721.02, et seq. regarding whether Westfield has a duty to provide McKinley coverage and indemnity for, among other things, business income loss pursuant to the terms and conditions of the Westfield policy of insurance, due to the COVID-19 pandemic, as more particularly described below.

10. Venue is proper in Stark County, Ohio under Ohio Rules of Civil Procedure 3(C)(3), 3(C)(6), and 3(C)(5) because Westfield conducted activity giving rise to McKinley's claims for relief in Stark County, because all or part of McKinley's claims for relief arose in Stark County, and because all or part of McKinley's damages were suffered in Stark County.

## FACTUAL BACKGROUND

### ***McKinley Has Paid for Business Interruption Coverage, Including Coverage for Losses Sustained from Physical Conditions Affecting Property and/or Losses Sustained from the Orders or Actions of Governmental Authorities***

11. At all relevant times, Westfield insured McKinley under a commercial business owner policy drafted by Westfield, bearing policy, number 'CWP 4 697 218' ("Policy"). The certified Policy is in the possession of Westfield, and while not attached hereto because it consists of hundreds of pages, it is incorporated herein by reference.

12. Under the Policy, McKinley agreed to make premium payments to Westfield in exchange for Westfield's promise to indemnify McKinley for losses including, but not limited to, business income loss at its seven (7) commercial property locations that contain a total of twelve (12) commercial

buildings, located entirely in North Canton, Ohio (each individually as a/the "Property" or collectively, as the "Properties").

13. The Policy is in effect from February 16, 2020 to February 16, 2021, and McKinley has faithfully paid premiums to Westfield, specifically to provide additional coverage for loss of Business Income including Rental Value ("BI"), Extra Expense coverage ("EE"), and coverage for loss due to actions of a Civil Authority.

14. Relevant portions of the Policy provide that Westfield will:

- a. "pay for the actual loss of Business Income you [McKinley] 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 the 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."
- b. "... necessary expenses you [McKinley] incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss of damage to property caused by or resulting from a Covered Cause of Loss."
- c. "Net Income (Net Profit of Loss before income taxes) that would have been earned or incurred as rental income from tenant occupancy of the premises described in the Declarations as furnished and equipped by you, including fair rental value of any portion of the described premises which is occupied by you""
- c. "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 a 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 Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

15. 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 Property is specifically prohibited by order of Civil Authority as the direct result of a covered loss to property in the immediate area of the Property. The covered physical loss includes, without limitation, loss of use.

16. COVID-19's actual or suspected physical presence at or in the vicinity of the Properties prevents McKinley and its tenants from making full use of the Properties, especially in cases where the tenant business was required to close in part or in full. Under the terms and conditions of the Policy, this kind of loss constitutes a physical loss to the Property in that there has been a loss of use of the Property. Moreover, the COVID-19 virus is a "physical" thing. For example, restaurants, hair, nail and tanning salons, and day cares, such as those operated by McKinley tenants, were forced to close due to the potential of the physical presence of the COVID-19 virus.

17. Under the terms and conditions of the Policy, physical loss does not mean and/or require tangible physical damage.

18. The Policy is an "all-risk" policy, as it provides that a covered cause of loss under the policy means direct physical loss of or damage to the property unless the loss is specifically excluded or

limited in the Policy. Here, no specific exclusion applies to reasonably justify the denial of McKinley's claims.

***McKinley has Suffered – and Continues to Suffer – Substantial Losses from the Physical Presence or Contamination of COVID19 and/or the Business Suspension Orders of the Government***

19. While the Policy was in force, McKinley sustained, and continues to sustain, a loss(es) due to the issues created by the physical spread and/or contamination of COVID-19 at, in, on, and/or around the Properties described in the Policy.

20. While the Policy was in force, McKinley sustained, and continues to sustain, a loss(es) due to the issues surrounding the spread of COVID-19 in the community (the "Pandemic").

21. While the Policy was in force, McKinley sustained, and continues to sustain, a loss(es) due to the civil authority orders issued by the Governor of Ohio and the Ohio Department of Health addressing COVID-19 and the Pandemic.

22. Based upon information and belief, Westfield has accepted the policy premiums from McKinley with no intention of providing any coverage under the Policy's Business Income, Extra-Expense, or Civil Authority Endorsement Coverage Sections due to a loss and/or shutdown from a pandemic, i.e. the issues surrounding the COVID-19 pandemic.

23. While the Policy was in force, McKinley sustained, and continues to sustain, a loss(es) due to the issues created by COVID-19 at, in, on, and/or around the Properties described in the Policy.

24. While the Policy was in force, McKinley sustained, and continues to sustain, a loss(es) due to the issues created by the spread of COVID-19 in the community.

25. While the Policy was in force, McKinley sustained, and continues to sustain, a loss(es) due to the civil authority orders issued by the Governor of Ohio and the Ohio Department of Health addressing the COVID-19 Pandemic.

***The COVID-19 Pandemic: The Policy Does Not Contain any Pandemic Exclusion***

26. In late 2019 and early 2020, an outbreak of respiratory illness caused by a novel COVID-19 virus started to infect humans across the globe.

27. On January 31, 2020, under §319 of the Public Health Service Act (42 U.S.C.247d), The Secretary of Health and Human Services ("HHS") declared a public health emergency in response to COVID-19.

28. On March 11, 2020, the World Health Organization ("WHO") declared the COVID-19 outbreak a pandemic (i.e. a global outbreak of disease) (the "Pandemic").

29. On March 13, 2020, the President of the United States of America, Donald J. Trump, issued the Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak ("Proclamation"), proclaiming the COVID-19 outbreak constituted a national emergency in the United States, beginning March 1, 2020.

30. Various states, including the State of Ohio issued and implemented mandatory Stay-At-Home Orders, requiring business, such as those occupying McKinley's properties, to shut down or severely curtail their operations, thus suffering a loss of use of their Properties, and resulting in substantial loss of business income.

31. On March 29, 2020 President Donald J. Trump announced the extension of his Administration's social distancing guidelines until April 30, 2020.

32. COVID-19 is a physical substance.
33. COVID-19 can be present outside the human body in viral fluid particles.
34. COVID-19 can and does live on and/or remains capable of being transmitted and active on inert physical surfaces.
35. COVID-19 can and does live on and/or remains capable of being transmitted and active on floors, walls, furniture, desks, tables, chairs, countertops, computer keyboards, touch screens, cardboard packages, food items, silverware, plates, serving trays, glasses, straws, menus, pots, pans, kitchen utensils, faucets, refrigerators, freezers, and other items of property for a period of time.
36. COVID-19 can be transmitted by way of human contact with surfaces and items of physical property on which COVID-19 particles are physically present.
37. COVID-19 has been transmitted by way of human contact with surfaces and items of physical property located at premises in Stark County.
38. COVID-19 can be transmitted by human to human contact and interaction at premises in Stark County, including places like restaurants.
39. COVID-19 has been transmitted by human to human contact and interaction at premises in Stark County.
40. COVID-19 can be transmitted through airborne viral particles emitted into the air at premises.
41. COVID-19 has been transmitted by way of human contact with airborne COVID-19 particles emitted into the air at premises in Stark County.
42. The presence of any COVID-19 particles renders items of physical property unsafe.

43. The presence of any COVID-19 particles on physical property impairs its value, usefulness, and/or normal function.

44. The presence of any COVID-19 particles causes direct physical harm to property.

45. The presence of any COVID-19 particles causes direct physical loss to property.

46. The presence of any COVID-19 particles causes direct physical damage to property.

47. The presence of any COVID-19 particles at a premises renders the premises unsafe, thereby impairing the premises' value, usefulness, and/or normal function.

48. The presence of people infected with or carrying COVID-19 particles renders physical property in their vicinity unsafe and unusable, resulting in direct physical loss to that property.

49. The presence of people infected with or carrying COVID-19 particles at a premises renders the premises, including property located at that premises, unsafe, resulting in direct physical loss to the premises and property.

***Various Civil Authorities Have Issued Orders Which Required  
the Suspension of McKinley's Business Operations***

50. In response to COVID-19 and the Pandemic, the Governor of Ohio has issued multiple executive orders pursuant to the authority vested in him by the Ohio Constitution and the laws of Ohio.

51. In response to COVID-19 and the Pandemic, the Ohio Department of Health, pursuant to its authority under Ohio law, has issued multiple orders, including a Stay At Home Order.

52. The term "civil authority" is not defined in the Policy.

53. The State of Ohio is a civil authority as contemplated by the Policy.

54. The Ohio Department of Health is a civil authority as contemplated by the Policy.

55. The Stark County Health Department is a civil authority as contemplated by the Policy.

56. The Governor of the State of Ohio is a civil authority as contemplated by the Policy.

57. On March 9, 2020, Ohio Governor Mike DeWine issued Executive Order 2020- 01D that declared a state of emergency in response to the physical presence of COVID-19 and the Pandemic.

58. On March 15, 2020, Ohio restricted food and beverage sales to carry-out and delivery only, with no onsite consumption permitted. Further, Ohio prohibited social gatherings of more than ten people. The stated goal of these orders was to slow the spread of COVID-19 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.

59. On March 22, 2020, the Ohio Department of Health issued a Stay At Home Order, effective March 23, 2020, ordering Ohio residents to stay at home. By way of this order the State of Ohio ordered all non-essential businesses in Ohio to cease all activities.

60. A substantial portion of the tenants that occupy the Properties do not qualify as Essential Businesses, and such tenants were required to cease and/or significantly reduce operations at their locations.

61. The civil authority orders, including, but not limited to the Stay At Home Order, prohibit access to the Properties described in the Policy.

62. The State of Ohio, through the Governor and the Department of Health, has issued, and continues to issue, authoritative orders governing Ohioans and Ohio businesses, including McKinley's, in response to COVID-19 and the Pandemic, the effect of which have required and continue to require McKinley tenants to cease and/or significantly reduce operations at, and that have prohibited and continue to prohibit access to the Properties described in the Policy.

***The Presence of COVID19 Is Uniformly Recognized to Cause  
Contamination, Loss and Damage to Property***

63. State and local governmental authorities, and public health officials around the country, acknowledge that the issues surrounding COVID-19 and the Pandemic cause direct physical loss and damage to property. Foreexample:

- a. The state of Colorado issued a Public Health Order indicating that "COVID-19... physically ***contributes to property loss, contamination, and damage...***" (Emphasis added);
- b. The City of New York issued an Emergency Executive Order in response to COVID-19 and the Pandemic, in part "because the virus ***physically is causing property loss and damage.***" (Emphasis added);
- c. Broward County, Florida issued an Emergency Order acknowledging that COVID-19 "***is physically causing property damage.***" (Emphasis added);
- d. The State of Washington issued a stay at home Proclamation stating the "COVID-19 pandemic and its progression ... remains a public disaster affecting life, health, ***[and]property ...***" (Emphasis added);
- e. The State of Indiana issued an Executive Order recognizing that COVID-19 has the "propensity to ***physically*** impact surfaces and personal ***property.***" (Emphasis added);

- f. The City of New Orleans issued an order stating "there is reason to believe that COVID-19 may spread amongst the population by various means of exposure, including the propensity to attach to surfaces for prolonged period of time, thereby spreading from surface to person and **causing property loss and damage** in certain circumstances." (Emphasis added);
- g. The State of Illinois issued an Executive Order describing COVID-19's "propensity to **physically** impact surfaces and personal **property.**" (Emphasis added);
- h. The State of New Mexico issued a Public Health Order acknowledging the "threat" COVID-19 "poses" to "**property.**" (Emphasis added);
- i. North Carolina issued a statewide Executive Order in response to the Pandemic not only "to assure adequate protection for lives," but also to "assure adequate protection of... **property.**" (Emphasis added); and
- j. The City of Los Angeles issued an Order in response to COVID-19 "because, among other reasons, the COVID-19 virus can spread easily from person to person and it is **physically causing property loss or damage** due to its tendency to attach to surfaces for prolonged periods of time." (Emphasis added).

64. The issues surrounding COVID-19 and the Pandemic are physically impacting public and private property in Ohio and throughout the country.

65. The issues surrounding COVID-19 and the Pandemic have caused and continue to cause direct physical loss and damage to property.

66. People in Stark County have been diagnosed with COVID-19.

67. As of May 20, 2020, Stark County had reported 610 cases of COVID-19 and 79 resulting deaths.

68. People in Stark County have, and have had, COVID-19 disease but have not been diagnosed.

69. People in Stark County have COVID-19 particles on or about their person and personal property.

70. Properties and premises throughout Stark County contain the presence of COVID-19 particles on surfaces and items of property.

71. Based on the prevalence of the virus in Stark County, it is probable that McKinley sustained direct physical loss of or damage due to the presence of coronavirus, and has unquestionably sustained direct physical loss as the result of the Pandemic and/or civil authority orders issued by the Governor of Ohio.

***The Rules of Contract Interpretation Provide Coverage for McKinley, but Defendant Has Wrongfully Denied Coverage Even Though the Policy Contains No Exclusions for Pandemic Losses***

72. McKinley submitted a timely insurance claim to Westfield.

73. Any effort by Westfield to deny the reality that the Pandemic causes physical loss of or damage to property would constitute a false and potentially fraudulent misrepresentation that could endanger policyholders, such as McKinley, and the public.

74. However, on April 27, 2020, Westfield wrongfully denied McKinley's claims for Business Interruption, Extra Expense, and Civil Authority coverage.

75. Prior to the COVID-19 Pandemic, companies throughout the insurance industry specifically used exclusionary language that specifically and expressly excluded loss or damage as a result of a pandemic and Severe Acute Respiratory Syndrome ("SARS"). Defendant knew or should have

known of the existence and availability of specific exclusionary riders for pandemics if the intention was to exclude losses resulting from pandemics.

76. For example, In *Meyer Natural Foods, LLC v. Liberty Mutual Fire Insurance Company*, 218 F.Supp.3d 1034, 196 Fed.R.Serv.3d 206, Liberty Mutual Fire Insurance Company denied coverage based on the following exclusion:

"We will not pay for loss or damage caused by or resulting from any of the following, regardless of any other cause or event, including a peril insured against, that contribute to the loss at the same time or in any other sequence:

10. The actual or suspected presence or threat of any virus, organism or like substance that is capable of inducing disease, illness, physical distress or death, whether infectious or otherwise, including but not limited to any epidemic, *pandemic*, influenza, plague, *SARS*, or Avian Flu. (emphasis added.)

77. COVID-19 is a SARS, and the WHO has officially named COVID-19 as SARS CoV-2.

78. In this case, under the coverage forms at issue, Westfield based its denial on exclusions that are not applicable to a pandemic.

79. Had Westfield intended to exclude claims for the COVID-19 Pandemic made under the subject Policy, it would have, and could have, included the express exclusionary language that had been utilized in the insurance industry in the past to deny such claims, which specifically included the term "pandemic" and "SARS," but Westfield failed to include such an exclusion in McKinley's Policy.

80. Westfield knowingly, purposely, and intentionally used inapplicable exclusions to deny claims by McKinley for Business Interruption, Extra Expense, and Civil Authority related to the COVID-19 pandemic.

81. Westfield had at its disposal contractual language that specifically excluded pandemics and SARS but did not include those policy exclusions in the subject Policy, yet wrongfully denied claims for those very reasons.

82. Westfield has actual knowledge of the different meanings between pandemic, SARS, virus, bacteria, and contamination, by way of its use of those terms and the use of those terms by other companies in the insurance industry in previous cases and policies utilizing those different terms, and wrongfully and intentionally used the terms "virus" and "bacteria," among others, to exclude McKinley's claims when, in fact, McKinley's claims are related to a pandemic - which is not expressly excluded in the Policy.

83. Alternatively, the business income losses suffered by McKinley were caused by the orders issued by the Governor of Ohio requiring McKinley to cease and/or severely curtail its business operations and not COVID-19.

84. Alternatively, the terms and conditions of coverage and exclusionary language relied upon by Westfield to deny McKinley coverage under the Policy related to the Pandemic are ambiguous and, therefore, must be strictly construed against Westfield and in favor of McKinley.

### **COUNT ONE**

#### ***DECLARATORY JUDGMENT***

85. McKinley restates each preceding paragraph as if fully rewritten herein.

86. There is a genuine dispute and actual controversy, over which this Honorable Court has jurisdiction, between McKinley and Westfield concerning their respective rights, duties and obligations for which McKinley requests a declaration of rights and obligations under the Policy. Speedy relief is

necessary in order to preserve the rights of the parties which may otherwise be impaired or lost. The declaratory judgment sought will settle the controversy between the parties.

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

88. McKinley is entitled to a declaration including, but not limited to, that:

- a. McKinley sustained direct physical loss or damage as a result of the Pandemic;
- b. Physical loss under the Policy does not require tangible physical damage;
- c. Loss of use and/or utilization of McKinley's business and constitutes a direct physical loss under the Policy;
- d. COVID-19 is a covered cause of loss under the Policy;
- e. The losses incurred by McKinley as a result of the executive orders issued by the Governor of Ohio are covered losses under the Policy;
- f. The prohibition (and/or significant limitation) of access to the Properties as Ordered by the Civil Authority Orders, constitutes a prohibition to the insureds' Properties;
- g. The Civil Authority Orders trigger coverage because the Policy does not include an exclusion for a pandemic;
- h. The Policy provides coverage to McKinley for any current and future civil authority closures of commercial buildings due to physical loss of or damage to property from COVID-19 under the Civil Authority coverage parameters and

the Policy provides business income coverage in the event COVID-19 has caused a loss or damage at the insureds' Properties or immediate area of the insureds' Properties;

- i. The Civil Authority Orders constitute a prohibition of access to the insureds' Properties by a Civil Authority as defined in the Policy;
- j. Westfield has not and cannot prove the application of any exclusion or limitation;
- k. McKinley is entitled to coverage for its Business Income loss and Extra Expense resulting from coronavirus;
- l. McKinley is entitled to coverage for loss due to the actions of Ohio's civil authorities;
- m. McKinley has coverage for any substantially similar civil authority order in the future that limits or restricts the public's access to McKinley's business establishments; and
- n. Any other issue that may arise during the course of litigation that is a proper issue on which to grant declaratory relief.

## **COUNT TWO**

### ***BREACH OF CONTRACT***

- 89. McKinley restates each preceding paragraph as if fully rewritten herein.
- 90. McKinley and Westfield entered into a valid and enforceable insurance contract.
- 91. McKinley gave valuable consideration in the form of premium payments in exchange for the promise of insurance coverage in the event of, among other things, loss of business income.

92. Westfield had an affirmative duty to comply with terms and conditions of the Policy and find coverage wherever possible under the Policy and indemnify McKinley for its losses sustained and recoverable under the terms and conditions of the Policy.

93. McKinley made a claim for loss of Business Income, Extra- Expense, and Civil Authority arising from the Pandemic, interruption by civil authority and prohibited ingress and loss of use and/or utilization of the Properties.

94. Westfield breached the insurance contract by denying coverage for McKinley's loss, which was due to a covered and foreseeable peril not subject to any exclusion.

95. McKinley complied with all of its obligations under the insurance contract.

96. McKinley has been injured and suffered financial harm as a result of Westfield's breach of the insurance contract.

97. In addition, in breaching the contract, Westfield has violated its implied duty to act in good faith and fair dealing with McKinley.

98. As a direct and proximate result of Westfield's breach of contract, McKinley has incurred substantial and ongoing monetary damages in excess of \$25,000.00.

### **COUNT THREE**

#### ***BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING (BAD FAITH)***

99. McKinley restates each preceding paragraph as if fully rewritten herein.

100. Ohio law recognizes the independent tort of bad faith in the context of the insured/insurer relationship.

101. Westfield's conduct has breached the implied covenant of good faith and fair dealing

implicit to the policy of insurance.

102. Ohio law provides that an insurer's lack of good faith is equivalent to bad faith.

103. McKinley is an insured of Westfield in the State of Ohio.

104. Westfield failed and refused to make an adequate investigation or any investigation regarding McKinley's claims which, among other things, has caused a severe delay in full indemnification of McKinley, and providing all benefits that McKinley is entitled to under the Policy, which has severely prejudiced and damaged McKinley, and has further resulted in Westfield withholding all recoverable benefits due under the Policy.

105. Westfield refused and continues to refuse to give any reasonable interpretation to the provisions in the Policy or any reasonable application of such provisions to McKinley's claims and has acted to protect its own financial interests therein at the expense of and detriment to McKinley's rights.

106. Westfield failed to provide McKinley any reasonable or justifiable basis for denying McKinley's claims.

107. Westfield misrepresented the Policy terms and conditions to McKinley including, and without limitation, attempting to use an inapplicable exclusion, i.e. the virus/bacteria exclusion in a knowingly and malicious attempt to avoid paying McKinley all benefits it is entitled to under the Policy.

108. Westfield, knowing that McKinley was inexperienced in insurance matters and unable to act to protect its interests, that such benefits were justly due, and that such benefits were necessary to pay McKinley's necessities of its use of the Properties, nevertheless has deprived McKinley of such benefits.

109. Westfield's refusal to properly investigate, adjust, handle, process, and/or pay benefits due McKinley compelled McKinley to, among other things, engage counsel and to initiate litigation to recover such benefits.

110. Upon information and belief, McKinley alleges that Westfield intends to and will continue to delay, deny, and withhold, in bad faith, benefits due McKinley unless and until compelled to pay such benefits by final judgment of this Honorable Court.

111. As a direct and proximate result of Westfield's conduct, McKinley has sustained substantial compensable losses, including benefits withheld, and economic losses, such as attorney's fees, loss of business income, personal property loss, out-of-pocket costs and expenses, diminution in value of the insurance policy, all to McKinley's detriment and damage in an amount to be proven at trial in excess of \$25,000.00.

112. Further, at all material times and in doing things alleged herein, Westfield acted intentionally and with actual malice so as to justify the award of punitive damages against Westfield.

**WHEREFORE**, Plaintiffs, McKinley Development Leasing Company, Ltd, McKinley Development Leasing Company (A), Ltd. and McKinley Development Leasing Company (D), Ltd., demands judgment as follows:

- A. For Count One, a declaratory judgment as set forth in Paragraph 88 of this Complaint;
- B. For Count Two, judgment against Westfield for compensatory damages in excess of \$25,000.00;
- C. For Count Three, judgment against Westfield for compensatory damages in excess of \$25,000.00, punitive damages in an amount to be determined at trial, and attorney fees;
- D. For judgment against Defendant for attorneys' fees in an amount to be determined by the Court, prejudgment and post judgment interest in accordance with the statutory rate; costs of the within action; and
- E. Any further relief that this Court deems just and equitable.

DATED: May 21, 2020

Respectfully submitted,

**TZANGAS | PLAKAS | MANNOS | LTD**



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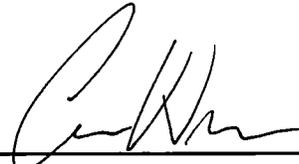
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*Counsel for Plaintiffs*

**INSTRUCTIONS FOR SERVICE**

**To the Clerk:**

Please issue summons, a copy of the Complaint upon Defendant at the address contained in the caption of this Complaint by Certified Mail, Return Receipt Requested.



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Collin S. Wise

*Counsel for Plaintiffs*